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### Contemporary Practice of the United States Relating to International Law (113:3 Am J Int'l L)

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

EDITED BY JEAN GALBRAITH\*

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\* Kristen DeWilde, Emily Kyle, Patricia Liverpool, Sabrina Ruchelli, Jenna Smith, and Brian Yeh contributed to the preparation of this section.

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

*United States Recognizes the Opposition Government in Venezuela and Imposes Sanctions as Tensions Escalate*

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The Trump administration formally recognized Juan Guaidó as the interim president of Venezuela on January 23, 2019, making the United States the first nation to officially accept the legitimacy of Guaidó's government and reject incumbent President Nicolás Maduro's claim to the presidency. In a campaign designed to oust Maduro from power, the United States has encouraged foreign governments and intergovernmental organizations to recognize Guaidó and has imposed a series of targeted economic sanctions to weaken Maduro's regime. As of June 2019, however, Maduro remained in power within Venezuela.

Maduro was elected for a second presidential term of six years in May 2018, after an election that was criticized as unfair and illegitimate.<sup>1</sup> Several days before his inauguration on January 10, 2019, the Lima Group announced that it would not recognize the legitimacy of Maduro's second term and urged Maduro not to assume the presidency.<sup>2</sup> On the day of Maduro's inauguration, Secretary of State Mike Pompeo "condemn[ed] Maduro's illegitimate usurpation of power" and "reiterate[d] [U.S.] support for Venezuela's National Assembly, the only legitimate branch of government duly elected by the Venezuelan people."<sup>3</sup>

Five days prior to Maduro's inauguration, Guaidó was sworn in as the leader of the National Assembly and swiftly invoked Article 233 of Venezuela's Constitution, which provides for the temporary transfer of powers to the president of the National Assembly in the absence of a duly elected president.<sup>4</sup> Guaidó declared himself interim president of Venezuela on January 23, 2019.<sup>5</sup>

<sup>1</sup> William Neuman & Nicholas Casey, *Venezuela Election Won by Maduro Amid Widespread Disillusionment*, N.Y. TIMES (May 20, 2018), at <https://www.nytimes.com/2018/05/20/world/americas/venezuela-election.html>. Secretary of State Mike Pompeo disclaimed the election process as an "unconstitutional interruption of Venezuela's democratic order." U.S. Dep't of State Press Release, Secretary Pompeo's Participation in a Meeting of the Lima Group (May 14, 2018), at <https://www.state.gov/secretary-pompeos-participation-in-a-meeting-of-the-lima-group> [<https://perma.cc/M3LT-SQLT>].

<sup>2</sup> The Lima Group was formed on August 8, 2017, in response to the critical situation in Venezuela. Declaración de Lima [The Lima Declaration], Aug. 8, 2017, at [http://www.rree.gob.pe/SitePages/declaracion\\_conjunta.aspx?id=DC-007-17](http://www.rree.gob.pe/SitePages/declaracion_conjunta.aspx?id=DC-007-17). The Lima Group consists of the following countries: Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Panama, Paraguay, and Peru. *Id.* The January 2019 announcement included Guyana and St. Lucia and did not include Mexico. Declaración del Grupo de Lima [Declaration of the Lima Group], Jan. 4, 2019, at <https://www.gob.pe/institucion/rree/noticias/24270-declaracion-del-grupo-de-lima>. The meeting preceding this announcement also included U.S. Secretary of State Mike Pompeo. Megan Specia, *Envoy Denounces Venezuela's Maduro and Urge Him to Cede Power*, N.Y. TIMES (Jan. 4, 2019), at <https://www.nytimes.com/2019/01/04/world/americas/diplomats-venezuela-maduro.html>.

<sup>3</sup> U.S. Dep't of State Press Release, *Actions Against Venezuela's Corrupt Regime* (Jan. 10, 2019), at <https://www.state.gov/actions-against-venezuelas-corrupt-regime> [<https://perma.cc/4D2Q-9AFL>].

<sup>4</sup> Edward Wong, *Pence Tells Venezuelans That U.S. Backs Efforts to Oust Maduro*, N.Y. TIMES (Jan. 22, 2019), at <https://www.nytimes.com/2019/01/22/world/americas/venezuela-usa-nicolas-maduro.html>; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] 1999, Art. 233.

<sup>5</sup> Joe Parkin Daniels & Mariana Zúñiga, *Venezuela: Who Is Juan Guaidó, the Man Who Declared Himself President?*, GUARDIAN (Jan. 23, 2019), at <https://www.theguardian.com/world/2019/jan/15/juan-guaido-venezuelan-opposition-leader-challenging-maduros-rule>.

Also on January 23, the United States recognized Guaidó as interim president of Venezuela.<sup>6</sup> Pursuant to his exclusive authority as a matter of U.S. constitutional law to recognize foreign governments,<sup>7</sup> President Trump stated:

Today, I am officially recognizing the President of the Venezuelan National Assembly, Juan Guaidó, as the Interim President of Venezuela. In its role as the only legitimate branch of government duly elected by the Venezuelan people, the National Assembly invoked the country's constitution to declare Nicolas Maduro illegitimate and the office of the Presidency therefore vacant. The people of Venezuela have courageously spoken out against Maduro and his regime and demanded freedom and the rule of law.<sup>8</sup>

Trump vowed to “continue to use the full weight of United States economic and diplomatic power to press for the restoration of Venezuelan democracy” and called on other states to recognize Guaidó as the interim president of Venezuela.<sup>9</sup>

Immediately following Guaidó's claim to the presidency and Trump's official recognition thereof, Maduro responded with dismissal: “I am the only president of Venezuela . . . We do not want to return to the 20th century of gringo interventions and coups d'état.”<sup>10</sup> With tensions high,<sup>11</sup> Pompeo withdrew a significant number of U.S. diplomats on January 24, and eventually made the decision on March 11 to “withdraw all remaining U.S. personnel from the U.S. Embassy in Caracas, Venezuela,” citing “the deteriorating situation in Venezuela as well as the conclusion that the presence of U.S. diplomatic staff at the embassy has become a constraint on U.S. policy.”<sup>12</sup>

<sup>6</sup> Donald J. Trump, Statement Announcing United States Recognition of National Assembly President Juan Gerardo Guaidó Marquéz as Interim President of Venezuela, 2019 DAILY COMP. PRES. DOC. NO. 046 (Jan. 23) [hereinafter Guaidó Recognition].

<sup>7</sup> In *Zivotofsky v. Kerry*, the Supreme Court held that the president possesses the “exclusive recognition power,” including “the authority to acknowledge, in a formal sense, the legitimacy of other states and governments,” as a power “essential to the conduct of Presidential duties . . . that Congress may not qualify.” *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015).

<sup>8</sup> Guaidó Recognition, *supra* note 6.

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

<sup>10</sup> Ana Vanessa Herrero, *After U.S. Backs Juan Guaidó as Venezuela's Leader, Maduro Cuts Ties*, N.Y. TIMES (Jan. 23, 2019), at <https://www.nytimes.com/2019/01/23/world/americas/venezuela-protests-guaido-maduro.html>.

<sup>11</sup> Maduro immediately ordered the expulsion of U.S. diplomats from Venezuela, although he rescinded that order several days later. Ana Vanessa Herrero & Megan Specia, *Venezuelan President Does an About-Face That Allows U.S. Diplomats to Stay*, N.Y. TIMES (Jan. 26, 2019), at <https://www.nytimes.com/2019/01/26/world/americas/nicolas-maduro-juan-guaido-venezuela-diplomats.html>. In the interim, Pompeo stated that “[t]he United States does not recognize the Maduro regime as the government of Venezuela” and “[a]ccordingly . . . does not consider former president Nicolas Maduro to have the legal authority to break diplomatic relations with the United States or to declare our diplomats persona non grata.” U.S. Dep't of State Press Release, *Continuing U.S. Diplomatic Presence in Venezuela* (Jan. 23, 2019), at <https://www.state.gov/continuing-u-s-diplomatic-presence-in-venezuela> [<https://perma.cc/X3DZ-GTLP>].

<sup>12</sup> U.S. Dep't of State Press Release, *On the Withdrawal of U.S. Diplomatic Personnel from Venezuela* (Mar. 11, 2019), at <https://www.state.gov/on-the-withdrawal-of-u-s-diplomatic-personnel-from-venezuela> [<https://perma.cc/TG8V-PWG2>]. The United States reached an agreement with Switzerland on April 5, under which Switzerland would “act[] as a protecting power for U.S. interests in Venezuela” and “assist U.S. citizens on [the United States'] behalf.” U.S. Dep't of State Press Release, *Signing of Protecting Power Arrangement for the United States in Venezuela* (Apr. 5, 2019), at <https://www.state.gov/signing-of-protecting-power-arrangement-for-the-united-states-in-venezuela> [<https://perma.cc/PER6-GX8A>].

The day after the U.S. recognition of Guaidó, Venezuela Minister of Defense Vladimir Padrino López declared loyalty to Maduro's government.<sup>13</sup> In a televised announcement, López "warn[ed] the people of Venezuela that a coup is taking place against . . . President Nicolas Maduro, legitimate president of the Bolivarian Republic of Venezuela" and proclaimed Guaidó's actions as a threat to the rule of law in Venezuela.<sup>14</sup> Maduro also received the backing of Russian President Vladimir Putin, who "expressed support for the legitimate Venezuelan authorities amid the worsening of the internal political crisis provoked from outside the country" and condemned such "destructive external interference [as] a gross violation of the fundamental norms of international law."<sup>15</sup>

On January 25, Pompeo reinforced the U.S. view of the legitimacy of Guaidó's presidency by "certif[y]ing the authority of Venezuela's interim President Juan Guaidó to receive and control certain property in accounts of the Government of Venezuela or Central Bank of Venezuela held by the Federal Reserve Bank of New York or any other U.S. insured banks."<sup>16</sup> The State Department indicated that "[t]his certification will help Venezuela's legitimate government safeguard those assets for the benefit of the Venezuelan people" and "call[ed] on other governments to recognize interim President Juan Guaidó and take similar steps to protect Venezuela's patrimony from further theft by Maduro's corrupt regime."<sup>17</sup>

Pompeo addressed the United Nations Security Council on January 26 and urged its members to "support Venezuela's democratic transition and interim President Guaidó's role in it."<sup>18</sup> Pompeo called on all countries to "pick a side": "Either you stand with the forces of freedom or you're in league with Maduro and his mayhem."<sup>19</sup> On February 28, 2019, the United States proposed to the Security Council a draft resolution that would

call[] for the start of a peaceful political process leading to free, fair, and credible presidential elections . . . [s]upport[] the peaceful restoration of democracy and rule of law in Venezuela; request[] the Secretary-General utilize his good offices to help ensure free, fair,

<sup>13</sup> Ana Vanessa Herrero & Neil MacFarquhar, *Russia Warns U.S. Not to Intervene in Venezuela as Military Backs Maduro*, N.Y. TIMES (Jan. 24, 2019), at <https://www.nytimes.com/2019/01/24/world/americas/venezuela-news-maduro-russia.html>.

<sup>14</sup> *Id.* (quoted from video recording).

<sup>15</sup> President of Russia Event, Telephone Conversation with President of Venezuela Nicolas Maduro (Jan. 24, 2019), at <http://en.kremlin.ru/events/president/news/59724>.

<sup>16</sup> U.S. Dep't of State Press Release, *Protecting Venezuela's Assets for Benefit of Venezuelan People* (Jan. 29, 2019), at <https://www.state.gov/protecting-venezuelas-assets-for-benefit-of-venezuelan-people> [<https://perma.cc/8SPB-YKYM>].

<sup>17</sup> *Id.* In addition to authorizing Guaidó to control property in the name of Venezuela, the Trump administration amended the term "Government of Venezuela" as used in previous executive orders to include: "the state and Government of Venezuela, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Venezuela and Petroleos de Venezuela, S.A. (PDVSA), any person owned or controlled, directly or indirectly, by the foregoing, and any person who has acted or purported to act directly or indirectly for or on behalf of, any of the foregoing, including as a member of the Maduro regime." Exec. Order No. 13,857, 84 Fed. Reg. 509 (Jan. 25, 2019). Trump issued this executive order "in light of actions by persons affiliated with the illegitimate Maduro regime . . . and continued attempts to undermine the Interim President of Venezuela . . ." *Id.*

<sup>18</sup> U.S. Dep't of State Press Release, *Remarks at a United Nations Security Council Meeting on Venezuela* (Jan. 26, 2019), at <https://www.state.gov/remarks-at-a-united-nations-security-council-meeting-on-venezuela> [<https://perma.cc/ET8L-L8LH>].

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

and credible presidential elections, and encourage[] subsequent peaceful, inclusive, and credible initiatives to address the prolonged crisis in the country.<sup>20</sup>

Though nine members voted to pass the resolution, it was ultimately vetoed by both Russia and China.<sup>21</sup>

Vice President Michael Pence returned to a special session of the Security Council on April 10, at which time he “called on the United Nations to revoke the credentials of Venezuela’s representative to the United Nations, recognize Interim President Juan Guaidó, and seat the representative of the free Venezuelan government without delay.”<sup>22</sup> Pence stated that “the United States is preparing a resolution recognizing the legitimacy of the government of Interim President Juan Guaidó” and urged “every member of the Security Council and all U.N. member states to support this resolution.”<sup>23</sup>

In the days and weeks that followed the U.S. recognition of Guaidó as interim president of Venezuela, Pompeo, Pence, and Trump met with governments in the region to reaffirm the U.S. support for Guaidó and its partnership with regional state allies concerning its efforts in Venezuela.<sup>24</sup> Dozens of states, including many nations from Latin America and Europe, and a number of major intergovernmental organizations, including the Organization of American States (OAS),<sup>25</sup> the European Union (EU),<sup>26</sup> and the Lima Group,<sup>27</sup> have formally recognized Guaidó as

<sup>20</sup> Draft SC Res. 186, para. 3 (*vetoed* Feb. 28, 2019), at <https://undocs.org/en/S/2019/186>.

<sup>21</sup> Michael Schwartz, *Russia Blocks Venezuela Measure at U.N., Calling It a U.S. Ploy for Regime Change*, N.Y. TIMES (Feb. 28, 2019), at <https://www.nytimes.com/2019/02/28/world/americas/russia-venezuela-veto-united-nations.html>.

<sup>22</sup> Michael R. Pence, Remarks by Vice President Pence in Press Gaggle (Apr. 10, 2019), at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-press-gaggle-new-york-ny> [<https://perma.cc/SM8K-NSFK>].

<sup>23</sup> Michael R. Pence, Remarks by Vice President Pence at a Special Session of the United Nations Security Council on the Crisis in Venezuela (Apr. 10, 2019), at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-special-session-united-nations-security-council-crisis-venezuela-new-york-ny> [<https://perma.cc/7GYD-354W>].

<sup>24</sup> See, e.g., U.S. Dep’t of State Press Release, Secretary Pompeo’s Meeting with Brazilian Foreign Minister Araujo (Feb. 6, 2019), at <https://www.state.gov/secretary-pompeos-meeting-with-brazilian-foreign-minister-araujo> [<https://perma.cc/8ANZ-LMNX>]; Joint Statement by President Donald J. Trump and President Iván Duque Márquez of Colombia on the Crisis in Venezuela, 2019 DAILY COMP. PRES. DOC. NO. 076 (Feb. 13); Michael R. Pence & Fabiana Rosales, Remarks by Vice President Pence and First Lady Fabiana Rosales of the Bolivarian Republic of Venezuela Before Bilateral Meeting (Mar. 27), at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-first-lady-fabiana-rosales-bolivarian-republic-venezuela-bilateral-meeting> [<https://perma.cc/A7R8-TSM9>].

<sup>25</sup> Organization of American States (OAS), Resolución Sobre la Situación en Venezuela [Resolution on the Situation in Venezuela], CP/RES. 1124/19 (2217/19), rev. 2 (Apr. 9, 2019). In response to the OAS decision, the Venezuela Foreign Ministry announced its “irrevocable decision to leave the Organization of American States on April 27, 2019 . . . given that the Bolivarian Republic of Venezuela cannot remain in an organization that goes to its knees before the imperial interests of the US administration.” Elizabeth Melimopoulos, *OAS Recognises Guaidó’s Envoy Until New Venezuela Elections Held*, AL JAZEERA (Apr. 10, 2019), at <https://www.aljazeera.com/news/2019/04/oas-recognises-guaido-envoy-venezuela-elections-held-190409210229113.html>.

<sup>26</sup> European Parliament Resolution of 31 January 2019 on the Situation in Venezuela, 2019/2543(RSP) (2019), at [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0061\\_EN.html?fbclid=IwAR0yZk2L\\_n\\_g0duyDjMgGJDIS3brzGgyeXtjYk2fgtibS1uVXUivwZrw4f8](https://www.europarl.europa.eu/doceo/document/TA-8-2019-0061_EN.html?fbclid=IwAR0yZk2L_n_g0duyDjMgGJDIS3brzGgyeXtjYk2fgtibS1uVXUivwZrw4f8).

<sup>27</sup> Declaration of the Lima Group, Jan. 24, 2019, at [https://international.gc.ca/world-monde/international\\_-relations-relations\\_internationales/latin\\_america-amerique\\_latine/2019-01-23-lima\\_group-groupe\\_lima.aspx?lang=eng](https://international.gc.ca/world-monde/international_-relations-relations_internationales/latin_america-amerique_latine/2019-01-23-lima_group-groupe_lima.aspx?lang=eng); *Venezuela Crisis: Juan Guaidó Backed by Lima Group*, BBC NEWS (Feb. 5, 2019), at <https://www.bbc.com/news/world-latin-america-47126434>.

interim president of Venezuela.<sup>28</sup> In contrast, other nations have publicly affirmed their support of Maduro's government, including Russia, China, Iran, and Cuba.<sup>29</sup>

Well before recognizing Guaidó as the interim president, the United States had begun using sanctions and visa revocations designed to pressure Maduro's government.<sup>30</sup> Sanctions originating under the Obama administration in 2015 and increasing under the Trump administration led Venezuela to request consultations with the United States at the World Trade Organization (WTO) in December 2018.<sup>31</sup> In its request, Venezuela claimed:

[T]he unilateral coercive trade-restrictive measures imposed by the United States on the Bolivarian Republic of Venezuela violate its obligations under Articles I:1, II:1, III:4, V:2, X:3, XI:1 and XIII:1 of the GATT 1994 . . . [and] the United States' commitments under Articles II:1, XVI:2 and XVII:1 of the GATS.<sup>32</sup>

Following its recognition of Guaidó, the United States has refused to engage in the consultation process at the WTO in light of its view that the Maduro government is illegitimate and therefore cannot represent Venezuela at the WTO.<sup>33</sup> A WTO official stated that a dispute settlement meeting scheduled for March 26 would be postponed "until further notice."<sup>34</sup>

Following the United States' recognition of Guaidó as interim president of Venezuela in January 2019, the Trump administration has undertaken still more sanctions and visa revocations designed to pressure the Maduro regime. The Trump administration announced on January 28 that it would impose sanctions against Venezuela's oil sector, including the state-owned oil company Petroleos de Venezuela, S.A. (PDVSA).<sup>35</sup> Pompeo declared that such sanctions would

<sup>28</sup> *Guaido vs Maduro: Who Is Backing Whom in Venezuela?*, REUTERS (Apr. 30, 2019), at <https://www.reuters.com/article/us-venezuela-politics-support-factbox/guaido-vs-maduro-who-is-backing-whom-in-venezuela-idUSKCN1S62DY>.

