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## Contemporary Practice of the United States Relating to International Law.

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# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY KRISTINA DAUGIRDAS AND JULIAN DAVIS MORTENSON

***In this section:***

- Agreement on Iran Nuclear Program Goes into Effect
- United States and China Reach Agreement Regarding Economic Espionage and International Cybersecurity Norms
- United States Ratifies the International Convention for the Suppression of Acts of Nuclear Terrorism
- United States Reaches Agreement with Turkey on Use of Incirlik Air Base for Strikes on ISIL; “Safe Zone” Not Part of the Deal

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

*Agreement on Iran Nuclear Program Goes into Effect*

On September 10, 2015, Senate Democrats blocked a Republican resolution that would have expressed disapproval of the Joint Comprehensive Plan of Action (JCPOA), the agreement concerning the scope and content of Iran's nuclear program.<sup>1</sup> The failure of that resolution has paved the way for implementing the JCPOA.

The United States, the other permanent members of the United Nations Security Council, Germany, the European Union, and Iran agreed to the JCPOA on July 14, 2015. Framed as a political agreement rather than a treaty that imposes legally binding obligations, the JCPOA significantly limits Iran's capacity to enrich uranium for the next fifteen years, eases sanctions imposed by the international community on Iran for its nuclear program, and establishes mechanisms for oversight by the International Atomic Energy Agency (IAEA).<sup>2</sup> In May 2015, Congress had enacted the Iran Nuclear Agreement Review Act (INARA).<sup>3</sup> Pursuant to INARA, Congress has a sixty-day window to review the agreement before President Barack Obama can waive statutory sanctions by executive action.<sup>4</sup> During this window, Congress can enact a joint resolution favoring the agreement, enact a joint resolution opposing the agreement, or take no action. If Congress approves the agreement or takes no action, then INARA's implementation restrictions would terminate.<sup>5</sup> If Congress successfully enacts a joint resolution of disapproval, however, INARA's provisions purport to prohibit the president from taking any action to relieve Iran of statutory sanctions.<sup>6</sup> Obama stated that he would "veto any legislation that prevents the successful implementation of this deal."<sup>7</sup>

In the weeks that followed the announcement of the JCPOA, numerous Republican legislators—as well as a handful of Democrats—expressed their opposition to it.<sup>8</sup> Separately, some congressional leaders called on Obama to delay a UN Security Council vote to endorse the JCPOA until after INARA's review period expired.<sup>9</sup> White House Press Secretary Josh Earnest "strenuously disagree[d]" with the suggestion that the adoption of the Security Council resolution "violat[es] the spirit" of INARA:

<sup>1</sup> Jennifer Steinhaur, *Democrats Hand Victory to Obama on Iran Nuclear Deal*, N.Y. TIMES, Sept. 10, 2015, at A1. Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 644, 649 (2015). See also *Joint Comprehensive Plan of Action*, July 14, 2015, at <http://www.state.gov/documents/organization/245317.pdf> [hereinafter JCPOA].

<sup>2</sup> JCPOA, *supra* note 1.

<sup>3</sup> Atomic Energy Act of 1954, 42 U.S.C. § 2160e, *amended by* Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114–17, 129 Stat. 201 (2015).

<sup>4</sup> *Id.* § 135(b).

<sup>5</sup> *Id.* §§ 135(c)(2)(A), (C).

<sup>6</sup> *Id.* § 135(c)(2)(B).

<sup>7</sup> Remarks on the Multilateral Agreement To Prevent Iran From Developing a Nuclear Weapon, 2015 DAILY COMP. PRES. DOC. 493 (July 14, 2015). See also *Background Conference Call on Iran*, THE WHITE HOUSE (July 14, 2015), at <https://www.whitehouse.gov/the-press-office/2015/07/14/background-conference-call-iran>.

<sup>8</sup> Carol Morello & Karen DeYoung, *Historic Deal Reached with Iran to Limit Nuclear Program*, WASH. POST, July 14, 2015, at [https://www.washingtonpost.com/world/historic-nuclear-deal-with-iran-expected-to-be-announced/2015/07/14/5f8d4db2-29ea-11e5-a5ea-cf74396e59ec\\_story.html](https://www.washingtonpost.com/world/historic-nuclear-deal-with-iran-expected-to-be-announced/2015/07/14/5f8d4db2-29ea-11e5-a5ea-cf74396e59ec_story.html).

<sup>9</sup> Karen DeYoung, *Lawmakers Urge Obama to Delay U.N. Vote on Iran Until Congress Weighs in*, WASH. POST, July 16, 2015, at [https://www.washingtonpost.com/world/national-security/lawmakers-urge-obama-to-delay-un-vote-on-iran-until-congress-weighs-in/2015/07/16/636cdcc0-2bfd-11e5-bd33-395c05608059\\_story.html](https://www.washingtonpost.com/world/national-security/lawmakers-urge-obama-to-delay-un-vote-on-iran-until-congress-weighs-in/2015/07/16/636cdcc0-2bfd-11e5-bd33-395c05608059_story.html).

The fact is there actually is an extraordinary provision included in the Security Council resolution that was adopted by the Security Council today, which is to ensure that the resolution adopted today doesn't actually go into effect for another 90 days.<sup>10</sup> And that is specifically to allow Congress ample time to conduct their review of the agreement.

And that does show, on the part of the international community, significant deference to the privileges of individual members of Congress. As I mentioned last week, I would just note that there is—that the U.N. Security Council resolution that was passed today doesn't have an impact on the kind of sanctions that are implemented bilaterally by the United States. That's the purview of the President of the United States and the United States Congress. And again, I think that also reflects the important role that Congress must play in this debate.<sup>11</sup>

Administration officials, meanwhile, sought to shore up support for the agreement. On July 23, 2015, in testimony before the Senate Foreign Relations Committee, Secretary of State John Kerry argued that the JCPOA was the most realistic option available to limit Iran's nuclear program—particularly in light of past attempts to negotiate similar agreements—and urged Congress to support the agreement: “[T]he alternative to the deal that we have reached is not . . . a ‘better deal,’ some sort of unicorn arrangement involving Iran’s complete capitulation. . . . The choice we face is between an agreement that will ensure Iran’s nuclear program is limited, rigorously scrutinized, and wholly peaceful, or no deal at all.”<sup>12</sup> Kerry acknowledged that the deal does not address other concerns about Iran: “This plan was designed to address the nuclear issue, the nuclear issue alone, because we knew that if we got caught up with all the other issues, we’d never get where we needed to [in order] to stop the nuclear program.”<sup>13</sup> However, Kerry stressed the administration has “extensive plans . . . about how we’re going to push back against Iran’s other activities, against terrorism, its support, its contributions to sectarian violence in the Middle East and other things.”<sup>14</sup>

Obama also took steps to persuade Democratic lawmakers to support the agreement. In addition to hosting ninety House Democrats at the White House in order to answer questions

<sup>10</sup> [Editors’ note: The referenced provision is paragraph 43(ii) of S.C. Res. 2231 (July 20, 2015).]

<sup>11</sup> *Press Briefing by Press Secretary Josh Earnest*, THE WHITE HOUSE (July 20, 2015), at <https://www.whitehouse.gov/the-press-office/2015/07/20/press-briefing-press-secretary-josh-earnest-72015>.

<sup>12</sup> *Iran Nuclear Agreement Review: Hearing Before the S. Comm. on Foreign Relations*, 114th Cong. (2015) (statement of John Kerry, Sec’y of State of the United States) [hereinafter *Kerry July 23 Testimony*]. See also *Iran Nuclear Agreement, The Administration’s Case: Hearing Before the H. Comm. on Foreign Affairs*, 114th Cong. (2015) (statement of John Kerry, Sec’y of State of the United States). In remarks in September, Kerry reiterated the point: “So while it may not happen all at once, it is clear that if we reject this plan, the multilateral sanctions regime will start to unravel. The pressure on Iran will lessen and our negotiating leverage will diminish, if not disappear. Now, obviously, that is not the path, as some critics would have us believe, to a so-called better deal. It is a path to a much weaker position for the United States of America and to a much more dangerous Middle East.” *Sec’y of State John Kerry, Remarks on Nuclear Agreement with Iran*, U.S. DEP’T OF STATE (Sept. 2, 2015), at <http://www.state.gov/secretary/remarks/2015/09/246574.htm>.

