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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

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

*United States Abstains on Security Council Resolution Criticizing Israeli Settlements*  
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On December 23, 2016, the United States abstained from voting on a United Nations Security Council resolution that condemned Israeli settlement construction, thereby allowing the resolution to be adopted by a vote of 14–0.<sup>1</sup> Israel’s response was swift and disapproving. The text of Resolution 2334 follows:

*The Security Council,*

...

*Reaffirming* the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and recalling the advisory opinion rendered on 9 July 2004 by the International Court of Justice,

*Condemning* all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, inter alia, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions,

*Expressing* grave concern that continuing Israeli settlement activities are dangerously imperilling the viability of the two-State solution based on the 1967 lines,

*Recalling* the obligation under the Quartet Roadmap,<sup>2</sup> endorsed by its resolution 1515 (2003), for a freeze by Israel of all settlement activity, including “natural growth”, and the dismantlement of all settlement outposts erected since March 2001,

*Recalling* also the obligation under the Quartet roadmap for the Palestinian Authority Security Forces to maintain effective operations aimed at confronting all those engaged in terror and dismantling terrorist capabilities, including the confiscation of illegal weapons,

*Condemning* all acts of violence against civilians, including acts of terror, as well as all acts of provocation, incitement and destruction,

...

*Stressing* that the status quo is not sustainable and that significant steps, consistent with the transition contemplated by prior agreements, are urgently needed in order to (i) stabilize the situation and to reverse negative trends on the ground, which are steadily eroding the two-State solution and entrenching a one-State reality, and (ii) to create the conditions for successful final status negotiations and for advancing the two-State solution through those negotiations and on the ground,

1. *Reaffirms* that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;

<sup>1</sup> UN SCOR, 7853rd mtg., UN Doc. S/PV.7853, at 4 (Dec. 23, 2016); SC Res. 2334, UN Doc. S/RES/2334 (Dec. 23, 2016) (adopted by a vote of 14–0–1).

<sup>2</sup> [Editors’ note: The “Quartet Roadmap” refers to a plan developed in 2003 by the United States, the European Union, the Russian Federation, and the UN secretary-general to advance the 1991 Madrid Conference process for peacefully resolving the Israeli-Palestinian conflict. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: ICJ Advisory Opinion on Israeli Security Fence*, 98 AJIL 349, 361 (2004).]

2. *Reiterates* its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard;
  3. *Underlines* that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations;
  4. *Stresses* that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution, and calls for affirmative steps to be taken immediately to reverse the negative trends on the ground that are imperiling the two-State solution;
  5. *Calls* upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967;
  6. *Calls for* immediate steps to prevent all acts of violence against civilians, including acts of terror, as well as all acts of provocation and destruction, calls for accountability in this regard, and calls for compliance with obligations under international law for the strengthening of ongoing efforts to combat terrorism, including through existing security coordination, and to clearly condemn all acts of terrorism;
  7. *Calls upon* both parties to act on the basis of international law, including international humanitarian law, and their previous agreements and obligations, to observe calm and restraint, and to refrain from provocative actions, incitement and inflammatory rhetoric, with the aim, inter alia, of de-escalating the situation on the ground, rebuilding trust and confidence, demonstrating through policies and actions a genuine commitment to the two-State solution, and creating the conditions necessary for promoting peace;
- ....

In an address to the Security Council after the vote, U.S. Permanent Representative to the UN Samantha Power said the United States' abstention was consistent with long-standing, bipartisan U.S. policy toward Israel and the Middle East. She quoted a 1982 statement by President Ronald Reagan that "underscore[d] the United States' deep and long-standing commitment to achieving a comprehensive and lasting peace . . ." and "highlight[ed] the United States' long-standing position that Israeli settlement activity in territories occupied in 1967 undermines Israel's security, harms the viability of a negotiated two-State outcome and erodes prospects for peace and stability in the region."<sup>3</sup>

Power also commented, however, that the U.S. decision had "not [been] straightforward," because Israel is "treated differently from other Member States" in the United Nations, as evidenced by the number of Israel-specific resolutions adopted by the General Assembly and Human Rights Council. Observing that the "Obama Administration has worked tirelessly to fight for Israel's right simply to be treated just like any other country,"<sup>4</sup> Power explained:

<sup>3</sup> UN SCOR, *supra* note 1, at 5.

<sup>4</sup> *Id.*

It is because this forum too often continues to be biased against Israel, because there are important issues that are not sufficiently addressed in the resolution and because the United States does not agree with every word in this text that the United States did not vote in favor of the resolution. But it is because the resolution reflects the facts on the ground and is consistent with United States policy across Republican and Democratic administrations throughout the history of the State of Israel that the United States did not veto it.<sup>5</sup>

Power took particular care to distinguish Resolution 2334 from a similar resolution that had been vetoed by the United States in 2011.<sup>6</sup> Whereas the vetoed resolution “focused exclusively on the settlements,” Power explained, Resolution 2334 “condemns violence, terrorism and incitement, which also pose extremely grave risks to the two-State solution.”<sup>7</sup>

Finally, Power emphasized that the United States saw no tension between its increasing criticisms of the “settlement problem” and its long-term alliance with Israel. On the first point, she cited the increasing numbers of settlers (an additional 355,000 since the 1993 Oslo Accords) as well as recent statements by the Israeli prime minister describing his government as “more committed to settlements than any in Israel’s history.”<sup>8</sup> The settlements, she said, “put the two-State solution at risk and threaten Israel’s stated objective to remain both a Jewish State and a democracy.”<sup>9</sup> On the second point, Power underscored that U.S. criticism of the settlements would not compromise long-standing United States financial and military support of Israel. She concluded: “Our vote today does not in any way diminish the United States’ steadfast and unparalleled commitment to the security of Israel, the only democracy in the Middle East.”<sup>10</sup>