<sup>29</sup> *Id.*; see also Rick Gladstone, *Venezuela's Top Diplomat Enlists Support from Dozens of Nations to Counter U.S.*, N.Y. TIMES (Feb. 14, 2019), at <https://www.nytimes.com/2019/02/14/world/americas/venezuela-united-nations-support.html>.

<sup>30</sup> For additional background, see Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 103 (2018).

<sup>31</sup> Request for Consultations by Venezuela, Measures Relating to Trade in Goods and Services, WTO Doc. WT/DS574/1 (Dec. 28, 2018).

<sup>32</sup> *Id.* at 2. The identified provisions deal generally with the equal treatment of goods, freedom of transit, the elimination of quantitative restrictions, and unrestricted market access. General Agreement on Tariffs and Trade 1994 [GATT 1994], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994); General Agreement on Trade in Services [GATS], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994).

<sup>33</sup> Tom Miles, *U.S. Objection Over Venezuela Threatens to Halt WTO Trade Disputes*, REUTERS (Mar. 26, 2019), at <https://www.reuters.com/article/us-usa-trade-venezuela-wto/u-s-objection-over-venezuela-threatens-to-halt-wto-trade-disputes-idUSKCN1R71KJ>; Request for the Establishment of a Panel by Venezuela, Measures Relating to Trade in Goods and Services, WTO Doc. WT/DS574/2 (Mar. 14, 2019) (noting the U.S. refusal to engage with the process).

<sup>34</sup> Miles, *supra* note 33.

<sup>35</sup> U.S. Dep't of State Press Release, *Sanctions Against PDVSA and Venezuela Oil Sector* (Jan. 28, 2019), at <https://www.state.gov/sanctions-against-pdvsa-and-venezuela-oil-sector/> [<https://perma.cc/F3Q7-JL22>].

prevent the illegitimate former Maduro regime from further plundering Venezuela's assets and natural resources . . . [and] further enriching themselves at the expense of the long-suffering Venezuelan people. It will also preserve the core pillar of Venezuela's national assets for the people and a democratically elected government.<sup>36</sup>

The sanctions also barred most American companies from engaging in business transactions with PDVSA.<sup>37</sup> National Security Advisor John Bolton estimated that these sanctions would “total[] \$7 billion in assets blocked today, plus over \$11 billion in lost export proceeds over the next year.”<sup>38</sup> Maduro responded by denouncing the sanctions as “unilateral, illegal, immoral and criminal,” threatening Trump that he “will have blood on [his] hands.”<sup>39</sup>

The Trump administration continued rolling out sanctions and visa revocations in its attempt to “hold corrupt officials of the former illegitimate Maduro regime accountable.”<sup>40</sup> On February 15, the State Department announced that it would be “imposing sanctions on five current or former officials of the illegitimate Maduro regime” in addition to previously announced visa restrictions and revocations on members of the “illegitimate Constituent Assembly” and the “illegitimate Supreme Court.”<sup>41</sup> That same day, Treasury Secretary Steven Mnuchin announced:

Treasury continues to target officials who have helped the illegitimate Maduro regime repress the Venezuelan people. We are sanctioning officials in charge of Maduro's security and intelligence apparatus, which has systematically violated human rights and suppressed democracy, including through torture and other brutal use of force force . . . We are intent on going after those facilitating Maduro's corruption and predation, including by sanctioning the President of PdVSA and others diverting assets that rightfully belong to the people of Venezuela.<sup>42</sup>

The Trump administration imposed additional sanctions on politicians and officials aligned with the Maduro regime on February 25<sup>43</sup> and March 1.<sup>44</sup> U.S. Special Representative for

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

<sup>37</sup> Edward Wong & Nicholas Casey, *U.S. Targets Venezuela with Tough Oil Sanctions During Crisis of Power*, N.Y. TIMES (Jan. 28, 2019), at <https://www.nytimes.com/2019/01/28/us/politics/venezuela-sanctions-trump-oil.html> [hereinafter Oil Sanctions Article].

<sup>38</sup> White House Press Release, Press Briefing by Press Secretary Sarah Sanders (Jan. 28, 2019), at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-012819> [<https://perma.cc/TMZ9-98H6>].

<sup>39</sup> Oil Sanctions Article, *supra* note 37.

<sup>40</sup> U.S. Dep't of State Press Release, U.S. Sanctions on Venezuelan Individuals and Entities (Feb. 15, 2019), at <https://www.state.gov/u-s-sanctions-on-venezuelan-individuals-and-entities> [<https://perma.cc/MBE5-QX78>].

<sup>41</sup> *Id.*

<sup>42</sup> U.S. Dep't of Treasury Press Release, Treasury Sanctions Officials Aligned with Former President Nicolas Maduro and Involved in Repression and Corruption (Feb. 15, 2019), at <https://home.treasury.gov/news/press-releases/sm612> [<https://perma.cc/V5HT-L6S2>].

<sup>43</sup> U.S. Dep't of State Press Release, The United States Sanctions Governors of Venezuelan States Aligned with Maduro (Feb. 25, 2019), at <https://www.state.gov/the-united-states-sanctions-governors-of-venezuelan-states-aligned-with-maduro> [<https://perma.cc/E2AT-XCJD>].

<sup>44</sup> U.S. Dep't of State Press Release, The United States Sanctions Illegitimate Maduro Regime Security Officials Associated with Violence and Obstruction of International Humanitarian Assistance (Mar. 1, 2019), at <https://www.state.gov/the-united-states-sanctions-illegitimate-maduro-regime-security-officials-associated-with-violence-and-obstruction-of-international-humanitarian-assistance> [<https://perma.cc/UA2M-QRMM>].

Venezuela Elliott Abrams announced the imposition of visa restrictions on forty-nine individuals determined to be “responsible for undermining Venezuela’s democracy” on February 28<sup>45</sup> and the revocation of seventy-seven visas belonging to “regime officials and their families” the following week.<sup>46</sup> On March 15, Abrams stated that an additional 340 visas had been revoked, promising that “that’s a process that will continue.”<sup>47</sup>

On March 11, the United States sanctioned “Evrofinance Mosnarbank, a Moscow-based bank jointly owned by Russia and Venezuela” responsible for “facilitating illegitimate transactions that prolong Maduro’s usurpation of democracy.”<sup>48</sup> The State Department announced on March 19 that the United States was designating a state-owned gold sector company to fall under the scope of Executive Order 13,850, which was signed by Trump on November 1, 2018, and “targets persons operating in the gold sector of the Venezuelan economy.”<sup>49</sup> On March 22, the Trump administration announced sanctions against several state-affiliated Venezuelan banks and further determined that “persons operating in Venezuela’s financial sector could be subject to sanctions pursuant to Executive Order 13850.”<sup>50</sup>

The Trump administration ratcheted up the pressure of its economic sanctions in April 2019 by targeting oil shipments between Venezuela and Cuba,<sup>51</sup> as well as financial activities of the Central Bank of Venezuela (CBV).<sup>52</sup> The Cuban oil sanctions sought to “hinder the [Maduro] regime’s further theft and the predatory influence of Cuba, which takes Venezuela’s oil and pays the regime with security and intelligence forces to keep Nicolas

<sup>45</sup> U.S. Dep’t of State Press Release, The United States Revokes U.S. Entry of Maduro-Aligned Individuals and Family (Mar. 1, 2019), at <https://www.state.gov/the-united-states-revokes-u-s-entry-of-maduro-aligned-individuals-and-family> [<https://perma.cc/G5ZH-QUAR>].

<sup>46</sup> U.S. Dep’t of State Press Release, Special Representative for Venezuela Elliott Abrams (Mar. 8, 2019), at <https://www.state.gov/special-representative-for-venezuela-elliott-abrams> [<https://perma.cc/44YM-7QEU>].

<sup>47</sup> U.S. Dep’t of State Press Release, Briefing with Special Representative for Venezuela Elliott Abrams (Mar. 15, 2019), at <https://www.state.gov/briefing-with-special-representative-for-venezuela-elliott-abrams> [<https://perma.cc/LND7-BYVX>].

<sup>48</sup> U.S. Dep’t of State Press Release, The United States Tightens Sanctions on Venezuela by Targeting Russia-Based Bank (Mar. 11, 2019), at <https://www.state.gov/the-united-states-tightens-sanctions-on-venezuela-by-targeting-russia-based-bank> [<https://perma.cc/7QPD-X3XD>].

<sup>49</sup> U.S. Dep’t of State Press Release, Sanctions Against Venezuelan Gold Sector (Mar. 19, 2019), at <https://www.state.gov/sanctions-against-venezuelan-gold-sector> [<https://perma.cc/47M8-C38T>]; Exec. Order No. 13,850, 83 Fed. Reg. 55,243 (Nov. 1, 2018).

<sup>50</sup> U.S. Dep’t of State Press Release, The United States Sanctions Venezuela’s State-Affiliated Bank (Mar. 22, 2019), at <https://www.state.gov/the-united-states-sanctions-venezuelas-state-affiliated-bank> [<https://perma.cc/WQ94-8HR7>]; White House Press Release, Statement by the Press Secretary on Sanctions Against Major Venezuelan Bank (Mar. 22, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-sanctions-major-venezuelan-bank> [<https://perma.cc/CB82-NSTD>].

<sup>51</sup> U.S. Dep’t of State Press Release, The United States Sanctions Companies Enabling Shipment of Venezuelan Oil to Cuba (Apr. 5, 2019), at <https://www.state.gov/the-united-states-sanctions-companies-enabling-shipment-of-venezuelan-oil-to-cuba> [<https://perma.cc/6UXS-LJPR>] [hereinafter Cuban Oil Sanctions]; U.S. Dep’t of State Press Release, The United States Takes Action To End Cuba’s Malign Influence on Venezuela (Apr. 12, 2019), at <https://www.state.gov/the-united-states-takes-action-to-end-cubas-malign-influence-on-venezuela> [<https://perma.cc/PZ6T-JWFN>] [hereinafter Cuba Sanctions].

<sup>52</sup> U.S. Dep’t of State Press Release, The United States Sanctions the Central Bank of Venezuela (Apr. 17, 2019), at <https://www.state.gov/the-united-states-sanctions-the-central-bank-of-venezuela> [<https://perma.cc/LH6X-26LJ>] [hereinafter CBV Sanctions].

Maduro in power.”<sup>53</sup> The Trump administration dealt a further blow in its April 17 sanctions against the CBV, which “formulates and implements Venezuela’s monetary policy, issues currency, and manages the country’s international reserves.”<sup>54</sup> By targeting the CBV, these sanctions “close[d] off a few remaining critical paths for financing” by the Maduro regime.<sup>55</sup>

Although the Trump administration’s campaign of economic sanctions has effectively drained most avenues for funding by Maduro’s government,<sup>56</sup> the Trump administration has consistently exempted humanitarian assistance and insisted that the sanctions “do not target the innocent people of Venezuela.”<sup>57</sup> Despite this assertion, Venezuela’s economic situation has worsened severely under the prolonged sanctions,<sup>58</sup> and the humanitarian crisis remains devastating.<sup>59</sup>

On April 30, Guaidó launched his most assertive challenge yet to the authority of Maduro’s government by calling on the people of Venezuela, at a military base in Caracas with uniformed soldiers standing by his side, to rise up and overtake the Maduro regime.<sup>60</sup> Guaidó announced that “brave soldiers, brave patriots, brave men attached to the Constitution have followed our call,” and “the definitive end of the usurpation starts today.”<sup>61</sup> Despite Guaidó’s call and Pompeo’s insistence that “[Maduro] had an airplane on the tarmac” and “was ready to leave [that] morning,” Maduro remained in power by day’s end.<sup>62</sup> Violent protests erupted throughout the day, and López dismissed the day’s events as “an attempt at a coup, without a doubt, at a mediocre level.”<sup>63</sup> In the days following, Maduro addressed soldiers at a military base in Caracas: “Soldiers of the fatherland, it’s time to fight!”<sup>64</sup> On May 1, Pompeo indicated that “[m]ilitary action [in Venezuela] is possible.

<sup>53</sup> Cuba Sanctions, *supra* note 51.

<sup>54</sup> CBV Sanctions, *supra* note 52.

<sup>55</sup> Clifford Krauss, *New U.S. Sanctions on Venezuela Aim to Choke Off Government’s Finances*, N.Y. TIMES (Apr. 17, 2019), at <https://www.nytimes.com/2019/04/17/business/us-venezuela-sanctions-maduro.html>.

<sup>56</sup> For more information and an up-to-date list of all Venezuela-related sanctions, see U.S. Dep’t of State, *Venezuela-Related Sanctions*, at <https://www.state.gov/venezuela-related-sanctions> [<https://perma.cc/JCY9-HA23>].

<sup>57</sup> See, e.g., CBV Sanctions, *supra* note 52.

<sup>58</sup> *Venezuela Crisis: Guaidó Calls for Uprising as Clashes Erupt*, N.Y. TIMES (Apr. 30, 2019), at <https://www.nytimes.com/2019/04/30/world/americas/venezuela-coup-guaido-military.html> [hereinafter Uprising Article].

<sup>59</sup> Megan Specia, *What Is Happening in Venezuela and Why It Matters*, N.Y. TIMES (Apr. 30, 2019), at <https://www.nytimes.com/2019/04/30/world/americas/venezuela-crisis.html>. A State Department press release emphasized that the United States has provided “more than \$213 million in humanitarian assistance to provide life-saving aid and critical basic social services . . . to the most vulnerable Venezuelans,” despite resistance from the Maduro regime to allow such aid into the country. U.S. Dep’t of State Press Release, *United States Provides Additional Humanitarian Aid to Venezuelans Who Have Fled Their Country* (Apr. 10, 2019), at <https://www.state.gov/united-states-provides-additional-humanitarian-aid-to-venezuelans-who-have-fled-their-country> [<https://perma.cc/LMV2-YV47>]; Ernesto Londoño, *U.S. Military Starts Flying Aid for Venezuela to Colombia*, N.Y. TIMES (Feb. 16, 2019), at <https://www.nytimes.com/2019/02/16/world/americas/venezuela-aid-us-air-force.html>.

<sup>60</sup> Uprising Article, *supra* note 58.

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

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

<sup>63</sup> Nicholas Casey, *Venezuelan Opposition Leader Steps Up Pressure, but Maduro Holds On*, N.Y. TIMES (Apr. 30, 2019), at <https://www.nytimes.com/2019/04/30/world/americas/venezuela-guaido-maduro.html>.

<sup>64</sup> Ana Vanessa Herrero & Rick Gladstone, *Maduro Speaks to Troops, Trying to Discredit Guaidó’s Call for Mutiny*, N.Y. TIMES (May 2, 2019), at <https://www.nytimes.com/2019/05/02/world/americas/maduro-venezuela-troops.html>.

If that's what's required, that's what the United States will do."<sup>65</sup> In mid-May, representatives of Maduro and Guaidó met for talks in Norway.<sup>66</sup>

*The State Department Designates Iran's Islamic Revolutionary Guards Corps as a Foreign Terrorist Organization*

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On April 8, 2019, President Trump announced that his administration would designate Iran's Islamic Revolutionary Guards Corps (IRGC) as a foreign terrorist organization (FTO) under Section 219 of the Immigration and Nationality Act (INA).<sup>1</sup> This is the first time the United States has designated an arm of another government, rather than a non-state actor, as an FTO.<sup>2</sup> In his announcement, Trump asserted that the Iranian government has used the IRGC to engage in a campaign of global terrorism.<sup>3</sup> The measure, which officially took effect on April 15, expands on previous terrorism-related sanctions imposed on the IRGC and Iran.<sup>4</sup>

Under the INA, as amended in 1996 by the Antiterrorism and Effective Death Penalty Act, the Secretary of State can designate an organization as an FTO if:

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity . . . or terrorism . . . , or retains the capability and intent to engage in terrorist activity or terrorism; and
- (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.<sup>5</sup>

<sup>65</sup> Interview with Maria Bartiromo of Mornings With Maria on Fox Business Network, Secretary of State, in Washington, DC (May 1, 2019), at <https://www.state.gov/interview-with-maria-bartiromo-of-mornings-with-maria-on-fox-business-network-4> [<https://perma.cc/S8JE-JD4B>].

<sup>66</sup> Rick Noack & Terrence McCoy, *Emissaries of Venezuela's Government, Opposition in Norway for Talks*, WASH. POST (May 16, 2019), at [https://www.washingtonpost.com/world/venezuelan-government-and-opposition-reportedly-headed-to-norway-for-talks/2019/05/16/607ee77c-77b4-11e9-bd25-c989555e7766\\_story.html](https://www.washingtonpost.com/world/venezuelan-government-and-opposition-reportedly-headed-to-norway-for-talks/2019/05/16/607ee77c-77b4-11e9-bd25-c989555e7766_story.html).

<sup>1</sup> Donald J. Trump, Statement on the United States Designation of Iran's Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization, 2019 DAILY COMP. PRES. DOC. NO. 212 (Apr. 8) [hereinafter Trump Statement].

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

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

<sup>4</sup> U.S. Dep't of State Press Release, Designation of the Islamic Revolutionary Guard Corps (Apr. 8, 2019), at <https://www.state.gov/designation-of-the-islamic-revolutionary-guard-corps> [<https://perma.cc/GDA9-Q4M9>] [hereinafter State Dep't Press Release]; see also In the Matter of the Designation of the Islamic Revolutionary Guard Corps (and Other Aliases) as a Foreign Terrorist Organization, 84 Fed. Reg. 15278 (Apr. 15, 2019) (proulgating the designation).

<sup>5</sup> 8 U.S.C § 1189(a)(1) (2016).

Designating an organization as an FTO has specified consequences:

- (1) Unlawful conduct.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. . . .
- (2) Financial institutions.—Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall—
  - (A) retain possession of, or maintain control over, such funds; and
  - (B) report to the Secretary the existence of such funds in accordance with regulations issued by the Secretary.<sup>6</sup>

The Treasury Department can also require that any U.S. financial institution in possession or control of an FTO's assets block all transactions involving those assets.<sup>7</sup> In addition to the financial ramifications, representatives and members of an FTO are deemed inadmissible to enter the United States.<sup>8</sup> According to the State Department, the designation “supports . . . efforts to curb terrorism financing and . . . encourage[s] other nations to do the same” and “[s]igmatizes and isolates designated terrorist organizations internationally.”<sup>9</sup>

In determining whether to designate an entity as an FTO, the State Department looks to actual terrorist attacks executed by the organization in addition to deciding whether the group has planned future attacks or “retains the capability and intent to carry out such acts.”<sup>10</sup> Presently, over sixty organizations are designated as FTOs, including Al-Qaeda, Hamas, and Boko Haram.<sup>11</sup>

Unlike the other designated FTOs, the IRGC is part of a foreign government. Within the Iranian military, it “commands the *Basij* national militia that has internal security responsibilities, and the IRGC's Qods Force . . . supports pro-Iranian movements and governments in the region.”<sup>12</sup> No other official military organization of a foreign country has been designated an FTO.<sup>13</sup>

Trump noted the unprecedented nature of the measure but also explained that the IRGC has engaged in significant terrorist activity and terrorism:

<sup>6</sup> 18 U.S.C. § 2339B(a) (2016). Material support means “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , and transportation, except medicine or religious materials.” 18 U.S.C. § 2239A(b)(1).