<sup>13</sup> *Kerry July 23 Testimony*, *supra* note 12.

<sup>14</sup> *Id.* See also *Impacts of the Joint Comprehensive Plan of Action (JCPOA) on U.S. Interests and the Military Balance in the Middle East: Hearing Before the S. Comm. on Armed Serv.*, 114th Cong. 22–23, 28 (2015) (statement of Gen. Martin Dempsey, who noted that “[i]f followed, the deal addresses one critical and the most dangerous point of friction with the Iranian regime,” while cautioning that “there are at least five other malign activities which give us and our regional partners concern,” including the pursuit of ballistic missile technology, weapons trafficking, the use of surrogates and proxies, the use of naval mines and undersea activity, and malicious activity in cyberspace), available at <http://www.armed-services.senate.gov/imo/media/doc/15-66%20-%207-29-15.pdf>.

about the agreement,<sup>15</sup> Obama sent a letter to Representative Jerrold Nadler of New York in which he sought to assuage concerns raised by Nadler and other congressional representatives.<sup>16</sup> The letter addresses the strength of mechanisms that ensure Iranian compliance with the JCPOA; enhance joint security efforts between the United States and Israel in the region; and promote further cooperation among Israel and Gulf countries against Iranian efforts in Syria, Yemen, and Lebanon:

The JCPOA . . . does not remove any of our options when it comes to preventing Iran from acquiring a nuclear weapon. . . . Should Iran seek to dash toward a nuclear weapon, all of the options available to the United States—including the military option—will remain available through the life of the deal and beyond.

Our support for Israel is also an important element in deterring Iran from ever seeking a nuclear weapon. . . . My Administration has pursued an unprecedented level of military, intelligence, and security cooperation with Israel . . . .

. . . .

As I have underscored repeatedly, it is imperative that, even as we effectively cut off Iran's pathways to a nuclear weapon through implementation of the JCPOA, we take steps to ensure that we and our allies and partners are more capable than ever to deal with Iran's destabilizing activities and support for terrorism. This involves deepened cooperation and information sharing with Israel and our Gulf Cooperation Council partners; it also involves continued enforcement of international and U.S. law, including sanctions related to Iran's non-nuclear activities. With very limited exceptions, Iran will continue to be denied access to our market—the world's largest—and we will maintain powerful sanctions targeting Iran's support for groups such as Hizballah, its destabilizing role in Yemen, its backing of the Assad regime, its missile program, and its human rights abuses at home.<sup>17</sup>

White House officials explained that “[w]hile many of the promises have been made before by Mr. Obama, Secretary of State John Kerry and others, . . . the letter represents the first time that the president himself has compiled them under his name and in writing.”<sup>18</sup>

By September 2, 2015, the president had secured enough support from Democratic Senators to block the passage of a resolution of disapproval.<sup>19</sup> The next week, Senate Democrats did just that, ensuring that the JCPOA would take effect without the president needing to exercise a veto. The procedural vote in the Senate—on a measure that would have registered formal disapproval of the deal—fell two short of the sixty that would have been required to break a Democratic filibuster.<sup>20</sup> As a result, the bill did not proceed to an up-or-down vote. Obama

<sup>15</sup> Helen Cooper & Gardiner Harris, *Top General Gives “Pragmatic” View of Iran Nuclear Deal*, N.Y. TIMES, July 29, 2015, at A10.

<sup>16</sup> Letter from Barack Obama, President of the U.S. to Jerrold Nadler, U.S. Congressman (Aug. 19, 2015), available at <http://nadler.house.gov/sites/nadler.house.gov/files/documents/Letter%20to%20Congressman%20Nadler%20re%20JCPOA.pdf>.

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

<sup>18</sup> Jonathan Weisman, *In Letter, Obama Tells Congress U.S. Will Still Press Iran*, N.Y. TIMES, Aug. 20, 2015, at A3.

<sup>19</sup> Kristina Peterson & Carol E. Lee, *Obama Secures Votes on Iran*, WALL ST. J., Sept. 3, 2015, at A1.

<sup>20</sup> Steinhauer, *supra* note 1.

heralded the outcome, calling it “a victory for diplomacy, for American national security, and for the safety and security of the world.”<sup>21</sup>

The Senate voted twice more on a resolution of disapproval, with the measure failing again each time. The third—and final—attempt by Senate Republicans to pass a resolution disapproving of the deal failed on September 17, the last day of INARA’s sixty-day review period.<sup>22</sup>

In turn, House Republicans pushed House Speaker John Boehner to hold additional votes concerning the measure. One vote concerned a bill *approving* of the JCPOA in order to force Democrats to express their support on the record.<sup>23</sup> The measure failed, with 244 Republicans and 25 Democrats voting against expressing support for the deal, and 162 Democrats in favor. The House successfully passed a resolution protesting that the White House had not disclosed secret side agreements between Iran and the IAEA and a bill that would have prevented the United States from lifting any sanctions on Iran.<sup>24</sup> Because they lacked support in the Senate, these measures did not proceed any further.

After these efforts to block implementation of the JCPOA failed and INARA’s sixty-day window expired, the administration began to take steps to implement the deal. The White House announced that the president would issue waivers suspending all U.S. nuclear-related sanctions on October 18, 2015.<sup>25</sup> That date marked Adoption Day, the second of the five landmark days that structure the JCPOA.<sup>26</sup> Adoption Day marked ninety days after the passage—on July 20, 2015—of United Nations Security Council Resolution 2231, which endorsed the JCPOA and created the “snapback” provisions to enforce the terms of the agreement.<sup>27</sup> The JCPOA provides that Iran will begin to provisionally apply the IAEA Additional Protocol on Adoption Day, thereby allowing the IAEA to undertake additional inspections. In turn, the JCPOA requires the European Union and United States to adopt regulations and issue waivers necessary to begin sanctions relief on Implementation Day, the third landmark day.<sup>28</sup>

On October 18, 2015—Adoption Day—Obama said:

Today marks an important milestone toward preventing Iran from obtaining a nuclear weapon and ensuring its nuclear program is exclusively peaceful going forward. On this Adoption Day of the Joint Comprehensive Plan of Action (JCPOA) reached between the P5+1, EU, and Iran, JCPOA participants will make necessary arrangements and preparations for the implementation of their JCPOA commitments. Today, Iran begins to take the steps necessary to implement its JCPOA commitments, including removing thousands

<sup>21</sup> *Statement by the President*, THE WHITE HOUSE (Sept. 10, 2015), at <https://www.whitehouse.gov/the-press-office/2015/09/10/statement-president>.

<sup>22</sup> Karen DeYoung, *Administration Prepares to Implement Iran Nuclear Deal as Republicans Fail to Stop It*, WASH. POST, Sept. 17, 2015, at [https://www.washingtonpost.com/world/national-security/administration-prepares-to-implement-iran-nuclear-deal-as-republicans-again-fail-to-stop-it/2015/09/17/dc4053ec-5d81-11e5-9757-e49273f05f65\\_story.html](https://www.washingtonpost.com/world/national-security/administration-prepares-to-implement-iran-nuclear-deal-as-republicans-again-fail-to-stop-it/2015/09/17/dc4053ec-5d81-11e5-9757-e49273f05f65_story.html).

<sup>23</sup> H.R. 3461, 114th Cong. (2015). See also David M. Herszenhorn, *House Rejects Iran Nuclear Deal*, N.Y. TIMES, Sept. 11, 2015, at A6.

<sup>24</sup> H. Res. 411, 114th Cong. (2015) (finding that the president has not complied with section 2 of INARA). The White House rejected the idea that any side deals existed. *The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon*, THE WHITE HOUSE, at <https://www.whitehouse.gov/issues/foreign-policy/iran-deal/q-and-a> (last visited Oct. 29, 2015).