At a speech presented at the State Department several days after the Security Council adopted Resolution 2334, Secretary of State John Kerry offered extended remarks on Resolution 2334 and the Israeli-Palestinian conflict. Kerry emphasized that the resolution was consistent with established international law and long-standing U.S. policy. Addressing the resolution’s conclusion that Israeli settlements are unlawful, he said:

[T]his resolution simply reaffirms statements made by the Security Council on the legality of settlements over several decades. It does not break new ground. In 1978, the State Department Legal Adviser advised the Congress on his conclusion that . . . the Israeli Government’s program of establishing civilian settlements in the occupied territory is inconsistent with international law, and we see no change since then to affect that fundamental conclusion.<sup>11</sup>

In that 1978 opinion, written during the Carter administration, the State Department legal adviser noted that Israel had established some seventy-five civilian settlements in territories captured during the 1967 war:

<sup>5</sup> *Id.* at 6.

<sup>6</sup> SC Draft Res., UN Doc. S/2011/24 (Feb. 18, 2011); UN SCOR, 6484th mtg. at 5, UN Doc. S/PV.6484 (Feb. 18, 2011) (Ambassador Susan Rice explained the U.S. veto: “While we agree with our fellow Council members—and indeed with the wider world—about the folly and illegitimacy of continued Israeli settlement activity, we think it unwise for this Council to attempt to resolve the core issues that divide Israelis and Palestinians. Therefore, regrettably, we have opposed this draft resolution.”); see J.R. Crook, *Contemporary Practice of the United States*, 105 AJIL 333, 345–47 (2011).

<sup>7</sup> UN SCOR, *supra* note 1, at 7.

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

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

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

<sup>11</sup> U.S. Dep’t of State Press Release, John Kerry, Remarks on Middle East Peace (Dec. 28, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/12/266119.htm> [hereinafter Dec. 28, 2016 Kerry Remarks].

On the basis of the available information, the civilian settlements in the territories occupied by Israel do not appear to be consistent with the[] limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to provide orderly government of the territories and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation.<sup>12</sup>

The 1978 legal adviser's opinion also addressed Israel's obligations as a party to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.<sup>13</sup> Article 49, paragraph 6 of that treaty provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."<sup>14</sup> The legal adviser's opinion concluded that the Israeli civilian settlements "appear to constitute" a transfer within the scope of that paragraph.<sup>15</sup> Although the opinion has never been formally withdrawn, not all successive administrations have endorsed it. While critical of Israeli settlements, President Reagan had objected to describing them as illegal.<sup>16</sup> And before its abstention to Resolution 2334, the Obama administration's position on the consistency of the settlements with international law had been unclear.<sup>17</sup>

In his speech on Resolution 2334, Kerry also responded to criticism of the resolution for describing East Jerusalem as "occupied territory." Kerry emphasized continuity with prior resolutions:

[T]o be clear, there was absolutely nothing new in last week's resolution on that issue. It was one of a long line of Security Council resolutions that included East Jerusalem as part of the territories occupied by Israel in 1967, and that includes resolutions passed by the Security Council under President Reagan and President George H.W. Bush. And remember that every U.S. administration since 1967, along with the entire international community, has recognized East Jerusalem as among the territories that Israel occupied in the Six-Day War.<sup>18</sup>

Kerry closed his discussion of Resolution 2334 by stating:

<sup>12</sup> Letter from the State Department Legal Adviser Concerning Legality of Israeli Settlements in the Occupied Territories, Apr. 21, 1978, reproduced in 17 ILM 777, 778 (1978) [hereinafter 1978 Opinion].

<sup>13</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516 [hereinafter Fourth Geneva Convention]. See also Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War* (in this issue of *AJIL*).

<sup>14</sup> Fourth Geneva Convention, *supra* note 13, Art. 49, para. 6.

<sup>15</sup> 1978 Opinion, *supra* note 12, at 779.

<sup>16</sup> Glenn Kessler, *1979 State Dept. Legal Opinion Raises New Questions About Israeli Settlements*, WASH. POST (June 17, 2009), at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/16/AR2009061603285.html>; Bernard Gwertzman, *State Department; About the West Bank and the Emperor's Clothes*, N.Y. TIMES (Aug. 25, 1983), at <http://www.nytimes.com/1983/08/25/us/state-department-about-the-west-bank-and-the-emperor-s-clothes.html> (In a meeting with reporters two weeks after his inauguration, Reagan told them: "As to the West Bank, I believe the settlements there—I disagreed when the previous Administration referred to them as illegal—they're not illegal." He added, however, that the Israeli effort to continue to build new settlements was "unnecessarily provocative.").

<sup>17</sup> During the summer of 2009, the State Department spokesperson declined to say whether the administration stood by the 1978 opinion. Kessler, *supra* note 16. Likewise, when the 2011 Security Council resolution on Israeli settlements came up for a vote, the United States had not yet declared settlement building illegal. See David E. Sanger, *U.S. Tries to Head Off Vote Against Israeli Settlements*, N.Y. TIMES (Feb. 18, 2011), at <http://www.nytimes.com/2011/02/18/world/middleeast/18israel.html>; see also Crook, *supra* note 6, at 346 (noting press reports suggested that the United States would have agreed to calling the settlements "illegitimate," but not "illegal").

<sup>18</sup> Dec. 28, 2016 Kerry Remarks, *supra* note 11.