<sup>7</sup> 8 U.S.C § 1189(a)(2)(C).

<sup>8</sup> 8 U.S.C § 1182(a)(3)(B)(i)(IV)–(V).

<sup>9</sup> U.S. Dep't of State, Foreign Terrorist Organizations, at <https://www.state.gov/foreign-terrorist-organizations> [<https://perma.cc/7B9U-2XYA>].

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

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

<sup>12</sup> CONG. RESEARCH SERV., IN11093, IRAN'S REVOLUTIONARY GUARD NAMED A TERRORIST ORGANIZATION 2 (2019).

<sup>13</sup> Trump Statement, *supra* note 1.

This unprecedented step, led by the Department of State, recognizes the reality that Iran is not only a state sponsor of terrorism, but that the IRGC actively participates in, finances, and promotes terrorism as a tool of statecraft. The IRGC is the Iranian Government's primary means of directing and implementing its global terrorist campaign.

This designation will be the first time that the United States has ever named a part of another government as [an] FTO. It underscores the fact that Iran's actions are fundamentally different from those of other governments. This action will significantly expand the scope and scale of our maximum pressure on the Iranian regime. It makes crystal clear the risks of conducting business with, or providing support to, the IRGC. If you are doing business with the IRGC, you will be bankrolling terrorism.

This action sends a clear message to Tehran that its support for terrorism has serious consequences. We will continue to increase financial pressure and raise the costs on the Iranian regime for its support of terrorist activity until it abandons its malign and outlaw behavior.<sup>14</sup>

In addition, the State Department charged that the IRGC "has been directly involved in terrorist plotting; its support for terrorism is foundational and institutional, and it has killed U.S. citizens."<sup>15</sup> The State Department's press release described the "Iranian regime" as "responsible for the deaths of at least 603 American service members in Iraq since 2003" and listed various terrorist activities dating back to 1996 which it attributed to the IRGC.<sup>16</sup>

This designation is the latest of many actions undertaken by the United States to penalize the IRGC and Iran for support of terrorism. In 2017, the Treasury Department designated the IRGC as a terrorism-supporting entity because of its relationship with the Qods Force.<sup>17</sup> In prior years, other administrations had previously subjected the IRGC to sanctions due to its support of Iran's missile and nuclear programs and connection with Iran's human rights abuses.<sup>18</sup> And since 1984, the State Department has branded Iran a "state sponsor of terrorism."<sup>19</sup> All of these measures have had the effect of imposing significant sanctions on the IRGC and its Qods Force.<sup>20</sup>

Commentators have questioned whether the designation of the IRGC as an FTO will have any practical impact in view of these prior actions and other Iran-related sanctions.<sup>21</sup>

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

<sup>15</sup> State Dep't Press Release, *supra* note 4.

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

<sup>17</sup> U.S. Dep't of Treasury Press Release, Treasury Designates the IRGC Under Terrorism Authority and Targets IRGC and Military Supporters Under Counter-Proliferation Authority (Oct. 13, 2017), at <https://www.treasury.gov/press-center/press-releases/Pages/sm0177.aspx> [<https://perma.cc/5QCB-DGPG>] [hereinafter Treasury 2017 Press Release]. The Qods Force had received a similar designation a decade earlier. U.S. Dep't of Treasury Press Release, Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism (Oct. 25, 2007), at <https://www.treasury.gov/press-center/press-releases/pages/hp644.aspx> [<https://perma.cc/DF9G-LYG5>].

<sup>18</sup> Treasury 2017 Press Release, *supra* note 17.

<sup>19</sup> U.S. Dep't of State, State Sponsors of Terrorism, at <https://www.state.gov/state-sponsors-of-terrorism> [<https://perma.cc/CPZ8-ZNY5>].

<sup>20</sup> State Dep't Press Release, *supra* note 4.

<sup>21</sup> See Elena Chachko, *The U.S. Names the Iranian Revolutionary Guard a Terrorist Organization and Sanctions the International Criminal Court*, LAWFARE (Apr. 10, 2019), at <https://www.lawfareblog.com/us-names-iranian-revolutionary-guard-terrorist-organization-and-sanctions-international-criminal> (explaining that existing measures are already a "powerful deterrent" and that any prosecutions pursuant to the designation may face significant

The measure has also generated concerns about retaliatory actions from Iran and other countries.<sup>22</sup> Previous administrations hesitated in labeling the IRGC an FTO from concern that any designation would complicate U.S. operations in the region and lead other nations to target U.S. security agencies.<sup>23</sup> High-level officials in the Trump administration reportedly opposed the designation due to these fears.<sup>24</sup> After the announcement, Major General Mohammad Ali Jafari, commander of the IRGC, reportedly warned that U.S. troops stationed in the Middle East would lose “their current status of ease and serenity.”<sup>25</sup> Soon after, Iran’s Supreme National Security Council declared the U.S. Central Command a terrorist organization and Iranian President Hassan Rouhani followed up by signing a bill into law that officially designated it as a terrorist organization.<sup>26</sup>

The designation of the IRGC as an FTO comes amid escalating tensions between the United States and Iran. In the six months following the U.S. withdrawal from the Joint Comprehensive Plan of Action (JCPOA) in May 2018, the United States restored crippling sanctions—both primary and secondary—aimed at Iran.<sup>27</sup> In the spring of 2019, the United States has cut out various exemptions to these sanctions<sup>28</sup> and added still more sanctions targeting Iran’s metal sectors.<sup>29</sup> On May 8, 2019, Rouhani threatened to suspend aspects of

obstacles); Suzanne Maloney, *What Both Trump and His Critics Get Wrong About the IRGC Terrorist Designation*, LAWFARE (Apr. 18, 2019), at <https://www.lawfareblog.com/what-both-trump-and-his-critics-get-wrong-about-ircg-terrorist-designation> (contending that “there is little reason to believe that [the designation] will prove a game-changer” but also conceding that the measure subjects individuals or entities to criminal prosecution); Afshon Ostovar, *Designating Iranian Military Unit a “Terrorist Organization” Will Make U.S. Relations With Iran More Difficult. Here’s How*, WASH. POST (Apr. 8, 2019), at [https://www.washingtonpost.com/politics/2019/04/08/designating-ircg-terrorist-organization-will-make-us-relations-with-iran-more-difficult-heres-how/?utm\\_term=.c1d4b7d02529](https://www.washingtonpost.com/politics/2019/04/08/designating-ircg-terrorist-organization-will-make-us-relations-with-iran-more-difficult-heres-how/?utm_term=.c1d4b7d02529) (asserting that the designation may not add much to prior pressures imposed on Iran and could potentially prompt countermeasures).

<sup>22</sup> Ostovar, *supra* note 21.

<sup>23</sup> Amy Gearan & Carol Morello, *Trump to Designate Iranian Military Unit as a Terrorist Group*, WASH. POST (Apr. 8, 2019), at [https://www.washingtonpost.com/politics/trump-names-iranian-military-unit-as-a-terrorist-group/2019/04/08/1613f82e-5a01-11e9-842d-7d3ed7eb3957\\_story.html?utm\\_term=.e3be79749cb0](https://www.washingtonpost.com/politics/trump-names-iranian-military-unit-as-a-terrorist-group/2019/04/08/1613f82e-5a01-11e9-842d-7d3ed7eb3957_story.html?utm_term=.e3be79749cb0).

<sup>24</sup> Edward Wong & Eric Schmitt, *Trump Designates Iran’s Revolutionary Guards a Foreign Terrorist Group*, N.Y. TIMES (Apr. 8, 2019), at <https://www.nytimes.com/2019/04/08/world/middleeast/trump-iran-revolutionary-guard-corps.html>.

<sup>25</sup> *Deputy FM: US Strategic Mistake Against IRGC to Change Iranian Forces’ Behavior Towards Americans*, FARIS NEWS AGENCY (Apr. 9, 2019), at <http://en.farsnews.com/13980120000227>.

<sup>26</sup> *Part 6: Iranian Officials React to IRGC Designation*, IRAN PRIMER (Apr. 11, 2019), at <https://iranprimer.usip.org/blog/2019/apr/09/part-6-iranian-officials-react-ircg-designation>; *Iran Designates as Terrorists All U.S. Troops in Middle East*, REUTERS (Apr. 30, 2019), at <https://www.reuters.com/article/us-usa-iran-rouhani/iran-designates-as-terrorists-all-u-s-troops-in-middle-east-idUSKCN1S61GB>. U.S. Central Command is the combatant command within the U.S. military that focuses on the Middle East.

<sup>27</sup> See generally Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 173 (2019) (providing a more detailed discussion of the re-imposition of sanctions and also discussing a case brought by Iran against the United States in the International Court of Justice (ICJ) in relation to these sanctions); Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 514 (2018) (describing the U.S. withdrawal from the JCPOA).

<sup>28</sup> Michael Pompeo, U.S. Dep’t of State, *Decision on Imports of Iranian Oil* (Apr. 22, 2019), at <https://www.state.gov/decision-on-imports-of-iranian-oil> [<https://perma.cc/6SZT-M2BP>] (announcing that the United States would no longer grant temporary exemptions from the re-imposition of sanctions).

<sup>29</sup> Exec. Order No. 13,871, 84 Fed. Reg. 20,761 (May 10, 2019). In another development in the spring of 2019, the ICJ ruled that it had jurisdiction over some claims in a case brought by Iran in 2016 challenging the U.S. use of Iranian assets to satisfy default judgments entered in U.S. domestic courts against Iran. *Certain Iranian Assets (Iran v. U.S.)*, Judgment (Int’l Ct. Just. Feb. 13, 2019), available at <https://www.icj-cij.org/files/case-related/164/164-20190213-SUM-01-00-EN.pdf>.

Iran's compliance with the JCPOA, in which Iran had agreed to limit its nuclear program, if the country did not receive respite from sanctions within sixty days.<sup>30</sup>

#### STATE DIPLOMATIC AND CONSULAR RELATIONS

##### *United States Recognizes Israeli Sovereignty Over the Golan Heights*

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In a reversal of decades of U.S. foreign policy, on March 25, 2019, President Trump issued a presidential proclamation recognizing Israeli sovereignty over the Golan Heights, a strategic piece of territory captured by Israel from Syria during the Six-Day War in 1967. This move, which generated international criticism, is the latest in a series of actions by the Trump administration that advance the interests of the Israeli government.

On March 21, 2019, Trump tweeted that “[a]fter 52 years it is time for the United States to fully recognize Israel’s Sovereignty over the Golan Heights, which is of critical strategic and security importance to the State of Israel and Regional Stability!”<sup>1</sup> In remarks later that day, Israeli Prime Minister Benjamin Netanyahu, joined by Secretary of State Mike Pompeo in Jerusalem, stated that:

President Trump has just made history. I called him. I thanked him on behalf of the people of Israel. He did it again. First he recognized Jerusalem as Israel’s capital and moved the U.S. embassy here. Then he pulled out of the disastrous Iran treaty and re-imposed sanctions. But now he did something of equal historic importance. He recognized Israel’s sovereignty over the Golan Heights, and he did so at a time when Iran is trying to use Syria as a platform to attack and destroy Israel. And the message that President Trump has given the world is that America stands by Israel.<sup>2</sup>

Four days later, Trump formalized his position by issuing a presidential proclamation declaring the new U.S. position on the status of the disputed territory. It reads, in part:

The State of Israel took control of the Golan Heights in 1967 to safeguard its security from external threats. Today, aggressive acts by Iran and terrorist groups, including

<sup>30</sup> Tamer El-Ghobashy, Michael Birnbaum & Carol Morello, *Iran Announces It Will Stop Complying With Parts of Landmark Nuclear Deal*, WASH. POST (May 8, 2019), at [https://www.washingtonpost.com/world/iran-to-take-steps-to-reduce-its-commitment-to-landmark-nuclear-deal/2019/05/07/90cc3b1c-70fe-11e9-9331-30bc5836f48e\\_story.html?utm\\_term=.525819244bc3](https://www.washingtonpost.com/world/iran-to-take-steps-to-reduce-its-commitment-to-landmark-nuclear-deal/2019/05/07/90cc3b1c-70fe-11e9-9331-30bc5836f48e_story.html?utm_term=.525819244bc3).

<sup>1</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 21, 2019, 9:50 AM), at [https://twitter.com/realDonaldTrump/status/1108772952814899200?ref\\_src=twsrc%5Etfw](https://twitter.com/realDonaldTrump/status/1108772952814899200?ref_src=twsrc%5Etfw) [<https://perma.cc/4BQY-66CN>].

<sup>2</sup> U.S. Dep’t of State Press Release, Remarks with Israeli Prime Minister Benjamin Netanyahu Before Dinner (Mar. 21, 2019), at <https://www.state.gov/secretary/remarks/2019/03/290554.htm> [<https://perma.cc/SX9A-87GE>]; Scott R. Anderson, *Recognizing Israel’s Claims to the Golan Heights: Trump’s Decision in Perspective*, LAWFARE (Mar. 22, 2019), at <https://www.lawfareblog.com/recognizing-israels-claims-golan-heights-trumps-decision-perspective> (observing that “[l]eft unclear [from Trump’s tweet] was whether the president was merely calling for U.S. recognition . . . or actually implementing it” and that “the first person to confirm the change in U.S. policy was none other than Israeli Prime Minister Benjamin Netanyahu”).

Hizballah, in southern Syria continue to make the Golan Heights a potential launching ground for attacks on Israel. Any possible future peace agreement in the region must account for Israel's need to protect itself from Syria and other regional threats. Based on these unique circumstances, it is therefore appropriate to recognize Israeli sovereignty over the Golan Heights.<sup>3</sup>

In a signing ceremony with Prime Minister Netanyahu and U.S. Ambassador to Israel David Friedman on the same day, Trump remarked:

Under my administration, the unbreakable alliance between the United States and Israel has never been stronger. You read things; you hear things. It's never been stronger. Just remember that. People talk, but it's only talk. Our relationship is powerful.

At this moment, the American Embassy stands proudly in Jerusalem, the capital the Jewish people have established. And they've wanted the Embassy for many, many years, for many decades, and frankly, through many Presidents. And we got it done. Not only did we get it done, we also got it built at a slight cost saving, like about \$1 billion cost saving.<sup>4</sup>

For his part, Netanyahu emphasized the importance of the Golan Heights to Israel's strategic interests.<sup>5</sup> He also lavished praise on Trump:

In the long sweep of Jewish history, there have been a handful of proclamations by non-Jewish leaders on behalf of our people in our land: Cyrus the Great, the great Persian king; Lord Balfour; President Harry S. Truman; and President Donald J. Trump. And you, Mr. President—Mr. President, you've done it not once but twice, with your bold proclamation on Jerusalem and with your bold proclamation today on the Golan.<sup>6</sup>

The U.S. decision was made several weeks before Israeli parliamentary elections on April 9, 2019, in which Netanyahu was locked in a close reelection campaign against rival Benny Gantz.<sup>7</sup> Netanyahu had reportedly asked Trump to recognize the Golan Heights as part of Israel on at least two prior occasions: once in 2017,<sup>8</sup> and again in 2018, after Trump declared

<sup>3</sup> Donald J. Trump, Proclamation 9852 – Recognizing the Golan Heights as Part of the State of Israel, 2019 DAILY COMP. PRES. DOC. No. 172, at 3 (Mar. 25). As a matter of U.S. domestic law, the Supreme Court held in 2015 that “the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.” *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015).

<sup>4</sup> Remarks with Prime Minister Benjamin Netanyahu of Israel on Signing a Proclamation Recognizing the Golan Heights as Part of the State of Israel and an Exchange with Reporters, 2019 DAILY COMP. PRES. DOC. No. 171, at 1 (Mar. 25).

<sup>5</sup> *Id.* at 3.

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

<sup>7</sup> Liz Sly, Loveday Morris & Suzan Haidamous, *Trump's Golan Tweet Inflames Regional Tensions as Syria Vows to Recover the Strategic Plateau*, WASH. POST (Mar. 22, 2019), at [https://www.washingtonpost.com/world/middle-east/trumps-golan-tweet-inflames-regional-tensions-as-syria-vows-to-recover-the-occupied-land/2019/03/22/ee13134e-4c1a-11e9-8cfc-2c5d0999c21e\\_story.html?utm\\_term=.36c6e58004f4](https://www.washingtonpost.com/world/middle-east/trumps-golan-tweet-inflames-regional-tensions-as-syria-vows-to-recover-the-occupied-land/2019/03/22/ee13134e-4c1a-11e9-8cfc-2c5d0999c21e_story.html?utm_term=.36c6e58004f4).

<sup>8</sup> Luke Baker, *Netanyahu Asks Trump to Recognize Israeli Sovereignty Over Golan Heights*, REUTERS (Feb. 16, 2017), at <https://www.reuters.com/article/us-usa-trump-israel-golan/netanyahu-asks-trump-to-recognize-israeli-sovereignty-over-golan-heights-idUSKBN15U2XX>.

that he would move the U.S. embassy in Israel to Jerusalem.<sup>9</sup> In an interview following his Twitter announcement, Trump stated that he had been contemplating the move for a “long time” and disclaimed any intention to help Netanyahu in the elections, explaining, “I wouldn’t even know about that. . . . I have no idea. I hear he is doing okay?”<sup>10</sup> U.S. National Security Advisor John Bolton justified the decision on national security grounds, writing on Twitter that “[t]o allow Golan Heights to be controlled by the likes of the Syrian or Iranian regimes would turn a blind eye to the atrocities of Assad and the destabilizing presence of Iran in the region. Strengthening Israel’s security enhances our ability to fight common threats together.”<sup>11</sup>

Captured by Israel during the Six-Day War in June 1967, the Golan Heights is a plateau located between northeastern Israel and southwestern Syria that is home to approximately 20,000 Israeli settlers and 20,000 Syrian Druze.<sup>12</sup> The international community has never recognized Israeli sovereignty over the Golan Heights, consistent with the view that an occupying power cannot unilaterally annex territory.<sup>13</sup> In November 1967, the UN Security Council unanimously adopted Resolution 242, the most significant provision of which:

*Affirms* that the fulfillment of [UN] Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force[.]<sup>14</sup>

Following Resolution 242, Israel continued to occupy the Golan Heights, and Syria attempted unsuccessfully to seize back control during the Yom Kippur War of 1973. Security Council Resolution 338, which called for an end to the Yom Kippur War, also called for the immediate implementation of Resolution 242 after the cease fire.<sup>15</sup> The following

<sup>9</sup> Karen DeYoung & Carol Morello, *In Trump’s Golan Heights Announcement, Politics Overshadowed Security*, WASH. POST (Mar. 23, 2019), at [https://www.washingtonpost.com/world/national-security/how-irans-moves-supercharged-trumps-announcement-on-golan-heights/2019/03/22/80ff2d06-4cce-11e9-b79a-961983b7e0cd\\_story.html?utm\\_term=.2e40bc908463](https://www.washingtonpost.com/world/national-security/how-irans-moves-supercharged-trumps-announcement-on-golan-heights/2019/03/22/80ff2d06-4cce-11e9-b79a-961983b7e0cd_story.html?utm_term=.2e40bc908463).