<sup>25</sup> DeYoung, *supra* note 22.

<sup>26</sup> See Daugirdas & Mortenson, *supra* note 1, at 650.

<sup>27</sup> JCPOA, *supra* note 1, at 16; S.C. Res. 2231, *supra* note 10, ¶¶ 11–12.

<sup>28</sup> See Daugirdas & Mortenson, *supra* note 1, at 650.

of centrifuges and associated infrastructure, reducing its enriched uranium stockpile from approximately 12,000 kilograms to 300 kilograms, and removing the core of the Arak heavy-water reactor and filling it with concrete so that it cannot be used again, among other steps. These next steps will allow us to reach the objectives we set out to achieve over the course of nearly two years of tough, principled diplomacy and will result in cutting off all four pathways Iran could use to develop enough fissile material for a nuclear weapon. I am confident in the extraordinary benefits to our national security and the peace and security of the world that come with the successful implementation of the JCPOA.

I have directed that the heads of all relevant executive departments and agencies of the United States begin preparations to implement the U.S. commitments in the JCPOA, in accordance with U.S. law, including providing relief from nuclear-related sanctions as detailed in the text of the JCPOA once the International Atomic Energy Agency (IAEA) has verified that Iran has completed all of its nuclear steps. We will also be closely monitoring Iran's adherence to its commitments, working closely with the IAEA and the other JCPOA participants, to ensure Iran fully fulfills each and every one of its commitments.<sup>29</sup>

Separately, Iran took steps to implement the JCPOA as well. The Iranian Parliament and Guardian Council approved the deal.<sup>30</sup> (The Guardian Council is a panel of clerics and jurists with authority to review laws passed by the Parliament and to ratify them or to send them back to Parliament if the Council concludes that the laws require further study.<sup>31</sup>) On October 15, 2015, Iran met an IAEA deadline for supplying information to the Agency on its past nuclear work.<sup>32</sup> The IAEA's director general now has until December 15, 2015 to provide the "final assessment on the resolution of all past and present outstanding issues."<sup>33</sup>

### *United States and China Reach Agreement Regarding Economic Espionage and International Cybersecurity Norms*

On September 25, 2015, during Chinese President Xi Jinping's visit to the United States, Xi and President Barack Obama announced an agreement relating to certain aspects of cyber-relations.<sup>1</sup> Pursuant to the agreement, "[t]he United States and China agree that neither country's government will conduct or knowingly support cyber-enabled theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to companies or commercial sectors."<sup>2</sup> The two countries

<sup>29</sup> Statement on the Adoption of the Joint Comprehensive Plan of Action To Prevent Iran From Obtaining a Nuclear Weapon, 2015 DAILY COMP. PRES. DOC. 734 (Oct. 18, 2015); see also Memorandum on Preparing for Implementation of the Joint Comprehensive Plan of Action of July 14, 2015 (JCPOA), 2015 DAILY COMP. PRES. DOC. 735 (Oct. 18, 2015).

<sup>30</sup> Thomas Erdbrink, *Iran Is Set to Put Nuclear Deal, Now Ratified, In Motion*, N.Y. TIMES, Oct. 14, 2015, at A9.

<sup>31</sup> *Id.*

<sup>32</sup> Rick Gladstone, *Iran Meets Atomic Agency Deadline for Material on Past Activities*, N.Y. TIMES, Oct. 15, 2015, at A13.

<sup>33</sup> *IAEA Statement on Iran*, INT'L ATOMIC ENERGY AGENCY (Oct. 15, 2015), at <https://www.iaea.org/news-center/news/iaea-statement-iran-0>.

<sup>1</sup> See *Fact Sheet: President Xi Jinping's State Visit to the United States*, THE WHITE HOUSE (Sept. 25, 2015), at <https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states> [hereinafter *Fact Sheet*]; The President's News Conference with President Xi Jinping of China, 2015 DAILY COMP. PRES. DOC. 647 (Sept. 25, 2015) [hereinafter *News Conference*].

<sup>2</sup> *Fact Sheet*, *supra* note 1.

also agreed to cooperate in addressing malicious cyberactivities. Specifically, the United States and China agreed to provide “timely responses . . . to requests for information and assistance concerning malicious cyber activities”; “to cooperate, in a manner consistent with their respective national laws and relevant international obligations, with requests to investigate cyber-crimes, collect electronic evidence, and mitigate malicious cyber activity emanating from their territory”; and “to provide updates on the status and results of those investigation[s] to the other side, as appropriate.”<sup>3</sup> Finally, the agreement indicated that “[b]oth sides are committed to making common effort to further identify and promote appropriate norms of state behavior in cyberspace within the international community.”<sup>4</sup> This agreement addresses cyberactivity in the pursuit of economic advantage, rather than those associated with “traditional intelligence-gathering functions”; Obama has described such cyberespionage as a “fundamentally different” issue.<sup>5</sup>

Addressing the agreement at a joint press conference with President Xi, President Obama said:

I raised once again our very serious concerns about growing cyber-threats to American companies and American citizens. I indicated that it has to stop. The United States government does not engage in cyber economic espionage for commercial gain. And today, I can announce that our two countries have reached a common understanding on the way forward. We’ve agreed that neither the U.S. or the Chinese government will conduct or knowingly support cyber-enabled theft of intellectual property, including trade secrets or other confidential business information for commercial advantage. In addition, we’ll work together, and with other nations, to promote international rules of the road for appropriate conduct in cyberspace.

So this is progress. But I have to insist that our work is not yet done. I believe we can expand our cooperation in this area, even as the United States will continue to use all of the tools at our disposal to protect American companies, citizens and interests.

....

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

<sup>4</sup> *Id.*; see also News Conference, *supra* note 1 (statement of Xi, as translated) (“China and the United States are two major cyber countries and we should strengthen dialogue and cooperation. Confrontation and friction are not made by choice for both sides. During my visit, competent authorities of both countries have reached important consensus on joint fight against cyber-crimes. Both sides agree to step up crime cases, investigation assistance and information-sharing. And both government[s] will not be engaged in or knowingly support online theft of intellectual properties. And we will explore the formulation of appropriate state, behavior and norms of the cyberspace. And we will establish a high-level joint dialogue mechanism on the fight against cyber-crimes and related issues, and to establish hotline links.”).

<sup>5</sup> Remarks by the President to the Business Roundtable, 2015 DAILY COMP. PRES. DOC. 624 (2015) [hereinafter Roundtable Remarks] (“We have repeatedly said to the Chinese government that we understand traditional intelligence-gathering functions that all states, including us, engage in. And we will do everything we can to stop you from getting state secrets or transcripts of a meeting that I’ve had, but we understand you’re going to be trying to do that. That is fundamentally different from your government or its proxies engaging directly in industrial espionage and stealing trade secrets, stealing proprietary information from companies. That we consider an act of aggression that has to stop.”); see also *Conference Call to Preview the Visit of President Xi Jinping of the People’s Republic of China*, THE WHITE HOUSE (Sept. 22, 2015), at <https://www.whitehouse.gov/the-press-office/2015/09/23/conference-call-preview-visit-president-xi-jinping-peoples-republic> [hereinafter *Conference Call*] (containing a statement from Deputy National Security Advisor for Strategic Communications Ben Rhodes that the U.S. concern about Chinese cyber activities is not “a matter of whether or not countries conduct traditional espionage”).

President Xi . . . indicated to me that, with 1.3 billion people, he can't guarantee the behavior of every single person on Chinese soil—which I completely understand. I can't guarantee the actions of every single American. What I can guarantee, though, and what I'm hoping President Xi will show me, is that we are not sponsoring these activities, and that when it comes to our attention that non-governmental entities or individuals are engaging in this stuff, that we take it seriously and we're cooperating to enforce the law.