In the end, we did not agree with every word in this resolution. There are important issues that are not sufficiently addressed or even addressed at all. But we could not in good conscience veto a resolution that condemns violence and incitement and reiterates what has been for a long time the overwhelming consensus and international view on settlements and calls for the parties to start taking constructive steps to advance the two-state solution on the ground.<sup>19</sup>

Israel objected fiercely to the resolution. Its permanent representative to the United Nations called on the Security Council to

put an end to the bias and obsession with Israel, stop such endless attempts to blame all the problems of the Middle East on the one true democracy in the region and make clear to the Palestinians that the only way forward is to end the incitement and terror and enter into direct and meaningful negotiations with Israel.<sup>20</sup>

Prime Minister Benjamin Netanyahu's office said that "[t]he Obama administration had 'not only failed to protect Israel against this gang-up at the UN, it ha[d] colluded with it behind the scenes.'"<sup>21</sup> Netanyahu emphasized his hope that things would be different under the incoming Trump administration, saying that he looked forward to working with the president-elect "to negate the harmful effects of this absurd resolution."<sup>22</sup> Israel also retaliated against several of the resolution's co-sponsors, recalling its ambassadors to New Zealand and Senegal and canceling the Senegalese foreign minister's planned visit to Israel.<sup>23</sup> Israel also vowed to cut aid to Senegal,<sup>24</sup> and Prime Minister Netanyahu reported that he "already instructed to stop about 30 m shekels in funding to five UN bodies that are especially hostile to Israel."<sup>25</sup>

The Palestinian representative to the United Nations, by contrast, praised the resolution, saying it reflected "long-standing global consensus on the matter".<sup>26</sup>

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

<sup>20</sup> UN SCOR, *supra* note 1, at 15.

<sup>21</sup> Ruth Eglash, *Netanyahu Summons U.S. Envoy over Anti-Settlement Resolution Adopted by U.N.*, WASH. POST (Dec. 25, 2016), at [https://www.washingtonpost.com/world/netanyahu-reprimands-nations-that-supported-un-settlement-resolution/2016/12/25/0519946f-3cdc-4e0c-96b3-a9926750dae0\\_story.html](https://www.washingtonpost.com/world/netanyahu-reprimands-nations-that-supported-un-settlement-resolution/2016/12/25/0519946f-3cdc-4e0c-96b3-a9926750dae0_story.html). The Obama administration denied the accusation of collusion. The press quoted a senior Obama administration official as saying:

To be clear: from the start, this was an Egyptian resolution. The Egyptians authored it, circulated it, and submitted it for a vote on Wednesday evening before asking for a delay and subsequently removing their sponsorship. Contrary to some claims, the administration was not involved in formulating the resolution nor have we promoted it.

Stephen Collinson, David Wright & Elise Labott, *US Abstains as UN Demands End to Israeli Settlements*, CNN.com (Dec. 24, 2016), at <http://edition.cnn.com/2016/12/23/politics/israel-official-rips-obama-un-settlements>.

<sup>22</sup> Ruth Eglash & Carol Morello, *Netanyahu Blasts U.N., Obama over West Bank Settlements Resolution*, WASH. POST (Dec. 24, 2016), at [https://www.washingtonpost.com/world/netanyahu-calls-un-resolution-on-settlements-shameful/2016/12/23/2d45fbac-c94cf-1e6-bf4b-2c064d32a4bf\\_story.html](https://www.washingtonpost.com/world/netanyahu-calls-un-resolution-on-settlements-shameful/2016/12/23/2d45fbac-c94cf-1e6-bf4b-2c064d32a4bf_story.html). The permanent representative had offered similar criticism. Collinson, *supra* note 21 ("It was to be expected that Israel's greatest ally would act in accordance with the values that we share and that they would have vetoed this disgraceful resolution. I have no doubt that the new U.S. administration and the incoming UN Secretary General will usher in a new era in terms of the UN's relationship with Israel.")

<sup>23</sup> Peter Beaumont, *Israel Rejects 'Shameful' UN Resolution amid Criticism of Netanyahu*, GUARDIAN (Dec. 24, 2016), at <https://www.theguardian.com/world/2016/dec/24/israel-rejects-shameful-un-resolution-amid-criticism-of-netanyahu>.

<sup>24</sup> Eglash, *supra* note 21.

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

<sup>26</sup> UN SCOR, *supra* note 1, at 16.

Israeli settlements in the occupied Palestinian territory, including East Jerusalem, the eternal capital of the State of Palestine, have no legal validity, constitute flagrant breaches under international law, namely the Fourth Geneva Convention, and constitute a major obstacle to peace, gravely diminishing the viability of the two-State solution based on the 4 June 1967 borders and the possibility of realizing it.<sup>27</sup>

He dismissed Israel's claims of being "bashed" and said the resolution "may rightly be seen as a last attempt to preserve the two-state solution" that, for many, "seems virtually impossible at this point as Israel, the occupying Power, has been permitted to entrench its occupation and a one-State reality with absolute impunity, at times even being rewarded for its violations and intransigence."<sup>28</sup>

Domestically, the Obama administration faced criticism from Republicans, including House Speaker Paul Ryan,<sup>29</sup> Senator John McCain,<sup>30</sup> and Senator Lindsey Graham,<sup>31</sup> as well as from some Democrats, including Senate Minority Leader Chuck Schumer.<sup>32</sup> Then-President-elect Donald Trump denounced the resolution and criticized the decision not to veto it. He tweeted: "As to the U.N., things will be different after Jan. 20th."<sup>33</sup> He described the resolution as a "big loss . . . for Israel in the United Nations [that] will make it much harder to negotiate peace."<sup>34</sup>

Since Trump's inauguration, however, his administration seems to have taken a somewhat more critical view of settlements. In a February 2 statement, Press Secretary Sean Spicer said: "While we don't believe the existence of settlements is an impediment to peace, the construction of new settlements or the expansion of existing settlements beyond their current borders may not be helpful in achieving that goal."<sup>35</sup> Trump seemed to go further on February 10, reportedly telling an Israeli newspaper that settlements "don't help the process" and that "he did not believe that 'going forward with these settlements is a good thing for peace.'"<sup>36</sup> During his first meeting with Netanyahu as president, Trump said at their joint press conference on February 15:

I reject unfair and one-sided actions against Israel at the United Nations—just treated Israel, in my opinion, very, very unfairly—or other international forums, as well as boycotts that target Israel . . . . As far as settlements, I'd like to see [Israel] hold back on settlements for a little bit. We'll work something out. But I would like to see a deal be made. I think a deal will be made.<sup>37</sup>

<sup>27</sup> *Id.*

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

<sup>29</sup> *House Speaker Ryan, Senator McCain Condemn U.S. Abstention on U.N.'s Israel Vote*, REUTERS (Dec. 23, 2016), at <http://www.reuters.com/article/us-israel-palestinians-un-ryan-idUSKBN14C220>.

<sup>30</sup> *Id.*

<sup>31</sup> Eglash, *supra* note 21.

<sup>32</sup> Jeremy Berke, *Democrats Scorch Obama over UN Vote Condemning Israeli Settlements*, BUSINESS INSIDER (Dec. 23, 2016), at <http://www.businessinsider.com/un-israel-vote-obama-democrats-2016-12>.

<sup>33</sup> Rick Gladstone, *Trump and U.N. Leader Discuss 'Cooperation'*, N.Y. TIMES (Jan. 4, 2017), at <https://www.nytimes.com/2017/01/04/world/americas/united-nations-donald-trump-antonio-guterres.html>.

<sup>34</sup> Collinson, *supra* note 21.

<sup>35</sup> White House Press Release, Statement by the Press Secretary (Feb. 2, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/02/statement-press-secretary>.

<sup>36</sup> Peter Baker, *Trump Adopts a Harder Line on Israeli Settlements*, N.Y. TIMES (Feb. 10, 2017), at <https://www.nytimes.com/2017/02/10/world/middleeast/trump-adopts-a-harder-line-on-israeli-settlements.html>.

<sup>37</sup> White House Press Release, Remarks by President Trump and Prime Minister Netanyahu of Israel in Joint Press Conference (Feb. 15, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/15/remarks-president-trump-and-prime-minister-netanyahu-israel-joint-press>.



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

*United States Sanctions Russian Individuals and Entities After Accusing Russian Government of Interfering with U.S. Election Process; Congressional Committees and Intelligence and Law Enforcement Agencies Continue to Investigate President Trump's Connections to Russian Officials*

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On October 7, 2016, following months of tense interactions between the United States and Russia regarding hacks of high-profile U.S. political organizations, the Department of Homeland Security and Office of the Director of National Intelligence (DNI) issued a joint statement formally accusing Russia of using cyberattacks to influence the U.S. election process.<sup>1</sup> Reports suggest that Russia intended to use the hacks and subsequent information dump to help then-candidate Donald Trump win the presidential election.<sup>2</sup> In response to the cyberattacks, the United States took steps against several Russian individuals and entities.<sup>3</sup> The Obama administration also initiated an extensive review of Russian involvement in the election, which eventually reaffirmed key intelligence conclusions regarding the scope of Russian interference.<sup>4</sup> Several congressional committees have also initiated investigations, all of which are still ongoing as of the date of publication.<sup>5</sup>

Several incidents appeared to trigger the U.S. accusation. The first, reported in June 2016, occurred when hackers breached the Democratic National Committee (DNC) computer network and gained access to its entire database of research on Donald Trump, who was by that time the presumptive Republican presidential nominee.<sup>6</sup> A private cybersecurity incident response group, CrowdStrike, investigated the breach at the DNC's request. CrowdStrike concluded that the hacks were perpetrated by two entities—known as “Cozy Bear” and “Fancy Bear”<sup>7</sup>—each working independently on behalf of a different Russian intelligence service.<sup>8</sup>

<sup>1</sup> The statement is described in more detail below. See *infra* text at notes 33–34.

<sup>2</sup> See *infra* notes 52–56 and corresponding text.

<sup>3</sup> See *infra* notes 89–97 and corresponding text.

<sup>4</sup> See *infra* notes 66–71, 117–27 and corresponding text.

<sup>5</sup> See *infra* notes 72–78 and corresponding text.

<sup>6</sup> Ellen Nakashima, *Russian Government Hackers Penetrated DNC, Stole Opposition Research on Trump*, WASH. POST (June 14, 2016), at [https://www.washingtonpost.com/world/national-security/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0\\_story.html](https://www.washingtonpost.com/world/national-security/russian-government-hackers-penetrated-dnc-stole-opposition-research-on-trump/2016/06/14/cf006cb4-316e-11e6-8ff7-7b6c1998b7a0_story.html). The DNC had apparently become aware of the hack in late April 2016. See *id.*

<sup>7</sup> See Dmitri Alperovitch, *Bears in the Midst: Intrusion into the Democratic National Committee*, CROWDSTRIKE (June 15, 2016), at <https://www.crowdstrike.com/blog/bears-midst-intrusion-democratic-national-committee>. According to CrowdStrike, Fancy Bear had infiltrated the network in April 2016, and the DNC discovered this breach. See Nakashima, *supra* note 6. Cozy Bear, on the other hand, gained access to the network in summer 2015, and had been monitoring the Democratic National Committee's (DNC) email and chat communications since that time. See *id.*

<sup>8</sup> Alperovitch, *supra* note 7. According to CrowdStrike, Russia's three main intelligence services have a “highly adversarial relationship” with one another. They

have overlapping areas of responsibility, but also rarely share intelligence and even occasionally steal sources from each other and compromise operations. Thus, it is not surprising to see them engage in intrusions against the same victim, even when it may be a waste of resources and lead to the discovery and potential compromise of mutual operations.