<sup>10</sup> Sly, Morris & Haidamous, *supra* note 7.

<sup>11</sup> John Bolton (@AmbJohnBolton), TWITTER (Mar. 22, 2019, 8:49 AM), at <https://twitter.com/ambjohnbolton/status/1109119841645068289?lang=en> [<https://perma.cc/A5V8-PY36>]; see also DeYoung & Morello, *supra* note 9.

<sup>12</sup> *Golan Heights Profile*, BBC (Mar. 25, 2019), at <https://www.bbc.com/news/world-middle-east-14724842>.

<sup>13</sup> See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 5–6 (2004) (“The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty. From the principle of inalienable sovereignty over a territory spring the constraints that international law imposes upon the occupant.”).

<sup>14</sup> SC Res. 242, para. 1 (Nov. 22, 1967). A few months earlier, the then Legal Adviser of the Israeli Minister of Foreign Affairs, Theodor Meron, had advised the Israeli government that the establishment of civilian settlements in the occupied Golan Heights was prohibited by the Fourth Geneva Convention. Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AJIL 357, 358 (2017).

<sup>15</sup> SC Res. 338, paras. 1–2 (Oct. 22, 1973).

year, Resolution 350 established a UN peacekeeping force in the Golan Heights that continues to this day.<sup>16</sup>

Several years later, in 1981, Israel legislated to make Israeli law applicable to the Golan Heights,<sup>17</sup> a development that was perceived as a move towards annexation. The Security Council responded by passing Resolution 497, “[d]ecid[ing] that the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect” and demanding that Israel rescind its decision.<sup>18</sup> When Israel failed to comply with the resolution, the Security Council considered another resolution that would have “decide[d] that all member states should consider applying concrete and effective measures in order to nullify the Israeli annexation of the Syrian Golan Heights and to refrain from providing any assistance or aid to and cooperation with Israel, in all fields,” but that resolution was vetoed by the United States.<sup>19</sup>

In keeping with the international community, past presidential administrations declined to recognize the Golan Heights as part of Israel and at times signaled resistance to Israeli efforts to assert sovereignty over the territory. In 1981, for example, following Israel’s passage of the legislation mentioned above, the Reagan administration suspended an agreement with Israel providing for greater military cooperation between the two countries.<sup>20</sup> More recently, the Obama administration turned down an Israeli request to recognize Israeli sovereignty over the Golan Heights in 2015,<sup>21</sup> and it reiterated the view that the Golan Heights was occupied territory following remarks by Netanyahu that Israel would never cede control of the Golan Heights.<sup>22</sup>

While recognizing the Golan Heights to be part of Israel, the Trump administration has asserted that its decision should not be taken as a precedent justifying the acquisition of territory through conquest more generally. When asked about this issue at a press briefing on March 26, Secretary of State Pompeo responded, “This is an incredibly unique situation. Israel was fighting a defensive battle to save its nation, and it cannot be the case that a UN

<sup>16</sup> SC Res. 350, para. 3 (May 31, 1974); *see also* United Nations Peacekeeping, UNDOF Fact Sheet, at <https://peacekeeping.un.org/en/mission/undof> (noting the deployment of roughly 1,100 mission members as of March 2019).

<sup>17</sup> Israel Min. For. Aff., Golan Heights Law (Dec. 14, 1981), at <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/golan%20heights%20law.aspx> [<https://perma.cc/HRV2-P572>].

<sup>18</sup> SC Res. 497, para. 1 (Dec. 17, 1981).

<sup>19</sup> *U.S. Vetos U.N. Resolution on Golan Annexation*, N.Y. TIMES (Jan. 21, 1982), at <https://www.nytimes.com/1982/01/21/world/us-vetos-un-resolution-on-golan-annexation.html>; *U.N. Resolution on Golan*, N.Y. TIMES (Jan. 21, 1982), at <https://www.nytimes.com/1982/01/21/world/un-resolution-on-golan.html?module=ArrowsNav&contentCollection=World&action=keypress&region=FixedLeft&pgtype=article>.

<sup>20</sup> Bernard Gwertzman, *U.S. Suspends Strategic Pact and Arms Deal with Israel Over Annexation of Golan*, N.Y. TIMES (Dec. 19, 1981), at <https://www.nytimes.com/1981/12/19/world/us-suspends-strategic-pact-and-arms-deal-with-israel-over-annexation-of-golan.html>.

<sup>21</sup> Baker, *supra* note 8.

<sup>22</sup> U.S. Dep’t of State Press Release, Daily Press Briefing – April 18, 2016, at 2:00–3:00 (Apr. 18, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/04/255946.htm> [<https://perma.cc/NB8Y-HQEK>] (quoting then State Department spokesperson John Kirby as saying in response to Netanyahu’s remarks that “the U.S. position on the status of the Golan Heights is longstanding and is unchanged. Every administration on both sides of the aisle since 1967 has maintained that those territories are not part of Israel. The conditions under which those territories are ultimately returned should be decided through negotiations between the respective parties.”).

resolution is a suicide pact. It simply can't be, and that's the reality that President Trump recognized in his executive order yesterday."<sup>23</sup> In an appearance several weeks later before a Senate appropriations subcommittee, Pompeo and Senator Dick Durbin of Illinois engaged in the following dialogue:

- Durbin: Draw a historic parallel for me between the decision to say to Israel that they could claim sovereignty over the Golan Heights, a territory that was seized during the 1967 war from Syria, and the Russian claims that they can claim Crimea, because they happened to invade it as well.
- Pompeo: Senator, the two situations could not be more starkly different . . . The Golan Heights was—the Israelis ended up with the Golan Heights as the result of having been attacked. . . They were at risk of their very nation being overrun . . . and they defended themselves, and they retained that terrain to continue to defend themselves from the murderous regimes in Syria. Russia, on the other hand, wasn't on the defensive. Russia chose at their own moment in time to go seize land from a people that posed no threat to them whatsoever.
- Durbin: So our diplomatic position is that land seized in the course of a war is then the spoils for those who happen to occupy it?
- Pompeo: I'll say two things about that. So there's international law doctrine on this very point. We don't have time to begin to go through it today. But [I'm] happy to have a team go over and walk you through that element of international law. But the second thing—it's just a practical policy matter. If it's the case that there is absolutely no cost for aggression. That is—if you attack, and you have some of your land taken as a result of an attack that you undertook and you get it back just cause you didn't succeed. . . . That's a bad incentive system to set up.<sup>24</sup>

In the immediate aftermath of Pompeo's testimony, the State Department did not provide a public explanation regarding how the U.S. recognition of the Golan Heights as part of Israel was consistent with international law.<sup>25</sup> On May 14, 2019, Pompeo and Friedman co-authored an editorial arguing that "President Trump's Golan proclamation is entirely consistent with Resolution 242."<sup>26</sup> They interpreted Resolution 242 as "provid[ing] that Israel would withdraw from some—but not necessarily all—territory captured in 1967."<sup>27</sup> In their view, U.S. recognition of the Golan Heights as part of Israel "afforded Israel the only

<sup>23</sup> U.S. Dep't of State, Remarks to the Press (Mar. 26, 2019), at <https://www.state.gov/remarks-to-the-press-7> [<https://perma.cc/W2MK-CJHP>].

<sup>24</sup> *State Department Fiscal Year 2020 Budget Request*, C-SPAN, at 49:00–51:00 (Apr. 9, 2019), at <https://www.c-span.org/video/?459622-1/secretary-state-pompeo-testifies-fiscal-year-2020-budget-request&start=2953>.

<sup>25</sup> See Julian Borger, *Pompeo Flounders on Why Annexation is Good for the Golan But Not for Crimea*, *GUARDIAN* (Apr. 11, 2019), at <https://www.theguardian.com/us-news/2019/apr/11/golan-heights-crimea-pompeo-us-state-department> (reporting that the State Department did provide follow-up information that reiterated the situational differences between the situation of the Golan Heights and that of Crimea).

<sup>26</sup> Michael R. Pompeo & David Friedman, *International Law Backs the Trump Golan Policy*, *WALL ST. J.* (May 14, 2019), at <https://www.wsj.com/articles/international-law-backs-the-trump-golan-policy-11557875474>.

<sup>27</sup> *Id.* (further noting that Israel had returned substantial territory in Sinai that it had occupied during the Six Day War).

secure and recognized boundary that can exist” in light of the appalling behavior of the Syrian government over the years—and thereby furthered “the objective of Resolution 242.”<sup>28</sup>

The U.S. decision to recognize the Golan Heights as part of Israel generated considerable international resistance. Following Trump’s announcement over Twitter, Syria sent a letter to the UN Security Council asking it to “take practical measures to ensure that the council is fulfilling . . . its mandate in the implementation of its [Golan Heights] resolutions . . .”<sup>29</sup> The European Union issued a statement saying that its position on the status of the Golan Heights had “not changed” and that it “does not recognise Israeli sovereignty over the occupied Golan Heights.”<sup>30</sup> In a special meeting of the Security Council convened to address the issue, Belgium, China, the Dominican Republic, Equatorial Guinea, France, Germany, Indonesia, Kuwait, Poland, Russia, South Africa, and the United Kingdom criticized the U.S. decision, reiterated the view that the Golan Heights is occupied territory, or did both.<sup>31</sup> The representative of South Africa described the U.S. recognition as “a unilateral action that is a blatant violation of international law and numerous relevant Security Council resolutions.”<sup>32</sup> In his remarks, the U.S. delegate emphasized that the decision was “of critical strategic and security importance to the State of Israel,” highlighted the security concerns that would arise for Israel were Syria to control the Golan Heights, and expressed strong support for the ongoing UN peacekeeping mission.<sup>33</sup>

The decision to recognize Israeli sovereignty over the Golan Heights follows other actions by the Trump administration that reflect a distinctively close alignment with the Israeli government. These include the U.S. recognition of Jerusalem as the capital of Israel,<sup>34</sup> the closure of the Palestinian Liberation Organization (PLO) office in Washington, D.C.;<sup>35</sup> and sharp curtailments of U.S. funding to Palestinian-related aid.<sup>36</sup> With Netanyahu’s apparent reelection to a fifth consecutive term as prime minister and subsequent failure to form a government,<sup>37</sup> the prospects of renewed peace negotiations between the Israelis and Palestinians remain uncertain. Several days before the election in April of 2019, Netanyahu promised

<sup>28</sup> *Id.* The editorial also described as “baseless” the statement of UN Secretary-General Antonio Guterres that “Israel’s 1981 annexation of the Golan [was] ‘null and void and without international legal effect.’” *Id.* The editorial did not discuss Resolution 497, which uses this language. See *id.* For a critique of the editorial, see Oona Hathaway & Scott Shapiro, *Trump’s Golan Policy and Its Threat to the Post-War International Legal Order*, JUST SECURITY (May 16, 2019), at <https://www.justsecurity.org/64141/trumps-golan-policy-and-its-threat-to-the-post-war-international-legal-order>.

<sup>29</sup> AFP & Times of Israel Staff, *Syria Asks Security Council to Uphold Resolutions on Golan*, TIMES ISRAEL (Mar. 23, 2019), at <https://www.timesofisrael.com/syria-asks-security-council-to-uphold-resolutions-on-golan>.

<sup>30</sup> Delegation of the European Union to Israel Press Release, Declaration by the High Representative on Behalf of the EU on the Golan Heights (Mar. 27, 2019), at [https://eeas.europa.eu/delegations/israel/60274/declaration-high-representative-behalf-eu-golan-heights\\_en](https://eeas.europa.eu/delegations/israel/60274/declaration-high-representative-behalf-eu-golan-heights_en).

<sup>31</sup> United Nations Press Release, Security Council Members Regret Decision by United States to Recognize Israel’s Sovereignty Over Occupied Syrian Golan (Mar. 27, 2019), at <https://www.un.org/press/en/2019/sc13753.doc.htm>.

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

<sup>33</sup> U.S. Mission to the United Nations Press Release, Remarks at a UN Security Council Meeting on the UN Disengagement Observer Force and the Golan Heights (Mar. 27, 2019), at <https://usun.state.gov/remarks/8993> [<https://perma.cc/T5R3-MALC>].

<sup>34</sup> Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 306, 306 (2018).

<sup>35</sup> Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 143, 147 (2019).

<sup>36</sup> *Id.* at 148–49.

<sup>37</sup> See Isabel Kershner, *After Coalition Talks Crumble, Israel on Course for Another Election*, N.Y. TIMES (May 29, 2019), at <https://www.nytimes.com/2019/05/29/world/middleeast/israel-election-benjamin-netanyahu.html>

to annex “some or all” of the West Bank if he was reelected.<sup>38</sup> When pressed by the Senate Appropriations subcommittee on how the United States would respond to such a move, Pompeo repeatedly avoided giving a direct answer.<sup>39</sup>

#### STATE RESPONSIBILITY AND LIABILITY

*D.C. District Court Enters Over \$300 Million Default Judgment Award Against Syria for the Death of Marie Colvin*  
doi:10.1017/ajil.2019.34

On February 1, 2019, the United States District Court for the District of Columbia granted a motion for default judgment and entered a \$302,511,836.00 award against the Syrian Arab Republic (“Syria”).<sup>1</sup> The court found the Syrian government liable for the death of Marie Colvin, who died in an artillery shelling on February 22, 2012, at a media center in the city of Homs. Colvin was a heralded war correspondent who had previously “cover[ed] conflict zones in Iraq, Chechnya, the Balkans, East Timor, Sri Lanka, Sierra Leone, and Libya.”<sup>2</sup> Colvin’s heirs brought suit, claiming that because Syria had been designated a “state sponsor of terrorism,” it could be held liable for an extrajudicial killing of a U.S. national under the Foreign Sovereign Immunities Act (FSIA).<sup>3</sup> Judge Amy Berman Jackson concluded that the plaintiffs met the evidentiary burden required to support their claim after finding personal and subject matter jurisdiction.<sup>4</sup>

Marie Colvin’s death occurred during the conflict in Syria, which began in 2011. Relying on evidence presented by the plaintiffs, as Syria did not participate in the case, the court found that her death came as a result of the Assad regime’s deliberate targeting of a civilian media center.<sup>5</sup> The court concluded that the highest military planning group within the Syrian government had ordered military operations “against those who tarnish the image of Syria in foreign media and international organizations.”<sup>6</sup> Syrian military forces focused on Homs

(describing Netanyahu’s failure to form a government and the scheduling of new elections, tentatively set for September 17).

<sup>38</sup> Edward Wong & Catie Edmondson, *Pompeo Refuses to Say What U.S. Would Do if Israel Annexes West Bank*, N.Y. TIMES (Apr. 9, 2019), at <https://www.nytimes.com/2019/04/09/us/politics/pompeo-israel-west-bank.html>.

<sup>39</sup> *Id.*; see generally C-SPAN, *supra* note 24.

<sup>1</sup> Colvin v. Syrian Arab Republic, 363 F. Supp. 3d 141, 146 (D.D.C. 2019).

<sup>2</sup> *Id.* at 149.

<sup>3</sup> *Id.* at 146 & nn. 1–2, 153; see also Complaint at 28–30, Colvin v. Syrian Arab Republic, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423).

<sup>4</sup> Colvin, 363 F. Supp. 3d at 146.

<sup>5</sup> *Id.* at 146–47 & nn. 3–4. The court drew upon expert reports and upon declarations provided by Syrian government defectors and by individuals present at the events. The expert reports were authored by Ewan Brown (a consultant for the Commission for International Justice and Accountability); David Kaye (the UN special rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression); and Robert Ford (the U.S. ambassador to Syria at the time of the events in question). *Id.* at n. 3.

<sup>6</sup> *Id.* at 148 (quoting the expert report of Ewan Brown).

“made it a priority to pin down the location” of a civilian media center in the Baba Amr neighborhood that, among other things, was used as a base for foreign journalists.<sup>7</sup> In February 2012, the renowned American journalist, Marie Colvin, stayed at the media center for several nights while on an assignment for the British newspaper, *The Sunday Times*.<sup>8</sup> On February 21—a day that Colvin carried out live interviews within Bab Amr for major U.S. and UK television providers—Syrian military officials linked the location of media center to the origin of intercepted broadcasts.<sup>9</sup> On February 22, Syrian forces targeted the media center with concentrated shelling.<sup>10</sup> One shell killed Colvin and a French photographer as they were fleeing the building.<sup>11</sup>

On July 9, 2016, Colvin’s sister and several other relatives filed suit in the federal district court in Washington D.C. against Syria, requesting compensatory and punitive damages. They claimed subject matter jurisdiction because Colvin’s killing was “extrajudicial” and committed by a “state sponsor of terrorism” under the FSIA.<sup>12</sup> The plaintiffs served the Syrian government in accordance with 28 U.S.C. § 1608, which stipulates how service against foreign states in U.S. courts is to be accomplished.<sup>13</sup> Section 1608 provides that if certain conditions are satisfied, the plaintiffs may send the summons, complaint, and notice of suit to the U.S. secretary of state for transmission through diplomatic channels.<sup>14</sup> The plaintiffs followed this procedure for service, and Syria did not mount a defense.<sup>15</sup> The clerk of the court then entered default against Syria, and on March 22, 2018, the plaintiffs filed a motion for default judgment.<sup>16</sup>

In its memorandum granting the plaintiffs’ motion for default judgment, the court addressed whether it had jurisdiction before moving to the merits of the claim. As Judge Jackson noted, “[a] foreign state is typically immune from jurisdiction in U.S. courts” unless there is some basis for jurisdiction under the FSIA, which creates several exceptions to otherwise presumptive immunity.<sup>17</sup> The court held that Syria’s conduct fell within the FSIA’s

<sup>7</sup> *Id.* at 148–150.

<sup>8</sup> *Id.* at 150–51.

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

<sup>10</sup> *Id.* at 151 (noting that Syrian military officials later gathered and “drank to a successful operation” in “locating and attacking the Media Center” and that the commander of the assault received “a new car as a reward for the successful attack” from a higher-ranked military official who was also President Assad’s brother).

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

<sup>12</sup> Complaint at 28, 30–31, *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423).