The last point I'll make on the cyber issue—because this is a global problem, and because, unlike some of the other areas of international cooperation, the rules in this area are not well developed, I think it's going to very important for the United States and China, working with other nations and the United Nations and . . . the private sector, to start developing an architecture to govern behavior in cyberspace that is enforceable and clear.

It doesn't mean that we're going to prevent every cyber-crime, but it does start to serve as a template whereby countries know what the rules are, they're held accountable, and we're able to jointly go after non-state actors in this area.<sup>6</sup>

Obama and Xi reached the agreement during their talks at the White House on September 24–25.<sup>7</sup> But the substance of the agreement had been “in the works” several weeks before that, with discussions beginning after China's alleged theft of records from the Office of Personnel Management, and continuing when National Security Advisor Susan E. Rice traveled to Beijing in late August to prepare for Xi's visit to the White House.<sup>8</sup> Following those conversations, Secretary of the Central Political and Legal Affairs Commission of the Communist Party of China Meng Jianzhu—acting as a Special Envoy for Xi—met with senior administration officials in Washington from September 9–12 to discuss cybersecurity issues,<sup>9</sup> leading to “substantial agreement” on those topics, including Chinese economic espionage.<sup>10</sup> At the time,

<sup>6</sup> News Conference, *supra* note 1; *see also id.* (statement of Xi) (“With President Obama and I have on many occasions—and this is a long history—have exchange of views on this. I think it's fair to say we've reached a lot of consensus on cybersecurity, including some new consensus. Overall, the United States is the strongest country in terms of cyber strength. China is the world's biggest cyber country in terms of the number of Web users. We have more than 600 million of netizens. Our two sides should cooperate because cooperation will benefit both, and confrontation will lead to losses on both sides. We are entirely able to carry out government department and expert levels of dialogue and exchanges to strengthen our cooperation in many respects and turn the cybersecurity between the two countries into a new growth source, rather than a point of confrontation between the two sides. China strongly opposes and combats the theft of commercial secrets and other kinds of hacking attacks. The U.S. side, if has concerns in this respect, we can, through the exiting channels, express those concerns. The Chinese side will take seriously the U.S. provision of any information. Now, we have already, and in the future, we will still, through the law enforcement authorities, maintain communication and coordination on this matter, and appropriately address them. So, all in all, we have broad, common interest in the field of the cyber. But we need to strengthen cooperation and avoid leading to confrontation. And nor should we politicize this issue. During my current visit, I think it's fair to say that the two sides, concerning combatting cyber-crimes, have reached a lot of consensus. Going forward, we need to, at an early date, reach further agreement on them and further put them on the ground.”).

<sup>7</sup> *Fact Sheet*, *supra* note 1.

<sup>8</sup> Ellen Nakashima & Steven Mufson, *The U.S. and China Agree Not to Conduct Economic Espionage in Cyberspace*, WASH. POST, Sept. 25, 2015, at [https://www.washingtonpost.com/world/national-security/the-us-and-china-agree-not-to-conduct-economic-espionage-in-cyberspace/2015/09/25/1c03f4b8-63a2-11e5-8e9e-dce8a2a2a679\\_story.html](https://www.washingtonpost.com/world/national-security/the-us-and-china-agree-not-to-conduct-economic-espionage-in-cyberspace/2015/09/25/1c03f4b8-63a2-11e5-8e9e-dce8a2a2a679_story.html).

<sup>9</sup> *Readout of Senior Administration Officials' Meeting with Secretary of the Central Political and Legal Affairs Commission of the Communist Party of China Meng Jianzhu*, THE WHITE HOUSE (Sept. 12, 2015), at <https://www.whitehouse.gov/the-press-office/2015/09/12/readout-senior-administration-officials-meeting-secretary-central>.

<sup>10</sup> Ellen Nakashima, *U.S. Won't Impose Sanctions on Chinese Companies Before Xi Visit*, WASH. POST, Sept. 14, 2015, at <https://www.washingtonpost.com/world/national-security/the-us-will-not-impose-sanctions-on>

administration officials characterized those talks as “pretty blunt” and “pretty ugly,”<sup>11</sup> and it was unclear whether a final agreement would be reached during Xi’s visit.<sup>12</sup>

According to press reports, China agreed to affirm the norm against economic cyberespionage in part because it was “rattled” by the threat of U.S. sanctions.<sup>13</sup> Last April, Obama had issued an executive order permitting the imposition of sanctions on individuals or entities that engage in malicious cyberenabled activities, including economic espionage, that threaten the United States’ interests.<sup>14</sup> So far no such sanctions have been imposed, but press reports indicated that the administration was contemplating sanctions on Chinese companies and individuals.<sup>15</sup> An administration official acknowledged that the United States decided to refrain from issuing any sanctions prior to Xi’s visit, in light of the progress made during the discussions between Meng and senior administration officials.<sup>16</sup> Such sanctions do remain a possibility, however. During Xi’s visit, Obama reiterated that the administration “will apply [sanctions] and whatever other tools [the United States] ha[s] in [its] toolkit to go after cyber criminals, either retrospectively or prospectively,” where there is “proof that they’ve gone after U.S. companies or U.S. persons.”<sup>17</sup>

In his announcement of the agreement, Obama noted that the primary question is now whether China’s “words [will be] followed by actions.”<sup>18</sup> Indeed, at a congressional hearing several days after the agreement was reached, Deputy Secretary of Defense Robert Work said, “I think all of us have some healthy skepticism about this, but I believe it’s a good confidence-building measure and a good first step, and we will see if it leads to better behavior on the part of the Chinese.”<sup>19</sup> Explaining the agreement, Work said:

chinese-companies-before-state-visit-by-president-xi-jinping/2015/09/14/98a447e6-5b25-11e5-b38e-06883aacba64\_story.html.

<sup>11</sup> David E. Sanger, *Cyberthreat Posed by China and Iran Confounds White House*, N.Y. TIMES, Sept. 15, 2015, at A6.

<sup>12</sup> See Julie Hirschfeld Davis & David E. Sanger, *Obama and Xi Jinping of China Agree to Steps on Cybertheft*, N.Y. TIMES, Sept. 25, 2015, at A9.

<sup>13</sup> See Nakashima & Mufson, *supra* note 8; see also *U.S. Cybersecurity Policy and Threats: Hearing Before the S. Comm. on Armed Servs.*, 114th Cong. 74–75 (2015) (quoting Director of National Intelligence James Clapper as saying “it appears that the threat of potential economic sanctions, particularly imposing them right before the visit of President Xi, I think, got their attention”), available at <http://www.armed-services.senate.gov/imo/media/doc/15-75%20-%209-29-15.pdf> [hereinafter *Hearing*].

<sup>14</sup> See Nakashima & Mufson, *supra* note 8; see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 643, 658 (2015) (discussing the content and scope of the executive order).

<sup>15</sup> Ellen Nakashima, *U.S. Developing Sanctions Against China over Cyberthefts*, WASH. POST, Aug. 30, 2015, at [https://www.washingtonpost.com/world/national-security/administration-developing-sanctions-against-china-over-cyberespionage/2015/08/30/9b2910aa-480b-11e5-8ab4-c73967a143d3\\_story.html](https://www.washingtonpost.com/world/national-security/administration-developing-sanctions-against-china-over-cyberespionage/2015/08/30/9b2910aa-480b-11e5-8ab4-c73967a143d3_story.html). See *Press Gaggle with Press Secretary Josh Earnest en Route Dillingham, AK*, THE WHITE HOUSE (Sept. 2, 2015), at <https://www.whitehouse.gov/the-press-office/2015/09/03/press-gaggle-press-secretary-josh-earnest-en-route-dillingham-ak> (“I . . . don’t have much I can say publicly about any steps related to economic sanctions that we’re contemplating.”); see *Daily Press Briefing*, U.S. DEP’T OF STATE (Aug. 31, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/08/246473.htm#CHINA> (“[W]e ha[ve] nothing to announce in terms of economic . . . sanctions. Certainly, that remains a tool in the proverbial toolbox when we look at these kinds of situations, but I’m not saying we’re moving forward in that direction.”).