*Id.*

Later that day, an entity named “Guccifer 2.0”—later identified by U.S. intelligence officials as an agent of Russia’s Main Intelligence Directorate (GRU)<sup>9</sup>—declared itself to be the “lone hacker” of the DNC’s network, posting several of the purportedly stolen documents.<sup>10</sup> In response, CrowdStrike asserted that “these claims do nothing to lessen our findings relating to the Russian government’s involvement.”<sup>11</sup>

The White House and State Department both declined to provide details about any investigation.<sup>12</sup> In contrast, the Kremlin’s spokesman, Dmitry Peskov, said: “I completely rule out a possibility that the [Russian] government or the government bodies have been involved in this.”<sup>13</sup> An adviser to Russian President Vladimir Putin on Internet issues added:

Usually these kinds of leaks take place not because hackers broke in, but . . . because someone simply forgot the password or set the simple password 123456. . . . [I]t’s always simpler to explain this away as the intrigues of enemies, rather than one’s own incompetence.<sup>14</sup>

The next incident occurred in July 2016, when WikiLeaks released nearly twenty thousand emails from the DNC, many of them including embarrassing information about the inner workings of the DNC.<sup>15</sup> It was unclear how WikiLeaks had obtained the emails, but some of them had earlier been published by Guccifer 2.0.<sup>16</sup> According to press reports, U.S.

<sup>9</sup> Charlie Savage & Nicole Perlroth, *Is D.N.C. E-mail Hacker a Person or a Russian Front? Experts Aren’t Sure*, N.Y. TIMES (July 27, 2016), at <http://www.nytimes.com/2016/07/28/us/politics/is-dnc-email-hacker-a-person-or-a-russian-front-experts-arent-sure.html> (discussing Guccifer 2.0’s connection with Russia’s Main Intelligence Directorate (GRU)). A subsequent media report indicated that Guccifer 2.0 was one of two “outlets” created by Fancy Bear, a “G.R.U.-controlled unit,” in order to make the hacked documents public. See David E. Sanger & Scott Shane, *Russian Hackers Acted to Aid Trump in Election, U.S. Says*, N.Y. TIMES (Dec. 9, 2016), at <https://www.nytimes.com/2016/12/09/us/obama-russia-election-hack.html>.

<sup>10</sup> Guccifer2, *Guccifer 2.0 DNC’s Servers Hacked by a Lone Hacker*, GUCCIFER 2.0 (June 15, 2016), at <https://guccifer2.wordpress.com/2016/06/15/dnc/>.

<sup>11</sup> Alperovitch, *supra* note 7.

<sup>12</sup> U.S. Dep’t of State, Daily Press Briefing (June 14, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/06/258467.htm> (“I[’ve] just seen these recent press reports. I don’t have anything to corroborate them. I’d refer you to the Democratic National Committee and to law enforcement authorities to speak to . . . these reports.”); White House Press Release, Press Briefing by Press Secretary Josh Earnest (June 15, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/06/15/press-briefing-press-secretary-josh-earnest-61516> (“[F]or any sort of discussion about a federal government response, I’d refer you to the FBI. . . . And I’m just not able to comment on this in much detail because I don’t weigh into even potential law enforcement or international security investigations.”).

<sup>13</sup> Nakashima, *Russian Government*, *supra* note 6.

<sup>14</sup> Andrew Roth, *Russia Denies DNC Hack and Says Maybe Someone “Forgot the Password,”* WASH. POST (June 15, 2016), at <https://www.washingtonpost.com/news/worldviews/wp/2016/06/15/russias-unusual-response-to-charges-it-hacked-research-on-trump>.

<sup>15</sup> See Tom Hamburger & Karen Tumulty, *WikiLeaks Releases Thousands of Documents About Clinton and Internal Deliberations*, WASH. POST (July 22, 2016), at <https://www.washingtonpost.com/news/post-politics/wp/2016/07/22/on-eve-of-democratic-convention-wikileaks-releases-thousands-of-documents-about-clinton-the-campaign-and-internal-deliberations>.

<sup>16</sup> David E. Sanger & Eric Schmitt, *Spy Agency Consensus Grows That Russia Hacked D.N.C.*, N.Y. TIMES (July 26, 2016), at <http://www.nytimes.com/2016/07/27/us/politics/spy-agency-consensus-grows-that-russia-hacked-dnc.html>. The founder of WikiLeaks, Julian Assange, has claimed that the “Russian government is not the source.” Adam Entous, Ellen Nakashima & Greg Miller, *Secret CIA Assessment Says Russia Was Trying to Help Trump Win White House*, WASH. POST (Dec. 9, 2016), at [https://www.washingtonpost.com/world/national-security/obama-orders-review-of-russian-hacking-during-presidential-campaign/2016/12/09/31d6b300-be2a-11e6-94ac-3d324840106c\\_story.html](https://www.washingtonpost.com/world/national-security/obama-orders-review-of-russian-hacking-during-presidential-campaign/2016/12/09/31d6b300-be2a-11e6-94ac-3d324840106c_story.html); see also *infra* note 109 and corresponding text. Yet, according to media reports, intelligence agencies identified individuals connected to the Russian government who provided WikiLeaks with the hacked documents. See Entous, Nakashima & Miller, *supra*.

intelligence agencies had “high confidence” that the Russian government was responsible for the DNC breach,<sup>17</sup> although they were less certain whether the exploit was designed to influence the election or was more routine cyberespionage.<sup>18</sup>