<sup>13</sup> *Colvin*, 363 F. Supp. 3d at 152; 28 U.S.C. § 1608.

<sup>14</sup> 28 U.S.C. § 1608(a)(1)–(4); *see also* *Republic of Sudan v. Harrison*, 139 U.S. 1048 (2019) (interpreting one aspect of the statutory requirement for service of process).

<sup>15</sup> *Colvin*, 363 F. Supp. 3d at 146, 154–55 (noting that the U.S. State Department sent these documents to the Czech Embassy in Syria, which in turn provided them to the Syrian Ministry of Foreign Affairs).

<sup>16</sup> Plaintiffs’ Motion for Default Judgment, *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423). “Federal Rule of Civil Procedure 55(a) provides that the Clerk of the Court must enter a party’s default ‘[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise.’” *Colvin*, 363 F. Supp. 3d at 152 (quotations omitted).

<sup>17</sup> *Colvin*, 363 F. Supp. 3d at 152. Further, “[u]nder the Foreign Sovereign Immunities Act, a court may not enter default judgment against a foreign state ‘unless the claimant establishes his claim or right to relief by evidence

“state sponsor of terrorism” exception.<sup>18</sup> This exception provides that a foreign state is not immune from suits for money damages in U.S. courts when the damages are sought for “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act,” if the foreign state was “designated as a state sponsor of terrorism” by the U.S. secretary of state at the time of the act.<sup>19</sup> Additionally, the claimant or victim at the time of the act must have been a “national of the United States,” “member of the armed forces,” or a U.S. government employee.<sup>20</sup> For claims brought based on acts that occurred within the foreign state being sued—as was the case with Colvin’s death within Syria—the plaintiffs must also have “afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.”<sup>21</sup>

The court found that Syria “has been designated a state sponsor of terrorism since December 29, 1979.”<sup>22</sup> The court also found that Colvin was a U.S. national at the time of the act and that the plaintiffs “afforded the foreign state . . . a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.”<sup>23</sup> Because the plaintiffs sought money damages from Syria based on the claim that Colvin’s death was an extrajudicial killing caused by the Syrian government, the court found that it had subject matter jurisdiction.<sup>24</sup> Additionally, the court found that the plaintiffs attempted to serve the Syrian government

satisfactory to the court.” *Id.* (citing 28 U.S.C. § 1608(e); *Han Kim v. Democratic People’s Republic of Korea*, 774 F.3d 1044, 1047 (D.C. Cir. 2014)) (quotations omitted).

<sup>18</sup> *Id.* at 152–53 (citing 28 U.S.C. § 1605A(a)(1)). The court did not discuss the extent to which this FSIA exception is consistent with customary international law. *See, e.g.*, RESTATEMENT (FOURTH) OF FOREIGN RELATIONS: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY § 460 rep. note 11 (2018) (stating that “it is not clear that § 1605A contravenes any presumptive jurisdictional constraint under international law”); Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT’L L. 853, 863–64 (2010) (discussing the extent to which customary international law recognizes exceptions to state sovereign immunity); *cf.* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 ICJ Rep. 1031, para. 78 (“[T]he Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict”).

<sup>19</sup> 28 U.S.C. § 1605A(a)(1)–(2); § 1605A(h)(6).

<sup>20</sup> *Id.*, § 1605A(a)(2)(ii).

<sup>21</sup> *Id.*, § 1605A(a)(2)(iii).

<sup>22</sup> *Colvin*, 363 F. Supp. 3d at 154 (citing 15 C.F.R. § 742.9(a)(2) (2013)). Syria is the longest listed member on the State Department’s current roster of state sponsors of terrorism. *See* U.S. Dep’t of State, State Sponsors of Terrorism at <https://www.state.gov/j/ct/list/c14151.htm> [<https://perma.cc/6NCL-M9PK>]. With respect to Syria’s continuing designation, the State Department has noted Syria’s support of Lebanese Hizballah, the support Syria has received from “Shia militia groups, some of which are U.S.-designated Foreign Terrorist Organizations aligned with Iran,” and more generally “the Assad regime’s permissive attitude towards al-Qa’ida and other terrorist groups’ foreign terrorist fighter facilitation efforts during the Iraq conflict.” *Chapter 2: State Sponsors of Terrorism*, in U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2017, at <https://www.state.gov/j/ct/rls/crt/2017/282847.htm> [<https://perma.cc/EW93-CVJV>].

<sup>23</sup> *Colvin*, 363 F. Supp. 3d at 154 (citing 8 U.S.C. § 1101(22); § 1605A(h)(5); 28 U.S.C. § 1605A(a)(2)) (quotation omitted).

<sup>24</sup> *Id.* at 153–54. In finding that the plaintiffs presented sufficient evidence to show that the Syrian government “caused” the extrajudicial killing of Marie Colvin, the court noted that the D.C. Circuit has interpreted the FSIA to only require “a showing of proximate cause.” *Id.* at 153. A showing of proximate cause is met “so long as there is some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered.” *Id.* (citations and quotations omitted). Declarations submitted to the court provided that the Syrian government knew foreign journalists were broadcasting somewhere within Baba Amr. *Id.* The Syrian government then “uncovered the location of the Media Center through informants and launched an artillery attack at a time foreign journalists were inside, thereby causing Colvin’s death.” *Id.*

with their summons, complaint, and notice of suit in compliance with statutory rules for establishing personal jurisdiction over foreign governments in U.S. courts.<sup>25</sup>

Once its jurisdiction over the claim was established, court turned to assessing the merits of the plaintiffs' claim. Judge Jackson articulated that under the FSIA:

a foreign state is liable to (1) "a national of the United States" (2) "for personal injury or death [ (3) ] caused by" (4) "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or provision of material support or resources for such an act," (5) committed by "that foreign state, or an official, employee, or agent of that foreign state" (6) "for which the courts of the United States may maintain jurisdiction under this section for money damages".<sup>26</sup>

The court had already addressed most of these elements in its jurisdictional analysis, leaving it only to decide the substantive questions of whether the plaintiffs presented enough evidence to support the claim that Colvin's death was an "extrajudicial killing" within the meaning of FSIA and whether the plaintiffs sufficiently established a theory of relief for punitive and compensatory damages.<sup>27</sup>

Moving first to the question of whether the plaintiffs had established a theory for relief, the court explained that "[b]ecause the FSIA-created federal cause of action does not provide any guidance on the substantive bases for liability to determine plaintiffs' entitlement to damages, courts have applied 'general principles of tort law' . . ."<sup>28</sup> In their complaint, the plaintiffs established two tort theories for recovery: wrongful death and intentional infliction of emotional distress (IIED).<sup>29</sup> Citing to an earlier federal district court opinion, the court held that the plaintiffs established a wrongful death claim for relief because "[i]t is axiomatic that acts of terrorism under [FSIA]—including extrajudicial killing or material support thereof—are, by definition, wrongful."<sup>30</sup> The court next drew upon the *Restatement (Second) of Torts* to assess whether Colvin's sister had met the four requirements for an IIED claim, which makes a defendant liable when it: "(1) engaged in extreme and reckless conduct, (2) that was directed at a person or persons other than plaintiff, (3) which intentionally or recklessly caused severe emotional distress, (4) to immediate family members who were present at the time the conduct occurred."<sup>31</sup> The court found that Syria's acts were extreme and reckless because "[a]cts of terrorism are by their very definition extreme and outrageous," and the acts were directed at Colvin.<sup>32</sup> The court also found that the acts caused severe emotional distress to Colvin's sister who had experienced "sleepless nights, anxiety over the welfare of her own children, and mental anguish over the

<sup>25</sup> *Id.* at 154–55. U.S. courts have personal jurisdiction over foreign states for claims of relief in which service is made pursuant to 28 U.S.C. § 1608. 28 U.S.C. § 1330(b).

<sup>26</sup> Colvin, 363 F. Supp. 3d at 155 (citing 28 U.S.C. §§ 1605A(c), (a)(1)).

<sup>27</sup> *Id.* at 156. With respect to the first element, the court noted that, like Colvin herself, the plaintiffs have U.S. citizenship. *Id.*

<sup>28</sup> *Id.* (quotations and citation omitted). The FSIA only provides that in an action for personal injury or death caused by a foreign state, "damages may include economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. § 1605A(c).

<sup>29</sup> Complaint at 30–31, Colvin v. Syrian Arab Republic, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423).

<sup>30</sup> Colvin, 363 F. Supp. 3d at 156 (citing *Shoham v. Islamic Republic of Iran*, No. 12-cv-508 (RCL), 2017 WL 2399454, at \*18 (D.D.C. June 1, 2017)).

<sup>31</sup> *Id.* at 157 (citing RESTATEMENT (SECOND) OF TORTS § 46(1)).

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

loss of the person she was closest to in her family.”<sup>33</sup> With respect to the last element—presence at the conduct—the court relied on commentary and another federal district court decision to conclude that this element need not be satisfied to establish the IIED claim of Colvin’s sister.<sup>34</sup>

After concluding that the plaintiffs could recover under theories of wrongful death and IIED, the D.C. District Court proceeded to assess whether Colvin’s death was an “extrajudicial killing” within the meaning of the FSIA. The FSIA bases its definition of “extrajudicial killing” on the Torture Victim Protection Act of 1991,<sup>35</sup> which provides that:

the term “extrajudicial killing” means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.<sup>36</sup>

The court held that plaintiffs met their evidentiary burden in showing that Colvin’s death constituted an extrajudicial killing under FSIA:

[The presented declarations and export reports] show[] that officials at the highest level of the Syrian government carefully planned and executed the artillery assault on the Baba Amr Media Center for the specific purpose of killing the journalists inside.

. . . The Syrian government launched the attack the morning immediately after it received an informant’s tip as to the location of the Media Center, and after Colvin conducted live broadcasts which were intercepted and helped to verify the Media Center’s location.

. . .

Finally, Colvin’s death was not lawful in any way. It was not authorized by a judgment pronounced by any court. Syria did not charge Marie Colvin with any crime nor was she ever called to appear or stand trial before any court in Syria. And, this killing was not lawfully carried out under the authority of the foreign nation pursuant to international law. *See, e.g., Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (“Whatever policy options exist for a foreign country, it has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national or international law.”).<sup>37</sup>

After examining an expert report, the D.C. District Court agreed to award some damages for Colvin’s lost income and \$11,836 in funeral expenses under the wrongful death claim.<sup>38</sup> It

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 158; *cf. Republic of Sudan v. Owens*, 194 A.3d 38 (D.C. 2018) (concluding with respect to a question certified to it by the D.C. Circuit that, as a matter of D.C. tort law, family members do not need to be physically present to assert IIED claims regarding harms to their relatives during terrorist attacks).

<sup>35</sup> 28 U.S.C. § 1605A(h)(7).

<sup>36</sup> Torture Victim Protection Act 1991, Pub. L. No. 102–256, § 3(a), 106 Stat. 73, 73 (1992).

<sup>37</sup> *Colvin*, 363 F. Supp. 3d at 158–59.

<sup>38</sup> *Id.* at 161. The court did not assign a specific damages amount for lost income in this opinion, as it wished to delay doing so until receiving “an updated [expert] report . . . that accounts for Colvin’s consumption costs.” *Id.*

also awarded \$2.5 million in compensatory damages under the IIED claim.<sup>39</sup> In its decision to award punitive damages, the court weighed four factors: “(1) the character of the defendants’ act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants.”<sup>40</sup> Finding that the act was “unconscionable,” the “harm to plaintiffs was significant,” “the need for deterrence for terrorist acts” high, and the Syrian government a sovereign with “substantial wealth,” the court decided that all factors weighed in favor of a punitive damages award.<sup>41</sup> In calculating the size of the award, the court explained that “in cases of exceptionally deadly attacks with multiple victims,” one approach by courts “is to multiply the defendant state’s annual expenditure on terrorism by a factor of three to five.”<sup>42</sup> Because the court found that the attack killing Colvin did not fall within the “exceptionally deadly” category, it decided to use another approach for calculating punitive damages—namely, to “impose a fixed amount per decedent.”<sup>43</sup> Citing to four federal district court cases, the court considered that “typically” this award would amount to \$150 million per decedent, but it noted that courts in several other cases had awarded \$300 million for a single decedent in light of particular circumstances.<sup>44</sup> Since Colvin was “specifically targeted because of her profession, for the purpose of silencing those reporting on the growing opposition movement in the country,” the court concluded that an award of \$300 million against Syria was appropriate.<sup>45</sup>

Whether these damages will ever be paid by Syria is an issue that remains unresolved. Since Judge Jackson issued her opinion, there have been three attempts to deliver the judgment physically to Syria’s Ministry of Foreign Affairs, but each delivery has been refused.<sup>46</sup> The U.S. State Department signaled support for the judgment, claiming that the “United States seeks to shed light on abuses committed by the Assad regime,” and will continue to “push for effective mechanisms to hold perpetrators accountable . . . .”<sup>47</sup>

<sup>39</sup> *Id.* at 161–63.

<sup>40</sup> *Id.* at 163 (citation omitted).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

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

<sup>44</sup> *Id.* at 164.

<sup>45</sup> *Id.* at 164–65. For a critique of this award, see Haim Abraham, *Awarding Punitive Damages Against Foreign States Is Dangerous and Counterproductive*, LAWFARE (Mar. 1, 2019), at <https://www.lawfareblog.com/awarding-punitive-damages-against-foreign-states-dangerous-and-counterproductive> (arguing that large punitive damages awards against foreign states are problematic because they impede “the ability of individuals to enforce awards of compensation against foreign states within the United States,” and that punitive damages pose a risk to “the peaceful international order” by placing the court “in a position of authority over the defendant”); see also E. Perot Bissell & Joseph R. Schottenfeld, Comment, *Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act*, 127 YALE L.J. 1890 (2018) (arguing for a more restrictive approach to the use of punitive damages in FSIA cases involving state sponsors of terror).

<sup>46</sup> Affidavit Requesting Foreign Mailing on April 8, 2019 at Ex. 4, Colvin v. Syrian Arab Republic, 363 F. Supp. 3d 141 (D.D.C. 2019) (No. 16-1423). Cf. Bissell & Schottenfeld, *supra* note 45, at 1897–98 (noting the difficulties in enforcing judgments under the FSIA’s terrorism exception and describing the establishment of various victim compensation funds).

<sup>47</sup> U.S. Dep’t of State Press Release, Marie Colvin Civil Suit Against the Syrian Regime (Feb. 1, 2019), at <https://www.state.gov/r/pa/prs/ps/2019/02/288720.htm> [<https://perma.cc/8W9G-PT4T>]. This press release came as the Trump administration began winding down the U.S. presence in Syria by withdrawing U.S. forces. Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 394 (2019).

## INTERNATIONAL CRIMINAL LAW

*The Trump Administration Revokes the ICC Prosecutor's U.S. Visa Shortly Before the ICC Pre-Trial Chamber Declines to Authorize an Investigation into War Crimes in Afghanistan*  
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On April 4, 2019, the United States revoked the visa of Fatou Bensouda, the prosecutor of the International Criminal Court (ICC).<sup>1</sup> This action occurred less than a month after Secretary of State Mike Pompeo announced that, except to the extent otherwise required by the UN Headquarters Agreement, the United States would impose visa restrictions on “those individuals directly responsible for any ICC investigation of U.S. personnel.”<sup>2</sup> In her preliminary investigation into the situation in Afghanistan, Bensouda had specifically listed war crimes by U.S. military and intelligence agencies as one of several categories of crimes that her office found reason to believe had occurred.<sup>3</sup> Approximately one week after Bensouda’s visa revocation, the ICC’s Pre-Trial Chamber (PTC) denied her request to move forward with an investigation of the situation in Afghanistan.<sup>4</sup>

The revocation of Bensouda’s visa built upon a “a continued effort to convince the ICC to change course” with respect to its consideration of U.S. war crimes in Afghanistan.<sup>5</sup> In September 2018, National Security Advisor John Bolton delivered an address that not only challenged the validity of investigatory steps taken by the ICC in Afghanistan, but also called into question the legitimacy, jurisdiction, and authority of the ICC as an international institution.<sup>6</sup> Bolton stated that “for all intents and purposes, the ICC is already dead to us.”<sup>7</sup> He further warned that “[t]he United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court.”<sup>8</sup> He specifically threatened a “ban [on ICC] judges and prosecutors . . . entering the United States.”<sup>9</sup>

<sup>1</sup> Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), at <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>; see also UN News, *Arrest of Three Libyans Wanted for Grave Crimes “Would Send Strong and Necessary Message” to Victims, Urges Top Prosecutor* (May 8, 2019), at <https://news.un.org/en/story/2019/05/1038171> [hereinafter UN News Story on Libya Briefing] (noting that the revocation occurred on April 4).

<sup>2</sup> U.S. Dep’t of State Press Briefing, *Remarks to the Press* (Mar. 15, 2019), at <https://www.state.gov/secretary/remarks/2019/03/290394.htm> [<https://perma.cc/8U82-HYCM>] [hereinafter *Remarks to the Press 2019*].

<sup>3</sup> Int’l Crim. Ct., *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan* (Nov. 20, 2017), at <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>.

<sup>4</sup> See generally *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Decision Pursuant to Article 15 of the Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019), available at [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF) [hereinafter *Decision on the Situation in Afghanistan*].

<sup>5</sup> See *Remarks to the Press 2019*, *supra* note 2.

<sup>6</sup> John Bolton, National Security Advisor, *Protecting American Constitutionalism and Sovereignty from International Threats* (Sept. 10, 2018), available at <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court>; see also Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 131, 169, 169–73 (2019) (discussing Bolton’s speech and responses to it).

<sup>7</sup> Bolton, *supra* note 6.

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

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

On March 15, 2019, Pompeo announced a policy of visa restrictions, citing to his authority under the Immigration and Nationality Act to place such restrictions on aliens “whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences.”<sup>10</sup> He further remarked:

I’m announcing a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel. This includes persons who take or have taken action to request or further such an investigation. These visa restrictions may also be used to deter ICC efforts to pursue allied personnel, including Israelis, without allies’ consent. Implementation of this policy has already begun. Under U.S. law, individual visa records are confidential, so I will not provide details as to who has been affected and who will be affected.

But you should know if you’re responsible for the proposed ICC investigation of U.S. personnel in connection with the situation in Afghanistan, you should not assume that you will still have or will get a visa, or that you will be permitted to enter the United States. The United States will implement these measures consistent with applicable law, including our obligations under the United Nations Headquarters Agreement. These visa restrictions will not be the end of our efforts. We are prepared to take additional steps, including economic sanctions if the ICC does not change its course.

The first and highest obligation of our government is to protect its citizens and this administration will carry out that duty. America’s enduring commitment to the rule of law, accountability, and justice is the envy of the world, and it is the core—at the core of our country’s success. When U.S. service members fail to adhere to our strict code of military conduct, they are reprimanded, they’re court-martialed, and sentenced if that’s what’s deserved. The U.S. Government, where possible, takes legal action against those responsible for international crimes. The United States directs foreign aid to strengthen foreign nations’ domestic justice systems, the first and best line of defense against impunity.