<sup>16</sup> Ellen Nakashima, *U.S. Won’t Impose Sanctions on Chinese Companies Before Xi Visit*, WASH. POST, Sept. 14, 2015, at [https://www.washingtonpost.com/world/national-security/the-us-will-not-impose-sanctions-on-chinese-companies-before-state-visit-by-president-xi-jinping/2015/09/14/98a447e6-5b25-11e5-b38e-06883aacba64\\_story.html](https://www.washingtonpost.com/world/national-security/the-us-will-not-impose-sanctions-on-chinese-companies-before-state-visit-by-president-xi-jinping/2015/09/14/98a447e6-5b25-11e5-b38e-06883aacba64_story.html).

<sup>17</sup> News Conference, *supra* note 1.

<sup>18</sup> *Id.*

<sup>19</sup> See *Hearing*, *supra* note 13, at 54.

[O]ne hopes that . . . this agreement may create the space for us to have a—more than a conversation, but one that would lead to some kind of a change in behavior on the part of these state actors. . . . [W]hat we have done [after identifying the source of a cyber attack] is, we have confronted China, and China, in some cases, has said, “Look, this was a hacker that was insider our country, but we had no control over him.” What this [agreement] allows us to do is say, “Okay, well, what are you going to do about that? That’s a cybercrime. Are you going to provide us the information we need to prosecute this person? Are you going to take care of it on your own?”<sup>20</sup>

In the weeks after the agreement was reached, China arrested several Chinese hackers that U.S. officials had identified as having stolen commercial secrets from U.S. firms with the intention of giving or selling that information to Chinese state-run companies.<sup>21</sup> A report by private researchers showed, however, that hackers linked to the Chinese government have continued to try to acquire confidential information by accessing U.S. technology and pharmaceutical companies’ networks.<sup>22</sup> Administration officials are aware of that report, but have declined to comment on it.<sup>23</sup> U.S. Cyber Command’s Deputy Commander Lt. Gen. James K. McLaughlin pointed out that the elimination of Chinese economic cyberespionage will take time, and it may simply be “too early . . . to see any of th[e] changes” called for by the agreement.<sup>24</sup>

#### USE OF FORCE AND ARMS CONTROL

##### *United States Ratifies the International Convention for the Suppression of Acts of Nuclear Terrorism*

On September 30, 2015, the United States ratified the International Convention for the Suppression of Acts of Nuclear Terrorism,<sup>1</sup> which President George W. Bush had signed on September 14, 2005.<sup>2</sup> The need for implementing legislation that would align U.S. law with the Convention’s requirements caused the delay between signing and ratification. Congress ultimately passed such legislation on June 2, 2015, as part of the USA Freedom Act.<sup>3</sup>

The Bush administration had submitted the Convention to the Senate for its advice and consent eight years ago, on July 12, 2007.<sup>4</sup> In its letter of transmittal to the Senate, the administration urged the Senate to “give early and favorable consideration” to the Convention

<sup>20</sup> *Id.* at 53.

<sup>21</sup> Ellen Nakashima & Adam Goldman, *In a First, Chinese Hackers Are Arrested at the Behest of the U.S. Government*, WASH. POST, Oct. 9, 2015, at [https://www.washingtonpost.com/world/national-security/in-a-first-chinese-hackers-are-arrested-at-the-behest-of-the-us-government/2015/10/09/0a7b0e46-6778-11e5-8325-a42b5a459b1e\\_story.html](https://www.washingtonpost.com/world/national-security/in-a-first-chinese-hackers-are-arrested-at-the-behest-of-the-us-government/2015/10/09/0a7b0e46-6778-11e5-8325-a42b5a459b1e_story.html). China has not indicated if it will prosecute these hackers. *See id.*

<sup>22</sup> Ellen Nakashima, *China Still Trying to Hack U.S. Firms Despite Xi’s Vow to Refrain, Analysts Say*, WASH. POST, Oct. 19, 2015, at [https://www.washingtonpost.com/world/national-security/china-still-trying-to-hack-us-firms-despite-xis-vow-to-refrain-analysts-say/2015/10/18/d9a923fe-75a8-11e5-b9c1-f03c48c96ac2\\_story.html](https://www.washingtonpost.com/world/national-security/china-still-trying-to-hack-us-firms-despite-xis-vow-to-refrain-analysts-say/2015/10/18/d9a923fe-75a8-11e5-b9c1-f03c48c96ac2_story.html).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>1</sup> *U.S. Ratification of the International Convention for the Suppression of Acts of Nuclear Terrorism*, U.S. DEP’T OF STATE (Sept. 30, 2012), at <http://www.state.gov/r/pa/prs/ps/2015/09/247636.htm> [hereinafter *U.S. Ratification*]; International Convention for the Suppression of Acts of Nuclear Terrorism, *opened for signature* Sept. 14, 2005, S. TREATY DOC. NO. 110-4, 2445 U.N.T.S. 89 [hereinafter NTC].

<sup>2</sup> George W. Bush, Letter of Transmittal, International Convention for the Suppression of Acts of Nuclear Terrorism, S. TREATY DOC. NO. 110-4, 2005 WL 5653114 (July 12, 2007) [hereinafter Letter of Transmittal].

<sup>3</sup> USA Freedom Act of 2015, Pub. L. No. 114-23, §§ 811–12, 129 Stat. 268, 309–13 (2015).

<sup>4</sup> Letter of Transmittal, *supra* note 2, at III.

because of its importance to “the campaign against international terrorism.”<sup>5</sup> Bush cited two features of the Convention as especially noteworthy. First, the Convention “imposes binding legal obligations upon States Parties either to submit for prosecution or to extradite any person within their jurisdiction” who aids, attempts, commits, or threatens to commit “terrorist acts involving radioactive material or a nuclear device.”<sup>6</sup> Second, the Convention requires parties “to provide one another legal assistance in investigations or criminal or extradition proceedings” initiated in response to violations of the treaty.<sup>7</sup>

On September 25, 2008, the Senate passed a resolution of ratification in support of the Convention.<sup>8</sup> The Senate’s consent was subject to one reservation and several understandings of the Convention, all of which the Bush administration had urged the Senate to adopt.<sup>9</sup> The reservation—explicitly permitted by the agreement’s text<sup>10</sup>—opted out of the Convention’s dispute settlement provision.<sup>11</sup>

The Bush administration then proposed implementing legislation to Congress.<sup>12</sup> Disagreements about two provisions in the proposed legislation kept it from being adopted promptly. The first of these contested provisions would authorize the federal government to investigate suspected acts of nuclear terrorism through surveillance of electronic communication;<sup>13</sup> the second would authorize the death penalty for violations of the Convention that resulted in death.<sup>14</sup> The Obama administration supported including the provisions in order to implement the Convention’s requirements that states parties investigate and appropriately punish violations of the Convention.<sup>15</sup> Nonetheless, the administration acknowledged that the wiretap and death penalty provisions were not “strictly required” since the Convention did not demand any specific investigative techniques or sentencing standards.<sup>16</sup>

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

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

<sup>7</sup> *Id.*

<sup>8</sup> 154 CONG. REC. S9554-56 (daily ed. Sept. 25, 2008).

<sup>9</sup> *Id.* at S9555; Letter of Transmittal, *supra* note 2, at III.

<sup>10</sup> NTC, *supra* note 1, art. 23(2).

<sup>11</sup> 154 CONG. REC. S9555.

<sup>12</sup> See *Implementation of Certain International Nuclear and Maritime Terrorism Agreements: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 26 (2011) [hereinafter *Hearing on the Nuclear Terrorism Convention*] (statement of Thomas M. Countryman, Assistant Sec’y, Bureau of Int’l Security and Nonproliferation, U.S. Dep’t of State).

<sup>13</sup> S. 1318 114th Cong. § 203(c) (2015).