When asked whether Russia wanted to interfere with the election, President Obama acknowledged in July that “experts have attributed [the DNC hack] to the Russians,” but then noted that “[a]nything’s possible.”<sup>19</sup> Secretary Kerry stated that he had “raise[d] the issue of the DNC” when meeting with Russian Foreign Minister Sergey Lavrov, but said that “before we draw any conclusions in terms of what happened or who is behind it it’s very important that whatever public information is put out is based on fact. . . . [A]nd we will continue to work to see precisely what those facts are.”<sup>20</sup> White House Press Secretary Josh Earnest reiterated that the White House had not yet adopted an official position:

There’s plenty of speculation out there. I recognize there’s been an analysis done that has indicated that the Russians are likely to blame, but that is not a conclusion that the FBI has chosen to publicize at this point. They’re conducting an ongoing investigation, and so I’ll let them speak to whether or not they’ve made such a determination, and I’ll let them speak to whether they believe it’s appropriate to go public with such a determination.<sup>21</sup>

Press Secretary Earnest later emphasized, in September 2016, that the FBI was

cognizant of the fact that as soon as they make a declaration like that most people are going to understandably be interested in seeing that evidence. And some of that evidence may not be something that we want to show. We don’t necessarily want to reveal sources and methods that the FBI uses to conduct these kinds of investigations. . . .

The other thing . . . that’s relevant here is the United States also may be in a position where we want to respond but not announce it in advance, or maybe not announce it ever.<sup>22</sup>

Russian officials continued to deny any role in releasing the DNC’s emails. Asked what he had told Secretary Kerry, Foreign Minister Lavrov replied: “Well, I don’t want to use four-letter words.”<sup>23</sup> Likewise, Deputy Foreign Minister Sergey Ryabkov asserted: “Only spin doctors who see conspiracy theories everywhere could imagine that Russia is trying to push this election to any specific candidate by hacking into some servers. In reality, this is simply impossible.”<sup>24</sup> Putin made a similar statement regarding the DNC incident:

<sup>17</sup> Sanger & Schmitt, *supra* note 16.

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

<sup>19</sup> *President Obama on Russian DNC Hack Involvement: “Anything’s Possible,”* NBC NEWS (July 26, 2016), at <http://www.nbcnews.com/nightly-news/video/president-obama-on-russian-dnc-hack-involvement-anything-s-possible-732675139636>.

<sup>20</sup> U.S. Dep’t of State Press Release, John Kerry, Press Availability in Vientiane, Laos (July 26, 2016), *available at* <https://2009-2017.state.gov/secretary/remarks/2016/07/260475.htm>.

<sup>21</sup> White House Press Release, Press Briefing by Press Secretary Josh Earnest (July 28, 2016), at <https://obama-whitehouse.archives.gov/the-press-office/2016/07/28/press-briefing-press-secretary-josh-earnest-72816>.

<sup>22</sup> White House Press Release, Press Briefing by Press Secretary Josh Earnest (Sept. 15, 2016), at <https://obama-whitehouse.archives.gov/the-press-office/2016/09/15/press-briefing-press-secretary-josh-earnest-91516>.

<sup>23</sup> Ministry of Foreign Aff. of the Russ. Fed’n Press Release, Foreign Minister Sergey Lavrov’s Answer to a Media Question Before the Meeting with the US Secretary of State John Kerry, Vientiane (July 26, 2016), at [http://www.mid.ru/en/web/guest/meropriyatiya\\_s\\_uchastiem\\_ministral-/asset\\_publisher/xK1BhB2bUjd3/content/id/2370461](http://www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministral-/asset_publisher/xK1BhB2bUjd3/content/id/2370461).

<sup>24</sup> Ministry of Foreign Aff. of the Russ. Fed’n Press Release, Deputy Foreign Minister Sergey Ryabkov Interviewed by Mezhdunarodnaya Zhizn Magazine (Aug. 10, 2016, 7:44 PM), at [http://www.mid.ru/en/web/guest/nota-bene/-/asset\\_publisher/dx7DsH1WAM6w/content/id/2386924](http://www.mid.ru/en/web/guest/nota-bene/-/asset_publisher/dx7DsH1WAM6w/content/id/2386924).

I know absolutely nothing about it, and Russia has never done anything like this at the State level. Frankly speaking, I could never even imagine that such information would be of interest to the American public or that the campaign headquarters of one of the candidates—in this case, Mrs. Clinton—apparently worked for her, rather than for all the Democratic Party candidates in an equal manner. I could never assume that anybody would find it interesting. Thus, in view of what I have said, we could not officially hack it.<sup>25</sup>

Shortly thereafter, media reports indicated that the FBI was also investigating a cyberattack against the Democratic Congressional Campaign Committee (DCCC).<sup>26</sup> The intrusion was reportedly initiated by Fancy Bear, which was apparently working for the GRU.<sup>27</sup> Given that entity's alleged role in the prior DNC breach,<sup>28</sup> one administration official stated that the FBI was treating the DNC and DCCC breaches as a single investigation.<sup>29</sup> As with the DNC breach, however, Kremlin spokesman Peskov denied that the Russian government was involved, stating that “[w]e don’t see the point any more in repeating yet again that this is silliness.”<sup>30</sup>

A third incident heightened U.S. fears that Russia was attempting to influence the presidential election directly. On August 29, a media report stated that hackers had targeted voter registration systems in Illinois and Arizona.<sup>31</sup> In addition, the FBI alerted Arizona state officials in June that Russian individuals were responsible for the hack in that state.<sup>32</sup> However, a spokesperson for Arizona's secretary of state noted that the FBI had not said whether the perpetrators were working for the Russian government.<sup>33</sup>

The various incidents and investigations finally led to an unusual joint statement on October 7 by the Department of Homeland Security and the Office of the DNI, in which they formally accused Russia of using cyberattacks to interfere with the U.S. election process. They said:

The U.S. Intelligence Community (USIC) is confident that the Russian Government directed the recent compromises of e-mails from US persons and institutions, including from US political organizations. The recent disclosures of alleged hacked e-mails on sites like DCLeaks.com and WikiLeaks and by the Guccifer 2.0 online persona are consistent with the methods and

<sup>25</sup> President of Russ. Press Release, Interview to *Bloomberg* (Sept. 5, 2016), at <http://en.kremlin.ru/events/president/news/52830>.