The United States also supports international hybrid legal mechanisms when they operate effectively and are consistent with our national interest. These would include, for example, the mechanism handling Rwandan and Yugoslav atrocities and international evidence collection efforts in both Syria and Burma. But the ICC is attacking America’s rule of law. It’s not too late for the court to change course and we urge that it do so immediately.<sup>11</sup>

While other countries, such as Sudan and Burundi, have prevented ICC officials from entering their countries to investigate war crimes and crimes against humanity,<sup>12</sup> the situation is further complicated here because the seat of the United Nations is located in New York City.<sup>13</sup>

<sup>10</sup> Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(C)(i) (2012); *see also* Remarks to the Press 2019, *supra* note 2 (quoting language from 8 U.S.C. § 1182(a)(3)(C)(i) (2012)); *cf.* *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (holding that § 1182(f) of the Immigration and Nationality Act grants the president “broad discretion to suspend the entry of aliens into the United States” if the president finds it “would be detrimental to the national interest”).

<sup>11</sup> Remarks to the Press 2019, *supra* note 2.

<sup>12</sup> Simons & Specia, *supra* note 1.

<sup>13</sup> Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, UN-U.S., June 26, 1947, 61 Stat. 756.

As such, the United States has agreed to uphold certain visitation rights for foreign nationals under the UN Headquarters Agreement. The U.S. government has an obligation to “not impose any impediments to transit to or from the headquarters district” by various persons, including those “invited to the head-quarters district by the United Nations or by [a] specialized agency on official business.”<sup>14</sup> If visas are required to access the UN headquarters, Section 13(a) of the UN Headquarters Agreement states that “they shall be granted without charge and as promptly as possible.”<sup>15</sup>

The United States joined the UN Headquarters Agreement in 1947 through an executive agreement concluded by President Truman, which Congress had authorized by a joint resolution.<sup>16</sup> Section 6 of the joint resolution included a provision that

[n]othing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the headquarters district and its immediate vicinity . . . and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries.<sup>17</sup>

The United Nations and the United States have a long-standing disagreement about the interpretation of this clause.<sup>18</sup> The United Nation reads it as applicable to foreign nationals traveling into U.S. territory “*other than* the Headquarters District,”<sup>19</sup> while the United States interprets it as applicable to foreign nationals traveling into U.S. territory generally.<sup>20</sup> The United States has further taken the position that “United Nations practice confirms that the host country is not expected to accept the entry of every individual to the Headquarters District, but must retain the right to exclude the entry of individuals in certain limited cases.”<sup>21</sup>

In announcing the ICC-related visa policy, Pompeo stated that the “United States will implement [the U.S. visa revocation policy] consistent with . . . our obligations under the United Nations Headquarters Agreement.”<sup>22</sup> Although the ICC is not a UN agency, the prosecutor periodically travels to the United Nations to brief the Security Council on the situations in Libya and Sudan, both of which the Security Council has referred to the ICC

<sup>14</sup> *Id.* Art. IV, § 11.

<sup>15</sup> *Id.* Art. IV, § 13(a).

<sup>16</sup> Pub. L. No. 80-357, 61 Stat. 756 (1947).

<sup>17</sup> *Id.*, Annex 2, § 6.

<sup>18</sup> A more detailed description of this disagreement—and of instances in which the United States has refused to provide accredited foreign nationals with access to the Headquarters District—can be found in Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 *AJIL* 516, 523–28 (2014).

<sup>19</sup> *See, e.g.*, Memorandum by the Legal Department, Admission of Representatives of Non-governmental Organizations Enjoying Consultative Status, UN Doc. E/2397 (Apr. 10, 1953), *available at* <https://history.state.gov/historicaldocuments/frus1952-54v03/d82> (also arguing that “in the event that the provision in section 6 of the Joint Resolution had been intended by the United States to constitute a reservation, it was never made known to the General Assembly as such, and it was never considered by the General Assembly nor accepted by it”).

<sup>20</sup> *See, e.g.*, Letter from Donald B. Lourie, Under Secretary of State for Administration, to Henry Cabot Lodge Jr., Ambassador to the UN (May 1, 1953), *available at* <https://history.state.gov/historicaldocuments/frus1952-54v03/d89>.

<sup>21</sup> Daugirdas & Mortenson, *supra* note 18, at 526 (quoting a 1988 State Department press release and noting that the United Nations legal counsel promptly contested this claim) (quotation marks omitted).

<sup>22</sup> Remarks to the Press 2019, *supra* note 2.

for investigation.<sup>23</sup> Pompeo did not explicitly state how the United States would interpret the Headquarters Agreement with respect to Bensouda's presentations to the Security Council. The day after the revocation of Bensouda's visa, UN Spokesperson for the Secretary General Stéphane Dujarric made clear that "we expect the United States to live up to the agreement to allow for the travel of ICC staff members to do their work here at the United Nations."<sup>24</sup> Consistent with this expectation, the United States permitted Bensouda to enter the United States in May in order to brief the Security Council on the situation in Libya.<sup>25</sup>

When the Office of the Prosecutor (OTP) confirmed the revocation of Bensouda's U.S. visa, the Associated Press reported that she stressed her "independent and impartial mandate" under the Rome Statute and commitment "to undertake that statutory duty with utmost commitment and professionalism, without fear or favor."<sup>26</sup> After the OTP's announcement, Human Rights Watch accused the United States of attempting "to bully the court and deter scrutiny of US conduct."<sup>27</sup> Expressing their views in more measured terms after Pompeo's announcement of the visa revocation policy, the foreign ministers of twenty-two countries in Europe and Latin America affirmed their support for the ICC and signaled "serious concern" over the policy and the "threat of additional measures" against ICC officials.<sup>28</sup>

On April 12th, 2019—eight days after Bensouda's visa revocation—the PTC denied Bensouda's request to investigate war crimes and crimes against humanity committed in Afghanistan since May 2003 and additional war crimes "linked to the situation in Afghanistan" committed in other states after July 2002.<sup>29</sup> The PTC concluded that Bensouda's request satisfied the relevant requirements for "both jurisdiction and admissibility,"<sup>30</sup> finding that "there is a reasonable basis to believe" that crimes committed by U.S. military and intelligence agencies, the Taliban, and Afghan National Security Forces occurred in Afghanistan and other states in the relevant time period.<sup>31</sup> Yet it rejected the request based on its assessment of the "interests of justice."<sup>32</sup> The PTC expressed concern

<sup>23</sup> SC Res. 1970, paras. 4, 7 (2011) (referring the situation in Libya to the ICC and inviting the prosecutor to brief the Security Council at six month intervals on developments); SC Res. 1593, paras. 1, 8 (2005) (referring the situation in Darfur to the ICC and inviting the prosecutor to brief the Security Council at six month intervals on developments).

<sup>24</sup> UN Press Briefing, Daily Press Briefing by the Office of the Spokesperson for the Secretary-General (Apr. 5, 2019), at <https://www.un.org/press/en/2019/db190405.doc.htm>.

<sup>25</sup> UN News Story on Libya Briefing, *supra* note 1.

<sup>26</sup> Mike Corder, *US Revokes Visa for International Court Prosecutor Bensouda*, ASSOC. PRESS (Apr. 5, 2019), at <https://www.apnews.com/a5e0748b9b7443e683c6a0f4e0c7d509>. The U.S. State Department confirmed Bensouda's visa revocation due to her own public statement on the matter. *Id.*

<sup>27</sup> Human Rights Watch, *US Threatens International Criminal Court Visa Bans on ICC Staff* (Mar. 15, 2019), at <https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court>.

<sup>28</sup> Liechtenstein UN (@LiechtensteinUN), TWITTER (Mar. 29, 2019, 4:48 PM), at <https://twitter.com/LiechtensteinUN/status/1111777186418167815> [<https://perma.cc/RQZ7-RFWG>].

<sup>29</sup> See Decision on the Situation in Afghanistan, *supra* note 4, paras. 5, 20.

<sup>30</sup> *Id.*, para. 96.

<sup>31</sup> *Id.*, paras. 47–48.

<sup>32</sup> *Id.*, paras. 87–96. The Rome Statute provides that, in deciding whether to initiate an investigation, the prosecutor should consider whether or not an investigation would "serve the interests of justice." Rome Statute of the International Criminal Court, Art. 53(1)(c), 2(c), July 1, 2002, 2187 UNTS 90 [hereinafter Rome Statute]. It also provides that, where the prosecutor decides to initiate an investigation, the PTC is to "authorize the commencement of the investigation" if it "considers that there is a reasonable basis to proceed with an investigation." *Id.* Art. 15(4). Although the Rome Statute nowhere explicitly instructs the PTC to assess "the interests of justice," the PTC

over (1) the “availability of evidence for crimes dating back so long in time”; (2) the prospect of attaining meaningful cooperation from relevant actors; and (3) the “significant amount of resources” necessary to fund this sort of investigation considering the ICC’s budget.<sup>33</sup> With respect to the second factor, the PTC stated:

[C]hanges within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present conjuncture gives any reason to believe such cooperation can be taken for granted. Indeed, the Prosecution acknowledges the difficulties in securing albeit minimal cooperation from the relevant authorities as one of the reasons explaining the unusual duration of the preliminary examination. The Chamber has noted the Prosecution’s submissions to the effect that even neutral, low-impact activities proved unfeasible. Accordingly, it seems reasonable to assume that these difficulties will prove even trickier in the context of an investigation proper.<sup>34</sup>

In light these factors, the PTC ultimately determined that this investigation would have limited success and “result in creating frustration and possibly hostility vis-à-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.”<sup>35</sup>

Bensouda initially responded to the PTC’s decision by committing to “further analyse the decision and its implications, and consider all available legal remedies.”<sup>36</sup> Article 15(5) of the Rome Statute affords the prosecutor an opportunity to bring another request on the same situation if there are “new facts or evidence.”<sup>37</sup> With respect to appeal of the PTC decision, however, Bensouda’s prospects remain unclear.<sup>38</sup> The Rome Statute enumerates a limited list of decisions that “[e]ither party may appeal.”<sup>39</sup> Of those listed, none refer to a decision based on the “interests of justice.”<sup>40</sup> One provision states that “[a] decision with respect to

considered that, as “a statutory legal parameter governing the exercise of the prosecutorial discretion,” this criterion therefore “also [fell] within the scope of the scrutiny mandated to [the PTC] over that discretion for the purposes of the determinations under article 15.” Decision on the Situation in Afghanistan, *supra* note 4, para. 88.

<sup>33</sup> Decision on the Situation in Afghanistan, *supra* note 4, paras. 93–95.

<sup>34</sup> *Id.*, para. 94.

<sup>35</sup> *Id.*, para. 96.

<sup>36</sup> Int’l Crim. Ct., Statement of the Office of the Prosecutor Following the Decision of Pre-Trial Chamber II Concerning the Situation in Afghanistan (Apr. 5, 2019), at <https://www.icc-cpi.int/Pages/item.aspx?name=190412-otp-stat-afghanistan>.

<sup>37</sup> Rome Statute, *supra* note 32, Art. 15(5).

<sup>38</sup> See Kevin Jon Heller, *Can the PTC’s Afghanistan Decision Be Appealed?*, OPINIO JURIS (Apr. 12, 2019), at <http://opiniojuris.org/2019/04/12/can-the-ptcs-afghanistan-decision-be-appealed> (discussing this issue and expressing doubt about the reviewability of the PTC’s decision).

<sup>39</sup> Rome Statute, *supra* note 32, Art. 82(1); see also Situation in the Democratic Republic of the Congo, ICC-01/04, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, para. 39 (July 13, 2006), available at [https://www.icc-cpi.int/CourtRecords/CR2006\\_01806.PDF](https://www.icc-cpi.int/CourtRecords/CR2006_01806.PDF) (stating that “[Article 82] defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers”).

<sup>40</sup> Rome Statute, *supra* note 32, Art. 82(1)(a)–(d). As mentioned in note 32, *supra*, the Rome Statute does not explicitly vest the PTC with the power to review the prosecutor’s decision regarding “the interest of justice,” so it is perhaps unsurprising that Article 82 is silent with respect to appealability on this ground.

jurisdiction or admissibility” is appealable<sup>41</sup>—but while the PTC did reach a decision with respect to jurisdiction and admissibility, its conclusion on these grounds was favorable to the prosecutor.<sup>42</sup> Another provision allows for appeal where the decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and, for which, in the opinion of the Pre-Trial Chamber . . . an immediate resolution by the Appeals Chamber may materially advance the proceedings.”<sup>43</sup> On June 9, Bensouda invoked this provision and sought leave from the PTC to appeal its decision.<sup>44</sup>

The PTC’s decision met with mixed reactions. Some observers expressed their shock over the PTC’s decision and their concern that U.S. treatment of the ICC could negatively impact multinational support for international law. The director of the American Civil Liberties Union’s Human Rights Program stated: “No one except the world’s most brutal regimes win when we weaken and sabotage international institutions established to fight impunity and hold the human rights abusers accountable.”<sup>45</sup> Other human rights practitioners have indicated that the PTC’s decision seemed to signal that powerful actors, who threaten the ICC and decline to cooperate in ICC investigations, can escape inquiry.<sup>46</sup> President Trump, on the other hand, lauded the ICC’s decision as “a major international victory, not only for [Americans], but for the rule of law.”<sup>47</sup> He reiterated that “[a]ny attempt to target American, Israeli, or allied personnel for prosecution will be met with a swift and vigorous response.”<sup>48</sup> Prime Minister Benjamin Netanyahu of Israel also praised the decision.<sup>49</sup>

<sup>41</sup> *Id.* Art. 82(1)(a).

<sup>42</sup> Decision on the Situation in Afghanistan, *supra* note 4, para. 96.

<sup>43</sup> Rome Statute, *supra* note 32, Art. 82(1)(d).

<sup>44</sup> Situation in the Islamic Republic of Afghanistan, ICC-02/17, Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, at paras. 7, 37 (June 7, 2019), available at [https://www.icc-cpi.int/CourtRecords/CR2019\\_03060.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_03060.PDF) (further noting that “notwithstanding the Prosecution’s reliance on article 82(1)(d) for purposes of this application, the [PTC’s] Decision is much more similar in character to a ‘final decision,’ where the benefits of appellate scrutiny are immediately apparent and widely accepted”).

<sup>45</sup> Am. Civ. Liberties Union, *ACLU Comment on ICC Decision Not To Investigate U.S. for War Crimes in Afghanistan* (Apr. 12, 2019), at <https://www.aclu.org/news/aclu-comment-icc-decision-not-investigate-us-war-crimes-afghanistan>.

<sup>46</sup> See, e.g., Gabor Rona, *More on What’s Wrong with the ICC’s Decision on Afghanistan*, OPINIO JURIS (Apr. 15, 2019), at <https://opiniojuris.org/2019/04/15/more-on-whats-wrong-with-the-iccs-decision-on-afghanistan> (observing that “the mere appearance of a potential link” between U.S. behavior and the PTC’s decision “will weigh heavily on the credibility of the ICC in the future”); Alex Whiting, *The ICC’s Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), at <https://www.just-security.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations> (acknowledging how the PTC’s decision communicates that the ICC “will often be unable to proceed against powerful states,” because it “can only succeed where it has international support”).

<sup>47</sup> Donald J. Trump, Statement on the International Criminal Court’s Decision Not to Authorize an Investigation into the Situation in Afghanistan, 2019 DAILY COMP. PRES. DOC. NO. 224 (Apr. 12).

<sup>48</sup> *Id.*

<sup>49</sup> See *Netanyahu Says ICC Decision Not to Probe US Troops Bodes Well for Israel*, TIMES ISRAEL (Apr. 14, 2019), at <https://www.timesofisrael.com/netanyahu-says-icc-decision-not-to-probe-us-troops-bodes-well-for-israel>.

## USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

*United States Initiates Withdrawal from Intermediate-Range Nuclear Forces Treaty*  
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On February 2, 2019, the United States formally notified Russia that it would withdraw from the Intermediate-Range Nuclear Forces (INF) Treaty in six months and that, effective immediately, it was suspending its performance under the treaty in light of Russia's material breach.<sup>1</sup> This decision came more than three months after the Trump administration indicated that the United States was planning to withdraw from the treaty.<sup>2</sup>

In a statement issued on February 1, President Trump declared:

For far too long, Russia has violated the Intermediate-Range Nuclear Forces (INF) Treaty with impunity, covertly developing and fielding a prohibited missile system that poses a direct threat to our allies and troops abroad. Tomorrow, the United States will suspend its obligations under the INF Treaty and begin the process of withdrawing from the INF Treaty, which will be completed in 6 months unless Russia comes back into compliance by destroying all of its violating missiles, launchers, and associated equipment. Our NATO Allies fully support us, because they understand the threat posed by Russia's violation and the risks to arms control posed by ignoring treaty violations.

The United States has fully adhered to the INF Treaty for more than 30 years, but we will not remain constrained by its terms while Russia misrepresents its actions. We cannot be the only country in the world unilaterally bound by this treaty, or any other. We will move forward with developing our own military response options and will work with NATO and our other allies and partners to deny Russia any military advantage from its unlawful conduct.

My Administration remains committed to effective arms control that advances United States, allied, and partner security, is verifiable and enforceable, and includes partners that fulfill their obligations. For arms control to effectively contribute to national security, all parties must faithfully implement their obligations. We stand ready to engage with Russia on arms control negotiations that meet these criteria, and, importantly, once that is done, develop, perhaps for the first time ever, an outstanding relationship on economic, trade, political, and military levels. This would be a fantastic thing for Russia and the United States, and would also be great for the world.<sup>3</sup>

<sup>1</sup> U.S. Dep't of State Press Release, U.S. Intent to Withdraw from the INF Treaty (Feb. 2, 2019), at <https://www.state.gov/secretary/remarks/2019/02/288722.htm> [<https://perma.cc/6AHW-3FNZ>] [hereinafter State Dep't INF Withdrawal Press Release].

<sup>2</sup> For discussion of these earlier events, as well as background on the INF treaty and the underlying disputes between the United States and Russia regarding it, see Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 132, 139–41 (2019) (also describing the broader trend of withdrawal from international agreements by the Trump administration and discussing the constitutional distribution of powers between the political branches with respect to withdrawal from treaties).

<sup>3</sup> White House Press Release, Statement from the President Regarding the Intermediate-Range Nuclear Forces (INF) Treaty (Feb. 1, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-intermediate-range-nuclear-forces-inf-treaty> [<https://perma.cc/2G4B-Y9JD>] [hereinafter White House Press Release].