<sup>14</sup> *Id.* § 201(a) (“Penalties.—Any person who violates this section shall be punished as provided under section 2332a(a).”); 18 U.S.C. § 2332a(a) (“A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction . . . shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.”); *Hearing on the Nuclear Terrorism Convention*, *supra* note 12, at 2–3 (statement of Robert C. Scott, Ranking Member, Subcomm. on Crime, Terrorism, and Homeland Security).

<sup>15</sup> *Hearing on the Nuclear Terrorism Convention*, *supra* note 12, app. 37 (response to hearing questions from Ronald Weich, Assistant Att’y Gen., Off. of Legislative Aff., U.S. Department of Justice); see also NTC, *supra* note 1, art. 10(1) (stating that a state party shall, upon receiving information that a violation of the treaty has occurred, “take such measures as may be necessary under its national law to investigate the facts contained in the information”); *id.* art. 5(b) (requiring states parties to make violations of the treaty “punishable by appropriate penalties which take into account the grave nature of these offences”); Letter from Judith C. Applebaum, Acting Assistant Attorney General, Department of Justice Office of Legislative Affairs, to Lamar Smith, Chairman, House Committee on the Judiciary (June 21, 2012), available at <http://www.justice.gov/sites/default/files/ola/legacy/2012/10/31/06-21-12-ltr-re-hr-5889.pdf>.

<sup>16</sup> *Hearing on the Nuclear Terrorism Convention*, *supra* note 12, app. 37.

In 2012, the House of Representatives passed a compromise bill that omitted the wiretap and death penalty provisions.<sup>17</sup> However, the House bill stalled in the Senate due to persistent disagreements about the two provisions.<sup>18</sup> According to Senator Chuck Grassley, who led efforts to include the controversial provisions, “it’s obvious that the government needs the ability to seek the death penalty for nuclear terrorists under the appropriate circumstances,” and it’s important that “authorities have the capacity to seek lawful wiretaps, authorized by a federal judge, to investigate these terrorists.”<sup>19</sup> Others in Congress disagreed and claimed that even if the provisions were required by the Convention, existing federal law already permitted wiretaps to investigate and the death penalty to punish terrorist acts.<sup>20</sup>

Congress finally enacted implementing legislation for the Convention on June 2, 2015, as part of the USA Freedom Act.<sup>21</sup> The legislation reflected the House version of the bill, which omitted additional wiretap authorities or specific authorizations for capital punishment. The legislation did include a provision criminalizing any action that “increases the risk of the release of radioactive material,”<sup>22</sup> and another that criminalized inchoate acts of nuclear terrorism, such as attempts and conspiracies to engage in nuclear terrorism.<sup>23</sup> Furthermore, the implementing legislation authorized U.S. jurisdiction over acts of nuclear terrorism that occur on vessels or aircrafts registered with the United States<sup>24</sup> and over violators of the Convention found in the United States.<sup>25</sup> In his speech on the passage of the USA Freedom Act, Secretary of State John Kerry lauded the Convention for providing “a specific legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit terrorist

<sup>17</sup> H.R. 5889, 112th Cong. (2012).

<sup>18</sup> Patrick Leahy, *Letter to the Editor, Nuclear Terrorism Bill Delay Unwarranted*, WASH. TIMES (Sept. 19, 2012), at <http://www.washingtontimes.com/news/2012/sep/19/nuclear-terrorism-bill-delay-unwarranted>; Diana Barnes, *Adoption of Nuclear Security Pacts Stalls in Senate*, NUCLEAR THREAT INITIATIVE (Sept. 27, 2012), at <http://www.nti.org/gsn/article/adoption-nuclear-security-pacts-stalls-senate>.

<sup>19</sup> *Grassley and Whitehouse Introduce Legislation to Combat Nuclear Terrorism and Proliferation*, CHUCK GRASSLEY (May 13, 2015), at <http://www.grassley.senate.gov/news/news-releases/grassley-and-whitehouse-introduce-legislation-combat-nuclear-terrorism-and>.

<sup>20</sup> See 161 Cong. Rec. S4176 (daily ed. June 16, 2015) (statement of Sen. Reed) (“[W]e have been advised by the Department of Justice that these provisions are not necessary, given the scope of existing law with respect to terrorists and with respect to anyone who conducts a terrorist act.”); see also 18 U.S.C. §§ 2332(a), 2332b(a), 2332f(a), 2332h, 2339A, 2339B, 2516(1)(q), 3592(c)(9).

<sup>21</sup> USA Freedom Act of 2015, Pub. L. No. 114-23, §§ 811–12, 129 Stat. 268, 309–13 (2015).

<sup>22</sup> *Id.* § 811(a), 129 Stat. at 309 (implementing NTC Article 2(1)(b), which states that a person commits an offense under the treaty when that person “uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material”).

<sup>23</sup> *Id.* § 811(a), 129 Stat. at 309 (implementing NTC Article 2(3), which states that “[a]ny person also commits an offense if that person attempts to commit an offense as set forth in paragraph 1 of the present article” and NTC Article 2(4), which states that “[a]ny person also commits an offense if that person: (a) Participates as an accomplice in an offense as set forth in paragraph 1, 2 or 3 of the present article; or (b) Organizes or directs others to commit an offense as set forth in paragraph 1, 2 or 3 of the present article; or (c) In any other way contributes to the commission of one or more offenses as set forth in paragraph 1, 2 or 3 of the present article by a group of persons acting with a common purpose . . .”).

<sup>24</sup> *Id.* § 811(a), 129 Stat. at 309–10 (implementing NTC Article 9(1)(b), which requires that “[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when . . . (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed”).

<sup>25</sup> *Id.* § 811(a), 129 Stat. at 310 (implementing NTC Article 9(4), which requires that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article”).

acts involving radioactive material or a nuclear device, or any device that may emit radiation or disperse radioactive material.”<sup>26</sup>

With the implementing legislation in place, the Obama administration deposited an instrument of ratification at the United Nations on September 30, 2015.<sup>27</sup> The United States became the 100th state party to the Convention, and the administration praised the Convention as “a cornerstone of the global nuclear security and counter terrorism architecture.”<sup>28</sup> The administration recognized the continuing threats posed by nuclear and radioactive material and called on nations around the world to continue to “work to eliminate the threat of nuclear terrorism.”<sup>29</sup>

*United States Reaches Agreement with Turkey on Use of Incirlik Air Base for Strikes on ISIL; “Safe Zone” Not Part of the Deal*

In July 2015, the United States and Turkey announced an agreement granting the United States access to Incirlik Air Base in southern Turkey for launching air attacks against the Islamic State in Syria and the Levant (ISIL).<sup>1</sup> Details of the deal have not been released “due to operational security”<sup>2</sup> and ongoing negotiations about the precise details of the countries’ cooperation.<sup>3</sup> Incirlik is a fifteen-minute flight from the Syrian border, and access to the base allows U.S. aircraft to carry out operations in Syria more effectively than other options in the Middle East.<sup>4</sup> Prior to the deal, Turkey had allowed the United States to use Incirlik only for surveillance missions by unarmed drones.<sup>5</sup> Within weeks of the announcement, the United States had deployed Air Force fighter planes and personnel to the base,<sup>6</sup> launched manned airstrikes from

<sup>26</sup> *Passage of Implementing Legislation for Nuclear Security Treaties*, U.S. DEP’T OF STATE (June 4, 2015), at <http://www.state.gov/secretary/remarks/2015/06/243196.htm>.

<sup>27</sup> *U.S. Ratification*, *supra* note 1.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>1</sup> *Daily Press Briefing*, U.S. DEP’T OF STATE (July 24, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/07/245262.htm>; see also *No. 212, 24 July 2015, Press Release Concerning Turkey-US Understanding on Countering DAESH*, TURK. MINISTRY FOREIGN AFF. (July 24, 2015), at [http://www.mfa.gov.tr/no\\_-212\\_-24-july-2015\\_-press-statement-concerning-turkey\\_us-understanding-on-countering-deash.en.mfa](http://www.mfa.gov.tr/no_-212_-24-july-2015_-press-statement-concerning-turkey_us-understanding-on-countering-deash.en.mfa).