<sup>26</sup> See Joseph Menn, Dustin Volz & Mark Hosenball, *Exclusive: FBI Probes Hacking of Democratic Congressional Group – Sources*, REUTERS (July 29, 2016), at <http://www.reuters.com/article/us-usa-cyber-democrats-exclusive-idUSKCN1082Y7>; Ellen Nakashima, *FBI Probes Suspected Breach of Another Democratic Organization by Russian Hackers*, WASH. POST (July 29, 2016), at [https://www.washingtonpost.com/world/national-security/fbi-probes-suspected-breach-of-dccc-computers-by-russian-hackers/2016/07/28/71210464-5536-11e6-b7dfe509430c39\\_story.html](https://www.washingtonpost.com/world/national-security/fbi-probes-suspected-breach-of-dccc-computers-by-russian-hackers/2016/07/28/71210464-5536-11e6-b7dfe509430c39_story.html). One report claimed that the breach might have begun in June 2016. Menn, Volz & Hosenball, *supra*.

<sup>27</sup> Nakashima, *FBI Probes Suspected Breach*, *supra* note 26.

<sup>28</sup> See *supra* note 7 and corresponding text.

<sup>29</sup> Nakashima, *FBI Probes Suspected Breach*, *supra* note 26; see also Dustin Volz (@dnvolz), TWITTER (July 29, 2017, 7:09 AM), at <https://twitter.com/dnvolz/status/759028001883451392> (publishing statement by Democratic Congressional Campaign Committee (DCCC) National Press Secretary Meredith Kelly that “[b]ased on the information [the DCCC] ha[s] to date, we’ve been advised by investigators that this is similar to other recent incidents, including the DNC breach”).

<sup>30</sup> Menn, Volz & Hosenball, *supra* note 26.

<sup>31</sup> Ellen Nakashima, *Russian Hackers Targeted Arizona Election System*, WASH. POST (Aug. 29, 2016), at [https://www.washingtonpost.com/world/national-security/fbi-is-investigating-foreign-hacks-of-state-election-systems/2016/08/29/6e758ff4-6e00-11e6-8365-b19e428a975e\\_story.html](https://www.washingtonpost.com/world/national-security/fbi-is-investigating-foreign-hacks-of-state-election-systems/2016/08/29/6e758ff4-6e00-11e6-8365-b19e428a975e_story.html).

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

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

motivations of Russian-directed efforts. These thefts and disclosures are intended to interfere with the US election process. Such activity is not new to Moscow—the Russians have used similar tactics and techniques across Europe and Eurasia, for example, to influence public opinion there. We believe, based on the scope and sensitivity of these efforts, that only Russia’s senior-most officials could have authorized these activities.<sup>34</sup>

The statement noted that the United States was not yet prepared to accuse Russia of hacking state voter registration systems:

Some states have also recently seen scanning and probing of their election-related systems, which in most cases originated from servers operated by a Russian company. However, we are not now in a position to attribute this activity to the Russian Government. The USIC and the Department of Homeland Security . . . assess that it would be extremely difficult for someone, including a nation-state actor, to alter actual ballot counts or election results by cyber attack or intrusion. This assessment is based on the decentralized nature of our election system in this country and the number of protections state and local election officials have in place. States ensure that voting machines are not connected to the Internet, and there are numerous checks and balances as well as extensive oversight at multiple levels built into our election process.<sup>35</sup>

The timing of the announcement was understood to be politically delicate. A senior administration official stated that President Obama was “under pressure to act” soon because a statement closer to Election Day might appear too political.<sup>36</sup> A media report claimed, however, that FBI Director James B. Comey advised the administration against publishing the October 7 statement, since he was concerned about the propriety of what some might view as a politically motivated intervention into the late stages of the

<sup>34</sup> See Dep’t of Homeland Sec. & Office of the Dir. of Nat’l Intelligence Press Release, Joint Statement from the Department of Homeland Security and Office of the Director of National Intelligence on Election Security (Oct. 7, 2016), at <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national>.

<sup>35</sup> *Id.* In addition, after the statement was released, WikiLeaks published hacked emails from John D. Podesta, the campaign chairman for Hillary Clinton. David E. Sanger & Charlie Savage, *U.S. Says Russia Directed Hacks to Influence Elections*, N.Y. TIMES (Oct. 7, 2016), at <http://www.nytimes.com/2016/10/08/us/politics/us-formally-accuses-russia-of-stealing-dnc-emails.html>. Podesta said that he was “not happy about being hacked by the Russians in their quest to throw the election to Donald Trump.” John Podesta (@johnpodesta), TWITTER (Oct. 7, 2016, 4:42 PM), at <https://twitter.com/johnpodesta/status/784539455453560833>. It was not initially clear whether the administration had also attributed this hack to the Russian government. See, e.g., White House Press Release, Press Briefing by Press Secretary Josh Earnest (Oct. 21, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/21/press-briefing-press-secretary-josh-earnest-10212016> (“I believe what the intelligence community and the Department of Homeland Security have said is that the kinds of tactics that we saw with regard to the malicious activity on Mr. Podesta’s email account are similar to the kinds of tactics that we’ve seen used in other places. . . . But I’m not aware of any sort of formal determination that ascribes responsibility to one country or one actor with regard to the malicious activity in Mr. Podesta’s email account.”). However, a private security firm later concluded that the same hackers were responsible for both the DNC and Podesta hacks. Nicole Perloth & Michael D. Shear, *Private Security Group Says Russia Was Behind John Podesta’s Email Hack*, N.Y. TIMES (Oct. 20, 2016), at <https://www.nytimes.com/2016/10/21/us/private-security-group-says-russia-was-behind-john-podestas-email-hack.html>. In addition, Director of National Intelligence James Clapper stated on January 5, 2017, that the October 7 statement could be extended to Mr. Podesta’s emails, even if it did not include them at the time, based on evidence gathered by the intelligence community after that statement. See *Hearing to Receive Testimony on Foreign Cyber Threats to the United States Before the S. Comm. on Armed Servs.*, 115th Cong. 62 (2017), available at [http://www.armed-services.senate.gov/imo/media/doc/17-01\\_01-05-17.pdf](http://www.armed-services.senate.gov/imo/media/doc/17-01_01-05-17.pdf) [hereinafter *Foreign Cyber Threats Hearing*] (statement of James R. Clapper, Jr., Director of Nat’l Intelligence) (“I would have to research the exact chronology of when John Podesta’s emails were compromised. But I think, though, that bears on my statement that our assessment now is that is even more resolute than it was with that statement on the 7th of October.”).