The State Department followed up the next day to implement this announcement. In a press release, it noted Russia's material breach of the INF treaty and stated that "[i]n accordance with customary international law, the United States has suspended its obligations under the INF Treaty, effective today, in response to Russia's material breach."<sup>4</sup> The statement went on:

[T]oday the United States provided Russia and other Treaty Parties with formal notice that the United States will withdraw from the INF Treaty in six months, pursuant to Article XV of the Treaty. The United States has concluded that extraordinary events related to the subject matter of the Treaty arising from Russia's continued noncompliance have jeopardized the United States' supreme interests, and the United States can no longer be restricted by the Treaty while Russia openly violates it. If Russia does not return to full and verifiable compliance with the Treaty by eliminating all 9M729 missiles, their launchers, and associated equipment in this six-month period, the Treaty will terminate.<sup>5</sup>

In response to the U.S. announcement, the Russian Foreign Ministry issued a statement placing sole responsibility for the collapse of the agreement on the United States:

By [triggering withdrawal from the INF Treaty], Washington, whose compliance with the INF Treaty we questioned for many years, has entered the path towards destroying the treaty, thereby delivering yet another crushing blow at the arms control system that took decades of painstaking efforts to create. This move will certainly have dramatic and far-flung consequences for the entire architecture of international security and strategic stability, primarily in Europe. Responsibility for this will rest fully and squarely with the United States.

Russia has done its best to preserve the treaty. We tried many times to engage the Americans in a professional discussion and proposed practical initiatives that could help settle mutual complaints. Showing goodwill, we adopted unprecedented transparency measures that went beyond the framework of the treaty obligations. However, all

<sup>4</sup> State Dep't INF Withdrawal Press Release, *supra* note 1 (specifically referencing Russia's "noncompliant missile system—the SSC-8 or 9M729"); *cf.* Vienna Convention on the Law of Treaties, Art. 60(1), 1155 UNTS 331, 8 ILM 679 (1969) (providing that "[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part"); *id.* Art. 60(2)(b)–(c) (providing with respect to multilateral treaties that a party who is "specially affected by the [material] breach" may suspend its own performance "in the relations between itself and the defaulting State" and further that any party "other than the defaulting State" may suspend its performance if the material breach "radically changes the position of every party with respect to the further performance of its obligations under the treaty"). On December 4, 2018, Secretary of State Pompeo had declared that Russia was in material breach of the INF Treaty and warned that the United States would suspend its treaty obligations in sixty days unless Russia complied with its obligations under the Treaty. U.S. Dep't of State Press Release, Press Availability at NATO Headquarters (Dec. 4, 2018), at <https://www.state.gov/secretary/remarks/2018/12/287873.htm> [<https://perma.cc/KU5F-P4F9>].

<sup>5</sup> State Dep't INF Withdrawal Press Release, *supra* note 1. The termination clause in the INF treaty provides in part that "[e]ach Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to withdraw to the other Party six months prior to withdrawal from this Treaty." Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Art. XV(2), U.S.-USSR, Dec. 8, 1987, 1657 UNTS 2 [hereinafter INF Treaty]. Because the treaty was made between the United States and the Soviet Union, not only Russia but also the other successor states to the Soviet Union are parties to the originally bilateral INF treaty.

our attempts were disregarded or blocked by the United States, which has long opted for destroying the INF Treaty so as to remove any restrictions that hindered the build-up of its missile potential.

In light of the new threats created by Washington, we will have to take the necessary measures to ensure our national security. Russia reserves the right to reciprocate by launching the design, production and deployment of ground-launched intermediate- and shorter-range missiles.<sup>6</sup>

In a publicized meeting between Russian President Vladimir Putin and his foreign and defense ministers that same day, Putin vowed a “symmetrical” response to the U.S. decision and announced that he was suspending Russia’s participation in the INF Treaty.<sup>7</sup> He also expressed his support for Russian development of a “land-based hypersonic intermediate-range missile” while stating that Russia should not “be drawn into an expensive arms race.”<sup>8</sup> Russia also signaled that challenges lie ahead for the New START Treaty, which was implemented to limit the number of nuclear warheads that Russia and the United States deploy. In remarks on February 1, Deputy Foreign Minister Sergei Ryabkov stated, “I truly fear that the New START treaty may have the same fate as the INF Treaty. . . . It may just expire on February 5th, 2021, and not be prolonged.”<sup>9</sup>

Despite their disagreement over the impetus for the U.S. withdrawal, both the United States and Russia share a common concern that China has been able to expand and modernize its weapons arsenal unconstrained by the INF Treaty. More than a decade earlier, Russia expressed concerns to the Bush administration that other nuclear powers—particularly China—were not bound by the treaty and proposed expanding it to include them.<sup>10</sup> Similarly, Trump administration officials have indicated that they would be willing to conclude an agreement similar to the INF Treaty that included China and other nuclear powers.<sup>11</sup> Following the announced U.S. withdrawal, China expressed regret at the U.S. decision but made clear its opposition to the “multilateralization” of the INF Treaty.<sup>12</sup>

<sup>6</sup> Russian Foreign Ministry Press Release, Foreign Ministry Statement (Feb. 2, 2019), at [http://www.mid.ru/en/web/guest/maps/us/-/asset\\_publisher/unVXBj4Z6e8/content/id/3495846](http://www.mid.ru/en/web/guest/maps/us/-/asset_publisher/unVXBj4Z6e8/content/id/3495846) [<https://perma.cc/YCX6-LC9C>].

<sup>7</sup> Kremlin Press Release, Meeting with Sergei Lavrov and Sergei Shoigu (Feb. 2, 2019), at <http://en.kremlin.ru/events/president/news/59763> [<https://perma.cc/GC5W-RDHQ>].

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

<sup>9</sup> Anne Gearan, Paul Sonne & Carol Morello, *U.S. to Withdraw from Nuclear Arms Control Treaty with Russia, Raising Fears of a New Arms Race*, WASH. POST (Feb. 1, 2019), at [https://www.washingtonpost.com/world/national-security/us-to-withdraw-from-nuclear-arms-control-treaty-with-russia-says-russian-violations-render-the-cold-war-agreement-moot/2019/02/01/84dc0db6-261f-11e9-ad53-824486280311\\_story.html?utm\\_term=.51d77709feaa](https://www.washingtonpost.com/world/national-security/us-to-withdraw-from-nuclear-arms-control-treaty-with-russia-says-russian-violations-render-the-cold-war-agreement-moot/2019/02/01/84dc0db6-261f-11e9-ad53-824486280311_story.html?utm_term=.51d77709feaa) (quoting this statement). By its terms, the New START Treaty expires ten years after entry into force. Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Art. XIV(2), Apr. 8, 2010, TIAS No. 11-205. The Treaty entered into force when the instruments of ratification were exchanged between the United States and Russia, which took place on February 5, 2011. *Id.* Art. XIV(1); U.S. Dep’t of State Press Release, Annual Report on Implementation of the New Start Treaty (Jan. 2018), at <https://www.state.gov/t/avc/rls/rpt/2018/280538.htm> [<https://perma.cc/4FHR-LKTZ>]. The Treaty will therefore expire on February 5, 2021, unless it is renewed.

<sup>10</sup> David E. Sanger & William J. Broad, *U.S. Suspends Nuclear Arms Control Treaty with Russia*, N.Y. TIMES (Feb. 1, 2019), at <https://www.nytimes.com/2019/02/01/us/politics/trump-inf-nuclear-treaty.html>.

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

<sup>12</sup> Chinese Foreign Ministry Press Release, Foreign Ministry Spokesperson Geng Shuang’s Remarks on the US Suspending INF Treaty Obligations and Beginning Withdrawal [*sic*] Process (Feb. 2, 2019), at [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1635268.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1635268.shtml) [<https://perma.cc/AX49-8KBF>].

The U.S. invocation of the withdrawal clause came after consultation with European allies, who were reportedly dismayed when the Trump administration initially signaled its plans to withdraw in October 2018.<sup>13</sup> By the time withdrawal was officially triggered in February 2019, U.S. allies in Europe were prepared for the decision. North Atlantic Treaty Organization (NATO) Secretary General Jens Stoltenberg said that the United States had announced its intent to withdraw “with the full support of all NATO Allies,” and that, while ready to continue engaging with Russia, NATO was “preparing for a world without the INF Treaty.”<sup>14</sup> Speaking frankly at the Munich Security Conference, Chancellor Angela Merkel of Germany described the collapse of the INF Treaty as “really bad news” that was “unavoidable” following “not decades, but years of violations of the terms of the treaty by Russia.”<sup>15</sup> She observed that “it leaves us with a very interesting constellation: a treaty that was essentially designed for Europe, an arms reduction treaty that directly affects our security, has been cancelled by the United States of America and Russia . . . . And we are left sitting there.”<sup>16</sup> She added that “we will obviously make every attempt to facilitate further arms reduction. The answer cannot be a blind arms race.”<sup>17</sup>

*U.S. Military Undergoes Restructuring to Emphasize Cyber and Space Capabilities*

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Since entering office, President Trump has taken steps to restructure the U.S. military to raise the profile of both its cybersecurity and space capabilities. The administration has elevated U.S. Cyber Command to a Unified Combatant Command and has implemented policies signaling a shift toward a more offensive cybersecurity mindset. The administration has also begun the process of establishing a U.S. Space Command, as well as pursuing a plan to create a new branch of the military centered around space-related operations. Although this restructuring does not by itself implicate international law, it might do so if it results in operational changes.

On August 18, 2017, President Trump released a presidential memorandum directing the secretary of defense to establish U.S. Cyber Command as a Unified Combatant

<sup>13</sup> See Galbraith, *supra* note 2, at 140.

<sup>14</sup> NATO Press Release, Press Conference by NATO Secretary General Jens Stoltenberg Following the Meetings of NATO Defence Ministers (Feb. 13, 2019), at [https://www.nato.int/cps/en/natohq/opinions\\_163394.htm](https://www.nato.int/cps/en/natohq/opinions_163394.htm) [<https://perma.cc/Y5DF-NX7M>].

<sup>15</sup> Office of the German Federal Chancellor Press Release, The Chancellor at the 55th Munich Security Conference (Feb. 16, 2019), at <https://www.bundestkanzlerin.de/bkin-en/news/-all-of-us-together-will-be-needed-says-chancellor-1581236> [<https://perma.cc/3TGA-ZCM4>].

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

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

Command.<sup>1</sup> Unified Combatant Commands are unified across the different military service departments—Army, Navy, and Air Force—but are divided up either by geographic region or by function.<sup>2</sup> Each “has a particular mission, and each may be involved in various operations or exercises.”<sup>3</sup> A long-standing congressional statute authorizes the president to create new Unified Combatant Commands and revise existing ones.<sup>4</sup> One of these existing commands—U.S. Strategic Command—had housed Cyber Command as a subordinate unit since its creation in 2010.<sup>5</sup> In 2016, in line with the objectives of the Obama administration, Congress instructed that Cyber Command should be made into its own Unified Combatant Command.<sup>6</sup>

On May 4, 2018, nearly a year after Trump’s memorandum, Cyber Command was officially elevated to a Unified Combatant Command, becoming the tenth overall combatant command at the time.<sup>7</sup> Cyber Command describes its mission as aiming “to direct, synchronize, and coordinate cyberspace planning and operations to defend and advance national interests in collaboration with domestic and international partners.”<sup>8</sup> More specifically:

The Command has three main focus areas: Defending the [Department of Defense (DoD) Information Network], providing support to combatant commanders for

<sup>1</sup> Donald J. Trump, Memorandum on Elevation of the United States Cyber Command to a Unified Combatant Command, 2017 DAILY COMP. PRES. DOC. NO. 577 (Aug. 18) [hereinafter Trump Cyber Memorandum]. Initiatives within the military to deal with cyber security issues existed as early as 1998, but it was not until 2008 that Secretary of Defense Robert Gates created an entity formally referred to as U.S. Cyber Command, which worked in collaboration with the National Security Agency. See U.S. Cyber Command, U.S. Cyber Command History, at <https://www.cybercom.mil/About/History> [<https://perma.cc/9AWX-EPJZ>].

<sup>2</sup> There are currently six geographic commands—Africa, Central, European, Northern, Pacific, and Southern—and, following the elevation of Cyber Command, four functional commands—Cyber, Strategic, Special Operations, and Transportation. See U.S. Dep’t of Defense, Combatant Commands, at <https://www.defense.gov/Our-Story/Combatant-Commands>.

<sup>3</sup> Katie Lange, *DoD’s 9 Combatant Commands: What They Are, What They Do*, DoDLIVE (Aug. 17, 2016), at <http://www.dodlive.mil/2016/08/17/dods-9-combatant-commands-what-they-are-what-they-do> [<https://perma.cc/6ZWF-UUGU>] (adding that “operations are various phases of a war or military engagement; exercises are routine or non-routine training that tests strategies and explores the effects of warfare without actual combat”).

<sup>4</sup> 10 U.S.C. § 161 (a)(1), (b)(2)(B); see also Mark P. Nevitt, *The Operational and Administrative Militaries*, 52 GA. L. REV. \_\_ (forthcoming 2019) (discussing the 1986 Goldwater-Nichols Act, which implemented the system of unified commands across the various forces within the military). Nevitt argues that congressional oversight tends to focus on the administrative branches of the military rather than on the conduct of the various commands, with the result that the executive branch has a great deal of autonomy with respect to these commands. See generally *id.*

<sup>5</sup> U.S. Cyber Command, History, at <https://www.cybercom.mil/About/History> (noting that the planning for this Cyber Command began in 2008).

<sup>6</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, at § 923(a), 130 Stat. 2000, 2357 (2016). In signing this act, President Obama stated that “Congress should leave decisions about the establishment of combatant commands to the executive branch” but noted that he “strongly support[ed] elevating [Cyber Command] to a unified combatant command.” Barack Obama, Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, 2016 DAILY COMP. PRES. DOC. NO. 863 (Dec. 23). Trump’s memorandum cited to this statutory provision in elevating Cyber Command. Trump Cyber Memorandum, *supra* note 1.

<sup>7</sup> Lisa Ferdinando, U.S. Dep’t of Defense Press Release, Cybercom to Elevate to Combatant Command (May 3, 2018), at <https://dod.defense.gov/News/Article/Article/1511959/cybercom-to-elevate-to-combatant-command> [<https://perma.cc/U4VM-HA9A>].

<sup>8</sup> U.S. Cyber Command, Mission and Vision, at <https://www.cybercom.mil/About/Mission-and-Vision> [<https://perma.cc/95B2-PPXC>].

execution of their missions around the world, and strengthening our nation's ability to withstand and respond to cyber attack.

The Command unifies the direction of cyberspace operations, strengthens DoD cyberspace capabilities, and integrates and bolsters DoD's cyber expertise. USCYBERCOM improves DoD's capabilities to operate resilient, reliable information and communication networks, counter cyberspace threats, and assure access to cyberspace. USCYBERCOM is designing the cyber force structure, training requirements and certification standards that will enable the Services to build the cyber force required to execute our assigned missions. The command also works closely with interagency and international partners in executing these critical missions.<sup>9</sup>

On September 20, 2018, the Trump administration released a new National Cyber Strategy,<sup>10</sup> the contents of which indicate an interest in increasing the military's capacity for offensive cyber operations.<sup>11</sup> The Strategy contains four "pillars."<sup>12</sup> Not all of these are directly related to military cybersecurity, but the third pillar—entitled "Preserve Peace through Strength"—provides: "Cyberspace will no longer be treated as a separate category of policy or activity disjointed from other elements of national power. The United States will integrate the employment of cyber options across every element of national power."<sup>13</sup> The Strategy lists the following objectives for this pillar: "[i]dentify, counter, disrupt, degrade, and deter behavior in cyberspace that is destabilizing and contrary to national interests, while preserving United States overmatch in and through cyberspace."<sup>14</sup> The Department of Defense released a Fact Sheet alongside the Strategy that notes a few more "key themes" of the Strategy, such as "[u]sing cyberspace to amplify military lethality and effectiveness" and "[d]efending forward, confronting threats before they reach U.S. networks."<sup>15</sup> In a press conference announcing the Strategy, National Security Advisor John Bolton emphasized that the United States intended to "through both offensive and defensive cyber actions . . . create structures of deterrence that will reduce malign behavior in cyberspace."<sup>16</sup>

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

<sup>10</sup> Donald J. Trump, Statement on the National Cyber Strategy, 2018 DAILY COMP. PRES. DOC. No. 615 (Sept. 20) [hereinafter National Cyber Strategy Statement].

<sup>11</sup> This was also signaled earlier in the general National Security Strategy released in December 2017. Its "Cyberspace" section noted that "[w]hen faced with the opportunity to take action against malicious actors in cyberspace, the United States will be risk informed, but not risk averse, in considering our options." NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 32 (2017), available at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [<https://perma.cc/HAX9-HYK3>].

<sup>12</sup> See generally NATIONAL CYBER STRATEGY OF THE UNITED STATES OF AMERICA (2018), available at <https://www.whitehouse.gov/wp-content/uploads/2018/09/National-Cyber-Strategy.pdf> [<https://perma.cc/EDT5-GMWA>].

<sup>13</sup> *Id.* at 20.

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

<sup>15</sup> U.S. Dep't of Defense, Fact Sheet: 2018 DoD Cyber Strategy and Cyber Posture Review (Sept. 18, 2018), available at [https://media.defense.gov/2018/Sep/18/2002041659/-1/-1/1/Factsheet\\_for\\_Strategy\\_and\\_CPR\\_FINAL.pdf](https://media.defense.gov/2018/Sep/18/2002041659/-1/-1/1/Factsheet_for_Strategy_and_CPR_FINAL.pdf) [<https://perma.cc/TA5M-5SFU>].