<sup>2</sup> Ceylan Yeginsu & Helene Cooper, *U.S. Jets to Use Turkish Bases in War on ISIS*, N.Y. TIMES, July 23, 2015, at A1.

<sup>3</sup> See *Senior Administration Officials On Counter-ISIL Coalition Efforts*, U.S. DEP’T OF STATE (July 28, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/07/245403.htm> (stating that the “mechanisms [and] modalities” of Turkish-U.S. cooperation are still being discussed); *Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room*, U.S. DEP’T OF DEFENSE (Aug. 25, 2015), at <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/614829/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in> [hereinafter *Cook Press Briefing*] (stating that U.S. “cooperation with the Turks . . . remains a work in progress . . .”).

<sup>4</sup> Dan Lamothe, *Here Are the First Images of U.S. F-16 Fighters Flying from Turkey to Carry Out Airstrikes*, WASH. POST, Aug. 13, 2015, at <https://www.washingtonpost.com/news/checkpoint/wp/2015/08/13/here-are-the-first-images-of-u-s-f-16-fighters-flying-from-turkey-to-carry-out-airstrikes>.

<sup>5</sup> Liz Sly & Karen DeYoung, *Turkey Agrees to Allow U.S. Military to Use its Base to Attack Islamic State*, WASH. POST, July 23, 2015, at [https://www.washingtonpost.com/world/middle\\_east/turkey-agrees-to-allow-us-military-to-use-its-base-to-attack-islamic-state/2015/07/23/317f23aa-3164-11e5-a879-213078d03dd3\\_story.html](https://www.washingtonpost.com/world/middle_east/turkey-agrees-to-allow-us-military-to-use-its-base-to-attack-islamic-state/2015/07/23/317f23aa-3164-11e5-a879-213078d03dd3_story.html).

<sup>6</sup> *Incirlik AB Receives F-16 Forces in Support of OIR*, U.S. AIR FORCES CENTRAL COMMAND (Aug. 10, 2015), at <http://www.afcent.af.mil/News/ArticleDisplay/tabid/136/Article/612987/incirlik-ab-receives-f-16-forces-in-support-of-oir.aspx>.

Turkey into Syria,<sup>7</sup> and finalized details for full Turkish inclusion in the U.S.-led coalition air operations against ISIL.<sup>8</sup> According to press reports, one senior administration official described the agreement as a “game changer.”<sup>9</sup>

Shortly after the Incirlik announcement, discrepancies between public statements by U.S. and Turkish officials led to some confusion about a rumored agreement to create a “safe zone” inside northern Syria along the Turkish border.<sup>10</sup> The legality of carving out such a space within Syrian territory has been debated since Turkey first proposed the idea.<sup>11</sup> In the past, Turkey had insisted that any air base permissions granted to the United States would be conditioned on the establishment of a safe zone inside Syria, protected by U.S. air power.<sup>12</sup> Turkey envisioned encouraging Syrian refugees who had fled their country to return to this protected area, easing the pressure on neighboring countries that have absorbed more than four million Syrian refugees.<sup>13</sup> After the announcement of the Incirlik deal, Turkish President Recep Tayyip Erdogan appeared to suggest a connection between that agreement and “the creation of a safe zone there [in Syria that] will lay the ground for 1.7 [million Syrian] citizens here to return home.”<sup>14</sup> His vision was echoed by Turkish Foreign Minister Mevlut Cavusoglu, who suggested that once the U.S.-Turkish Incirlik agreement is effectuated, “safe zones will be formed naturally.”<sup>15</sup>

Contrary to initial suggestions from Ankara, however, the United States has maintained that references to a safe zone are “getting ahead of what’s actually happening,” which is “an agreement to use Turkish facilities to enhance . . . air operations against ISIL on the ground.”<sup>16</sup> U.S. officials did acknowledge ongoing discussions with Ankara about how to “clear out . . . the last stretch of international border with Turkey that is controlled by ISIL.” But officials from the U.S. State Department and Defense Department emphasized

<sup>7</sup> *US Begins Manned Airstrikes Against ISIS from Turkey into Syria*, U.S. AIR FORCES CENTRAL COMMAND (Aug. 13, 2015), at <http://www.afcent.af.mil/News/ArticleDisplay/tabid/136/Article/613418/us-begins-manned-airstrikes-against-isis-from-turkey-into-syria.aspx>.

<sup>8</sup> *Cook Press Briefing*, *supra* note 3.

<sup>9</sup> Yeginsu & Cooper, *supra* note 2.

<sup>10</sup> The media has used the phrases buffer zone, protected zone, and safe zone interchangeably.

<sup>11</sup> See Molly O’Toole, *Pentagon Doesn’t Know If It’s Allowed to Defend Syrian Fighters or Turkish “Safe Zone”*, DEFENSE ONE (July 28, 2015) at <http://www.defenseone.com/politics/2015/07/pentagon-approval-fight-syrial/118675>; Erin Cunningham, *U.S., Turkey Aim to Create Buffer Zone on Syrian Border. Nobody Knows How.*, WASH. POST, Aug. 13, 2015, at [https://www.washingtonpost.com/world/middle\\_east/us-said-it-will-create-a-safe-zone-on-syrian-border-but-nobody-knows-how/2015/08/12/4c7d0baa-37e4-11e5-ab7b-6416d97c73c2\\_story.html](https://www.washingtonpost.com/world/middle_east/us-said-it-will-create-a-safe-zone-on-syrian-border-but-nobody-knows-how/2015/08/12/4c7d0baa-37e4-11e5-ab7b-6416d97c73c2_story.html).

<sup>12</sup> *August 2015 Monthly Forecast: Syria*, SECURITY COUNCIL REPORT (July 31, 2015), at [http://www.securitycouncilreport.org/monthly-forecast/2015-08/syria\\_22.php](http://www.securitycouncilreport.org/monthly-forecast/2015-08/syria_22.php).

<sup>13</sup> See Sly & DeYoung, *supra* note 5 (explaining the safe zone long imagined by the Turkish government); Dan Lamothe, *The Many Complications of the U.S. Establishing a Military “Safe Zone” in Syria with Turkey*, WASH. POST, July 27, 2015, at <https://www.washingtonpost.com/news/checkpoint/wp/2015/07/27/the-many-complications-of-the-u-s-establishing-a-military-safe-zone-in-syria-with-turkey/> (enumerating refugee numbers).

<sup>14</sup> *Turkey’s Erdoğan Demands Lifting of HDP Deputies’ Immunity*, HURRIYET DAILY NEWS (Turk.) (July 28, 2015), at <http://www.hurriyetdailynews.com/erdogan-vows-more-military-ops-says-parliament-should-lift-immunity-of-terrorism-linked-deputies.aspx?pageID=517&nID=86038&NewsCatID=338>.

<sup>15</sup> Anne Barnard et al., *Turkey and U.S. Plan to Create Syria “Safe Zone” Free of ISIS*, N.Y. TIMES, July 27, 2015, at <http://www.nytimes.com/2015/07/28/world/middleeast/turkey-and-us-agree-on-plan-to-clear-isis-from-strip-of-northern-syria.html>.

<sup>16</sup> *Daily Press Briefing*, U.S. DEP’T OF STATE (Aug. 11, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/08/245937.htm>.

that “there’s no imposition of a no-fly zone”<sup>17</sup> and that they “haven’t mentioned or discussed a safe zone . . . .”<sup>18</sup>

In addition to the “military, financial, [and] humanitarian challenges” cited by a State Department spokesperson,<sup>19</sup> there would be significant legal hurdles to any safe zone proposal. Since 2014, Syria has indicated that it would not consent to the creation of a protected space within its borders and would consider any such imposition an “attack on Syrian territory and its sovereignty.”<sup>20</sup> Given Syria’s resistance, force would likely be necessary to create and protect a safe zone,<sup>21</sup> and Secretary of Defense Ashton Carter has reportedly expressed uncertainty about whether the Pentagon has legal authority to engage Syrian government troops.<sup>22</sup>

While the United States has remained mostly silent about the legality of Turkey’s proposal, Russian Ambassador to Turkey Andrey Karlov has asserted that only the UN Security Council has the ability to authorize the creation of such a zone inside Syria.<sup>23</sup> Given Russia’s Security Council veto power, no such resolution seems likely.<sup>24</sup> In September 2014, Karlov warned that “these well-intentioned steps if not approved by the U.N. Security Council could bring more evil.”<sup>25</sup> “It should not be forgotten,” he said, “that [t]he road to hell is paved with good intentions.”<sup>26</sup> Absent Security Council approval, any safe zone in Syria would likely have to rely on the much more uncertain grounds of either humanitarian considerations<sup>27</sup> or self-defense.<sup>28</sup>

<sup>17</sup> *Daily Press Briefing*, U.S. DEP’T OF STATE (July 27, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/07/245313.htm>.

<sup>18</sup> *Cook Press Briefing*, *supra* note 3.

<sup>19</sup> *Daily Press Briefing*, U.S. DEP’T OF STATE (June 29, 2015), at <http://www.state.gov/r/pa/prs/dpb/2015/06/244480.htm>.

<sup>20</sup> Brandon Turbeville, *NATO’s Dream Coming True—Turkey Pushes for Syria No-Fly Zone; US Approves*, GLOBAL RESEARCH (Can.) (Oct. 3, 2014), at <http://www.globalresearch.ca/natos-dream-coming-true-turkey-pushes-for-syria-no-fly-zone-us-approves/5406399> (quoting a statement by Syrian Foreign Minister Waleed Muallem in an interview with Lebanese television outlet Al-Meyadin). *See also* Manal Ismael, *Foreign Ministry: Syria Categorically Rejects Setting Up Buffer Zone on its Lands*, SYRIAN ARAB NEWS AGENCY (Oct. 16, 2014), at <http://sana.sy/en/?p=15432> (citing letters from Syria’s Ministry of Foreign Affairs and Expatriates to the UN Secretary-General and Security Council, stating that “the Syrian government categorically rejects setting up any buffer or ‘safe’ zones” and will take “all necessary measures to preserve its national sovereignty, unity and territorial integrity”).

<sup>21</sup> *See Syria Safe Zone Would Require “Combat Mission”*, THE DAILY STAR (Leb.) (May 6, 2015, 8:11 PM), at <http://www.dailystar.com.lb/News/Middle-East/2015/May-06/297071-syria-safe-zone-would-require-combat-mission-us.ashx> (quoting U.S. Secretary of Defense Ashton Carter stating that “[w]e would need to fight to create such a space and then fight to keep such a space . . .”).

<sup>22</sup> O’Toole, *supra* note 11.

<sup>23</sup> Serkan Demirtaş, *UN to Decide on No-Fly Zone on Turkish-Syrian Border: Russian Envoy*, HURRIYET DAILY NEWS (Turk.) (Sept. 22, 2014), at <http://www.hurriyetdailynews.com/un-to-decide-on-no-fly-zone-on-turkish-syrian-border-russian-envoy.aspx?PageID=238&NID=72007&NewsCatID=359>.

<sup>24</sup> Although not authorizing the use of force, the Security Council has adopted resolutions condemning the violence in Syria, demanding compliance with international law, and declaring obligations to facilitate humanitarian access to people in need. *See* S.C. Res. 2139 (Feb. 22, 2014); S.C. Res. 2165 (July 14, 2014); S.C. Res. 2191 (Dec. 17, 2014).

<sup>25</sup> Demirtaş, *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> *See* Ashley Deeks, *A “Buffer Zone” Inside Syria, and Its Complications*, LAWFARE (Dec. 5, 2014, 6:34 PM), at <https://www.lawfareblog.com/buffer-zone-inside-syria-and-its-complications> (distinguishing the legal implications of a buffer zone created to expel ISIL—which may fall under the banner of self-defense—and a buffer zone created to protect Syrian civilians—which may rely on more controversial humanitarian justifications).

<sup>28</sup> Both the United States and Turkey have relied on a theory of self-defense under Article 51 of the UN Charter to justify air strikes against ISIL in Syria. *See* Chargé d’affaires a.i. of the Permanent Mission of Turk. to the U.N., Letter dated 24 July 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015), available at <http://>

In addition to the legal hurdles to establishing a safe zone, humanitarian and political concerns have also been expressed. UN Aid Chief Stephen O'Brien warned Turkey against calling any planned buffer a "safe zone" absent a guarantee of protection for civilians who might return.<sup>29</sup> Commentators have also speculated that Turkey's cooperation in the fight against ISIL has merely provided "cover" for it to attack Kurdish rebels along the Syrian border.<sup>30</sup> When questioned about Turkish airstrikes against both ISIL and Kurdish targets following the Incirlik deal, a U.S. State Department spokesperson dismissed the simultaneous timing of the attacks as "coincidence."<sup>31</sup> U.S. officials have consistently defended Turkey's right to defense of its territorial integrity against hostile Kurdish separatists,<sup>32</sup> while simultaneously supporting Kurdish forces in Syria that have at least some connection to Kurdish militants in Turkey.<sup>33</sup>

So far, President Barack Obama's administration has continued to reject proposals for a safe zone. At a press conference in October 2015, Obama described them as "half-baked ideas . . . [that] downplay the challenges involved in this situation."<sup>34</sup> He suggested that hard questions needed to be answered before endorsing such a proposal, asking "specifically, precisely, what exactly would you do, and how would you fund it, and how would you sustain it . . . . [T]ypically, what you get is a bunch of mumbo jumbo."<sup>35</sup> Despite this skepticism, press reports suggest the White House may be keeping the possibility of a safe zone on the table.<sup>36</sup>

[www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2015/563](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/563); Permanent Rep. of the U.S. to the U.N., Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/695](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/695).

<sup>29</sup> Michelle Nichols, *United Nations Warns Turkey against Calling Buffer a "Safe Zone"*, REUTERS (July 28, 2015), at <http://www.reuters.com/article/2015/07/28/us-mideast-crisis-turkey-un-idUSKCN0Q225Z20150728> ("What you don't want to do is call something a safe zone, people flee to it, but it hasn't got sufficient protection.")

<sup>30</sup> Eric Cunningham, *Turkey is Waging a Two-Front War. Some Worry It's Only Making Things Worse*, WASH. POST, Aug. 9, 2015, at [https://www.washingtonpost.com/world/middle\\_east/turkey-is-waging-a-two-front-war-some-worry-its-only-making-things-worse/2015/08/05/e68c47fd-9da1-4ab4-b64f-cf5765493e02\\_story.html](https://www.washingtonpost.com/world/middle_east/turkey-is-waging-a-two-front-war-some-worry-its-only-making-things-worse/2015/08/05/e68c47fd-9da1-4ab4-b64f-cf5765493e02_story.html).

<sup>31</sup> *Daily Press Briefing*, *supra* note 17.

<sup>32</sup> *Daily Press Briefing*, U.S. DEP'T OF STATE (Aug. 3, 2015), at <http://www.state.gov/t/pa/prs/dpb/2015/08/245625.htm>.

<sup>33</sup> See *Department of Defense Press Briefing with Brigadier General Kevin J. Killea, Chief of Staff, Combined Joint Task Force-Operation Inherent Resolve via DVIDS from Southwest Asia on Operation Inherent Resolve*, U.S. DEP'T OF DEFENSE (Aug. 21, 2015), at <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/614489/> department-of-defense-press-briefing-with-brigadier-general-kevin-j-killea-chie.

<sup>34</sup> The President's News Conference, 2015 DAILY COMP. PRES. DOC. 686 (Oct. 2, 2015).

<sup>35</sup> *Id.*

<sup>36</sup> Mark Mazzetti & Peter Baker, *U.S. is Debating Ways to Shield Syrian Civilians*, N.Y. TIMES, Oct. 22, 2015, at A1.