<sup>16</sup> John Bolton, U.S. National Security Advisor, *National Security Adviser John Bolton on Cyber Strategy*, C-SPAN, at 5:40 (Sept. 20, 2018), at <https://www.c-span.org/video/?451807-1/national-security-adviser-bolton-briefs-cyber-strategy-audio-only>. In a related development one month earlier, Trump reportedly ordered the reversal of an Obama administration directive, known as Presidential Policy Directive 20 (PPD-20), which placed restrictive interagency approval requirements on any offensive cyber operation. Dustin Volz, *Trump, Seeking to Relax Rules on U.S. Cyberattacks, Reverses Obama Directive*, WALL ST. J. (Aug. 15, 2018), at <https://www.wsj.com/articles/trump-seeking-to-relax-rules-on-u-s-cyberattacks-reverses-obama-directive-1534378721>. The Trump

For its part, Congress signaled some support for a broader emphasis on military cyber operations in the National Defense Authorization Act for Fiscal Year 2019 (NDAA for 2019), which passed in August of 2018. Section 1636 provides that “[i]t shall be the policy of the United States . . . that the United States should employ all instruments of national power, including the use of offensive cyber capabilities, to deter . . . and respond to when necessary, all cyber attacks or other malicious cyber activities of foreign powers that target United States interests.”<sup>17</sup> Section 1642 addresses more potential threats, narrowing in specifically on Russia, China, North Korea, and Iran, and providing:

In the event that the National Command Authority determines that the Russian Federation, People’s Republic of China, Democratic People’s Republic of Korea, or Islamic Republic of Iran is conducting an active, systematic, and ongoing campaign of attacks against the Government or people of the United States in cyberspace, including attempting to influence American elections and democratic political processes, the National Command Authority may authorize the Secretary of Defense, acting through the Commander of the United States Cyber Command, to take appropriate and proportional action in foreign cyberspace to disrupt, defeat, and deter such attacks under the authority and policy of the Secretary of Defense to conduct cyber operations and information operations as traditional military activities.<sup>18</sup>

In addition to elevating the role of cyber operations within the military, the Trump administration has demonstrated an interest in building up the military’s capabilities in space. On March 23, 2018, the White House released a fact sheet providing details on a new National Space Strategy, noting that one aim of the strategy was to “strengthen U.S. and allied options to deter potential adversaries from extending conflict into space and, if deterrence fails, to counter threats used by adversaries for hostile purposes.”<sup>19</sup>

administration has since replaced PPD-20 with National Security Presidential Memorandum 13 (NSPM-13), the text of which has not been made public, but which reportedly “frees the military to engage, without a lengthy approval process, in actions that fall below the ‘use of force’ or a level that would cause death, destruction or significant economic impacts.” Ellen Nakashima, *White House Authorizes “Offensive Cyber Operations” to Deter Foreign Adversaries*, WASH. POST. (Sept. 20, 2018), at [https://www.washingtonpost.com/world/national-security/trump-authorizes-offensive-cyber-operations-to-deter-foreign-adversaries-bolton-says/2018/09/20/b5880578-bd0b-11e8-b7d2-0773aa1e33da\\_story.html](https://www.washingtonpost.com/world/national-security/trump-authorizes-offensive-cyber-operations-to-deter-foreign-adversaries-bolton-says/2018/09/20/b5880578-bd0b-11e8-b7d2-0773aa1e33da_story.html). For a more complete discussion of the broader implications accompanying the reversal of PPD-20, see Dakota S. Rudesill, *Trump’s Secret Order on Pulling the Cyber Trigger*, LAWFARE (Aug. 29, 2018), at <https://www.lawfareblog.com/trumps-secret-order-pulling-cyber-trigger>.

<sup>17</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, at § 1636(a) (2018).

<sup>18</sup> *Id.*, § 1642(a)(1); see also *id.*, § 1642(d) (providing that this section should not be “construed to . . . affect the War Powers Resolution”). The remaining provisions of the NDAA addressing cyberspace-related matters tend to be more administrative in nature. For an expanded discussion regarding these provisions, see Robert Chesney, *The Law of Military Cyber Operations and the New NDAA*, LAWFARE (July 26, 2018), at <https://www.lawfareblog.com/law-military-cyber-operations-and-new-ndaa>.

<sup>19</sup> White House Fact Sheet, President Donald J. Trump Is Unveiling an America First National Space Strategy (Mar. 23, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unveiling-america-first-national-space-strategy> [<https://perma.cc/BS5N-6M9Z>]. The executive branch has not released the actual text of the strategy. The issuance of this fact sheet came shortly after a deadline—set by the National Defense Authorization Act for Fiscal Year 2018—for the Department of Defense to produce an interim report with recommendations for reforming the “organizational and management structure for the national security space components of the Department of Defense.” National Defense Authorization Act for Fiscal Year 2018, Pub. L. 115-81, at § 1601(c) (2017).

On June 18, 2018, noting that “it is not enough to merely have an American presence in space, [the United States] must have American dominance in space,” Trump “direct[ed] the Department of Defense and Pentagon to immediately begin the process necessary to establish a Space Force as the sixth branch of the armed forces.”<sup>20</sup> Two months later on August 9, Vice President Pence delivered a speech at the Pentagon regarding national security and space. Justifying the need for a Space Force, he noted that “our adversaries have been working to bring new weapons of war into space itself.”<sup>21</sup> He specifically referenced actions by Russia and China, including China’s 2015 “creat[ion of] a separate military enterprise to oversee and prioritize its warfighting capabilities in space.”<sup>22</sup>

Released the same day as Pence’s speech, a report by the Department of Defense made clear that some changes would be undertaken by the executive branch but that “[e]stablishing a sixth branch of the Armed Forces requires Congressional action.”<sup>23</sup> With respect to steps that could be taken by the executive branch:

First, DoD will establish a Space Development Agency to develop and field space capabilities at speed and scale. The Air Force has already begun to transform its Space and Missile Center (SMC). The Department will accelerate and extend this transformation to all services by creating a joint Space Development Agency.

Second, the Department will develop the Space Operations Force to support the Combatant Commands. These joint space warfighters will provide space expertise to combatant commanders and the Space Development Agency, and surge expertise in time of crisis to ensure that space capabilities are leveraged effectively in conflict.

Third, the Department will create the governance, services, and support functions of the Space Force. Many of these will require changes to U.S. law. The Department will build a legislative proposal for Congressional consideration as a part of the Fiscal Year 2020 budget cycle.

Fourth, the Department will create a U.S. Space Command, led by a four star general or flag officer, to lead the use of space assets in warfighting and accelerate integration of space capabilities into other warfighting forces. U.S. Space Command will be responsible for directing the employment of the Space Force.<sup>24</sup>

<sup>20</sup> Associated Press, *Trump Announces Creation of “Space Force,”* YOUTUBE (June 18, 2018), available at <https://www.youtube.com/watch?v=Kna3YYX7XeE>. Presently, in addition to the Army, the Navy, and the Air Force, the other two branches are the Marine Corps, which is formally lodged within the Navy, and the Coast Guard, which is currently situated within the Department of Homeland Security.

<sup>21</sup> White House Press Release, *Remarks by Vice President Pence on the Future of the U.S. Military in Space* (Aug. 9, 2018), at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-future-u-smilitary-space>.

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

<sup>23</sup> U.S. DEP’T OF DEFENSE, *FINAL REPORT ON ORGANIZATIONAL AND MANAGEMENT STRUCTURE FOR THE NATIONAL SECURITY SPACE COMPONENTS OF THE DEPARTMENT OF DEFENSE 4* (2018), available at <https://media.defense.gov/2018/Aug/09/2001952764/-1/-1/1/organizational-management-structure-dod-national-security-space-components.pdf> [<https://perma.cc/D8EF-KL94>].

<sup>24</sup> *Id.* at 7. The report goes into further detail about all four of these components, including individual timelines, goals, and developmental priorities. *Id.* at 8–13. Space Command had previously existed as a Unified Combatant Command from 1985 to 2002, but its duties were thereafter folded within Strategic Command, another Unified Combatant Command, when military focus turned to combatting terrorism and improving homeland security

With respect to the final action step—the establishment of a U.S. Space Command—it remains unclear whether this will result in an eleventh Unified Combatant Command (in addition to Cyber Command and the nine other existing ones) or will instead be lodged within the existing U.S. Strategic Command. The NDAA for 2019 had instructed the Department of Defense to establish U.S. Space Command as a subordinate unified command within U.S. Strategic Command.<sup>25</sup> On December 18, 2018, however, Trump issued a memorandum to “direct the establishment, consistent with United States law, of United States Space Command as a functional Unified Combatant Command.”<sup>26</sup> The executive branch has requested that Congress repeal the just-mentioned language from the NDAA for 2019 so that there will be no impediment to making U.S. Space Command into a Unified Combatant Command.<sup>27</sup>

The Trump administration is also pursuing legislation to make the Space Force the sixth branch of the armed services.<sup>28</sup> On March 1, 2019, the Department of Defense proposed such legislation to Congress. Rather than creating the Space Force as a wholly independent branch, the proposal places the Space Force within the Air Force, akin to how the Marine Corps sits within the Navy.<sup>29</sup> Although Trump had originally envisioned the Space Force as an entirely independent military branch,<sup>30</sup> earlier in the spring he had signaled his openness to this nested placement as an initial step.<sup>31</sup> Reception to the proposal in Congress has been mixed to date,<sup>32</sup> and most recently lawmakers have

following the September 11, 2001 attacks. Gary Shugart, *Re-establishing U.S. Space Command*, PURVIEW (Oct. 1, 2018), at <http://purview.dodlive.mil/2018/10/01/reestablishing-u-s-space-command>.

<sup>25</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-233, at § 1601(a)(1) (2018).

<sup>26</sup> Donald J. Trump, Memorandum on Establishment of United States Space Command as a Unified Combatant Command, 2018 DAILY COMP. PRES. DOC. No. 855 (Dec. 18); see also U.S. Dep’t of Defense Press Release, United States Space Command Commander Announced (Mar. 26, 2019), at <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1796472/united-states-space-command-commander-announced> [<https://perma.cc/36H3-RUDU>] (stating that Trump has nominated a commander for the future Space Command).

<sup>27</sup> Marcus Weisberber, *Legislative Hurdle Delays US Space Command Stand-Up*, DEFENSE ONE (Feb. 28, 2019), at <https://www.defenseone.com/politics/2019/02/legislative-hurdle-delays-us-space-command-stand/155220>.

<sup>28</sup> Jim Garamone, U.S. Dep’t of Defense Press Release, DOD Sends Space Force Legislation to Congress (Mar. 1, 2019), at <https://dod.defense.gov/News/Article/Article/1771782/dod-sends-space-force-legislation-to-congress> [<https://perma.cc/YU43-JKHF>]; see also U.S. DEP’T OF DEFENSE, UNITED STATES SPACE FORCE LEGISLATIVE PROPOSAL (Mar. 1, 2019), available at <https://media.defense.gov/2019/Mar/01/2002095010/-1/-1/1/UNITED-STATES-SPACE-FORCE-LEGISLATIVE-PROPOSAL.PDF> [<https://perma.cc/2BHT-NC67>] [hereinafter SPACE FORCE PROPOSAL].

<sup>29</sup> SPACE FORCE PROPOSAL, *supra* note 28, at 2. The rationale behind this decision is a consideration for not generating unnecessary costs. U.S. Dep’t of Defense Press Transcript, Off-Camera Press Briefing in the Pentagon Briefing Room (Jan. 29, 2019), at <https://dod.defense.gov/News/Transcripts/Transcript-View/Article/1743317/off-camera-press-briefing-in-the-pentagon-briefing-room> [<https://perma.cc/JJD6-KGZE>].

<sup>30</sup> Even as late as November 29, 2018, the White House was reportedly committed to an entirely independent Space Force. Jacqueline Klimas, *Trump Going for Full-Blown Space Force, White House Memo Reveals*, POLITICO (Nov. 29, 2018), at <https://www.politico.com/story/2018/11/29/space-force-military-branch-999528>.

<sup>31</sup> See Donald J. Trump, Memorandum on Establishment of the United States Space Force, 2019 DAILY COMP. PRES. DOC. No. 88 (Feb. 19) (defining “United States Space Force” as a new military branch “to be *initially* placed by statute within the Department of the Air Force”) (emphasis added).

<sup>32</sup> See Senate Armed Services Committee, Executive Summary of Proposed FY 2020 National Defense Authorization Act, available at <https://www.armed-services.senate.gov/imo/media/doc/FY%202020%20NDAA%20Executive%20Summary.pdf> (proposing legislation that would create a Space Force within the Air Force in line with the suggestion of the Department of Defense); Sandra Erwin, *HASC Chairman Rejects Trump’s Space*

informed Acting Defense Secretary Patrick Shanahan that more budget details are needed for the Space Force, as well as for U.S. Space Command and the Space Development Agency.<sup>33</sup>

The U.S. military restructuring with respect to cyber operations and space does not directly implicate issues of international law. To the extent that this reshuffling results in operational actions, however, it remains to be seen how such actions will fit into the existing international legal framework. International law on the use of force and international humanitarian law are generally applicable. The specifics of how these laws apply to cyber operations have been the subject of considerable interest, with the Tallinn Manual 2.0 often looked to as the most significant piece of work on the subject to date.<sup>34</sup> With respect to space, the United States is a party to the Outer Space Treaty, which bans certain military actions in space,<sup>35</sup> and there are other sources of law specifically focused on space that are potentially relevant as well.<sup>36</sup>

#### SETTLEMENT OF DISPUTES

##### *The United States Resolves Its Request for Consultations Regarding Peru's Environmental Obligations Under Bilateral Trade Agreement*

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On April 9, 2019, the United States and Peru reached a resolution regarding concerns about Peru's forest sector obligations under the 2007 United States–Peru Trade

*Force Proposal, Says Committee Will Seek "Other Options,"* SPACENEWS (Mar. 25, 2019), at <https://spaceneews.com/hasc-chairman-rejects-trumps-space-force-proposal-says-committee-will-look-for-other-options> (reporting on House Armed Services Committee Chairman Adam Smith's opposition to the Space Force proposal).

<sup>33</sup> Sandra Erwin, *House Appropriators Press for Details on Space Force Cost and Organization*, SPACENEWS (May 1, 2019), at <https://spaceneews.com/house-appropriators-press-for-details-on-space-force-cost-and-organization>.

<sup>34</sup> TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., 2d ed. 2017); see also Dan Efrony & Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112 AJIL 583 (2018) (assessing the extent to which states to date have accepted the rules set out in the Tallinn Manual); Eric Talbot Jensen, *The Tallinn Manual 2.0: Highlights and Insights*, 48 GEO. J. INT'L LAW 735 (2017) (discussing some of the key points from Tallinn 2.0). For a recent perspective on how the Department of Defense may be approaching these issues, see Michael J. Adams & Megan Reiss, *International Law and Cyberspace: Evolving Views*, LAWFARE (Mar. 4, 2018), at <https://www.lawfareblog.com/international-law-and-cyberspace-evolving-views> (also noting that the "U.S. government . . . has taken no official position on the views set forth in the [Tallinn] Manual").

<sup>35</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, at Art. 4, Jan. 27, 1967, 18 UST 2410, 610 UNTS 205 (prohibiting treaty parties from putting "nuclear weapons or any other kinds of weapons of mass destruction" into orbit or onto celestial bodies).

<sup>36</sup> See Matthew T. King & Laurie R. Blank, *International Law and Security in Outer Space: Now and Tomorrow*, 113 AJIL UNBOUND 125, 127–29 (2019) (discussing the application of international law to military space operations).

Promotion Agreement (PTPA).<sup>1</sup> At issue was Peru's relocation of the Agency for the Supervision of Forest Resources and Wildlife (OSINFOR) to a "subordinate position" in its Ministry of Environment in December 2018.<sup>2</sup> The United States requested consultations under the PTPA on the ground that this relocation conflicted with a provision in the Environment Chapter's "Annex on Forest Sector Governance" (Forest Annex),<sup>3</sup> which states that "OSINFOR shall be an independent and separate agency."<sup>4</sup> Following the consultations, Peru agreed to restore OSINFOR to its original location within the Peruvian government.<sup>5</sup>

OSINFOR is mainly responsible for the "verification of all timber concessions and permits" in an effort to prevent illegal logging.<sup>6</sup> In the negotiating of the PTPA, the United States specifically sought to ensure that OSINFOR would remain independent in order to protect forest oversight from political pressures.<sup>7</sup> Following Peru's decision in December 2018 to move OSINFOR to within the Ministry of Environment, the United States requested consultations in January 2019.<sup>8</sup> Consistent with the PTPA's protocol for resolving disputes arising under the Environment Chapter, including the Forest Annex, the United States and Peru "held technical consultations to discuss the matter" in late January.<sup>9</sup> The parties then referred the matter to the PTPA's Environmental Affairs Council (EAC). A month later, this bilateral committee of senior officials with environmental responsibilities convened in Lima, Peru.<sup>10</sup>

As a result of their deliberations, Peru withdrew its previous decision to move OSINFOR within the Ministry of the Environment.<sup>11</sup> Its decree of April 9 reinstated OSINFOR's former position within the government such that OSINFOR will once again be part of the Presidency of the Council of Ministers and thus directly communicate with Peru's Prime Minister.<sup>12</sup> This decree also established a timeline for the Presidency of the Council of Prime Ministers to hire OSINFOR's next leader.<sup>13</sup> U.S. Trade Representative Robert Lighthizer stated:

<sup>1</sup> Office of the U.S. Trade Rep. Press Release, USTR Successfully Resolves Concerns Raised in First-Ever Environment Consultations Under the U.S.-Peru Trade Promotion Agreement (PTPA) (Apr. 9, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/ustr-successfully-resolves-concerns#> [<https://perma.cc/D4GF-9R2K>] [hereinafter USTR Press Release of April 9].

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

<sup>3</sup> *Id.* For discussion of the U.S. request for consultations, see Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 376, 400 (2019).

<sup>4</sup> Trade Promotion Agreement, Peru-U.S., Apr. 12, 2006, Annex 18.3.4, § 3(h)(iii), available at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> [hereinafter PTPA].

<sup>5</sup> USTR Press Release of April 9, *supra* note 1.

<sup>6</sup> See PTPA, *supra* note 4, at Annex 18.3.4, § 3(h)(iii).

<sup>7</sup> USTR Press Release of April 9, *supra* note 1; see also Galbraith, *supra* note 3, at 402 n. 19 (discussing how OSINFOR once suffered from "perverse incentives and institutional pressures" because it was funded through logging revenues but gained greater independence when it was positioned inside Peru's Office of the Presidency of the Council of Ministers).

<sup>8</sup> Galbraith, *supra* note 3, at 403.

<sup>9</sup> USTR Press Release of April 9, *supra* note 1; see also Galbraith, *supra* note 3, at 403 (describing the dispute resolution mechanism set forth in Environment Chapter of the PTPA).

<sup>10</sup> USTR Press Release of April 9, *supra* note 1; Galbraith, *supra* note 3, at 403 (providing a description of the EAC's membership).

<sup>11</sup> USTR Press Release of April 9, *supra* note 1.

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

<sup>13</sup> *Id.*; see also Galbraith, *supra* note 3, at 402 (noting that OSINFOR's former leader, Rolando Navarro, sought asylum in the United States after facing threatening protests against his efforts to carry out OSINFOR's environmental mandate).

We are pleased with Peru's decision to retain OSINFOR as an independent and separate agency, as required by our bilateral agreement . . . . This shows that strong enforcement works. I am committed to using enforcement tools to ensure that our trade agreements protect the environment and advance the interests of U.S. workers and businesses.<sup>14</sup>

In keeping with its emphasis on trade agreements and their enforcement, the Trump administration has recently initiated a set of consultations under another free trade agreement—the United States–Republic of Korea Free Trade Agreement (KORUS).<sup>15</sup> According to the United States, South Korea's evidentiary rules governing the competition hearings of the Korea Free Trade Commission (KFTC) prevent U.S. companies from receiving procedural protections to which they are entitled under KORUS.<sup>16</sup> The United States now seeks changes from South Korea that will “address issues related to opaque KFTC hearing procedures regarding [U.S. companies'] lack of access to evidence, including evidence used to bring allegations against” them.<sup>17</sup>

<sup>14</sup> USTR Press Release of April 9, *supra* note 1.

<sup>15</sup> Office of the U.S. Trade Rep. Press Release, USTR Requests First-Ever Consultations Under the U.S.-Korea Free Trade Agreement (KORUS) (Mar. 15, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/march/ustr-requests-first-ever> [<https://perma.cc/XH7X-JP4Y>].

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

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