<sup>36</sup> Sanger & Savage, *supra* note 35.

presidential campaign.<sup>37</sup> Consequently, the statement was released without the FBI's name on it, despite the fact that the FBI had taken the lead in investigating the DNC and DCCC hacks.<sup>38</sup>

Russian officials dismissed the claims in the statement. A Foreign Ministry spokesperson said that “[t]he US side has failed to provide any facts or arguments to corroborate its allegations.”<sup>39</sup> Similarly, Putin criticized

the hysteria the USA has whipped up over supposed Russian meddling in the American presidential election. The United States has plenty of genuinely urgent problems, it would seem, from the colossal public debt to the increase in firearms violence and cases of arbitrary action by the police.

You would think that the election debates would concentrate on these and other unresolved problems, but the elite has nothing with which to reassure society, it seems, and therefore attempt to distract public attention by pointing instead to supposed Russian hackers, spies, agents of influence and so forth.

I have to ask myself and ask you too: Does anyone seriously imagine that Russia can somehow influence the American people's choice?<sup>40</sup>

Press Secretary Earnest, in response, said that Putin's statement was “not surprising,” and did not “undermine our confidence in the analysis that's been put forward by the intelligence community and the Department of Homeland Security.”<sup>41</sup>

In the wake of the October accusation, it was not immediately clear what measures the United States might take in response. Earlier in the year, responding to inquiries about how the United States would respond if the FBI concluded that the Russian government was involved in the hacks, a White House deputy press secretary had said:

[G]enerally speaking, if you look at how the United States has responded to intrusions by state actors into cyber infrastructure within the United States, there's a whole host of options available to us. That includes economic sanctions that would be housed at the Department of Treasury, and

<sup>37</sup> Ellen Nakashima, *Comey Was Concerned Publicly Blaming Russia for Hacks of Democrats Could Appear Too Political in Run-up to Elections*, WASH. POST (Nov. 1, 2016), at [https://www.washingtonpost.com/world/national-security/fbi-director-james-b-comey-was-concerned-that-publicly-blaming-russia-for-hacks-of-democrats-could-appear-too-political-in-runup-to-nov-8/2016/10/31/b01a8be4-9fab-11e6-8832-23a007c77bb4\\_story.html](https://www.washingtonpost.com/world/national-security/fbi-director-james-b-comey-was-concerned-that-publicly-blaming-russia-for-hacks-of-democrats-could-appear-too-political-in-runup-to-nov-8/2016/10/31/b01a8be4-9fab-11e6-8832-23a007c77bb4_story.html).

<sup>38</sup> *Id.*

<sup>39</sup> Ministry of Foreign Aff. of the Russ. Fed'n Press Release, Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow (Oct. 13, 2016), at [http://www.mid.ru/en/web/guest/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2498635#11](http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2498635#11); see also Ministry of Foreign Aff. of the Russ. Fed'n Press Release, Foreign Minister Sergey Lavrov's Interview with Amanpour Program on CNN International, Moscow (Oct. 12, 2016), at [http://www.mid.ru/en/web/guest/meropriyatiya\\_s\\_uchastiem\\_ministra/-/asset\\_publisher/xK1BhB2bUjd3/content/id/2497676](http://www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/2497676) (“Now everybody in the United States is saying that it is Russia which is running the United States presidential debate. It's flattering, . . . but it has nothing to be explained by the facts. We have not seen a single fact, a single proof. . .”).

<sup>40</sup> Vladimir Putin, President of Russ., Remarks at the 13th Annual Meeting of the Valdai International Discussion Club (Oct. 27, 2016), at <http://en.special.kremlin.ru/events/president/transcripts/53151>.

<sup>41</sup> White House Press Release, Press Briefing by Press Secretary Josh Earnest (Oct. 27, 2016), at <https://obama-whitehouse.archives.gov/the-press-office/2016/10/27/press-briefing-press-secretary-josh-earnest-10272016>. Indeed, even after the election took place, the Director of the National Security Agency, Adm. Michael S. Rogers, reiterated that Russia's hacking was “a conscious effort by a nation-state to attempt to achieve a specific effect.” Wall Street Journal (@WSJ), TWITTER (Nov. 15, 2016, 2:02 PM), at <https://twitter.com/WSJ/status/798647324687929344>.

that does include law enforcement measures that could be taken out of the Department of Justice.<sup>42</sup>

Elaborating after the October 7 statement was issued, Earnest asserted that the United States would

ensure that [its] response is proportional. It is unlikely that our response would be announced in advance. It's certainly possible that the President could choose response options that we never announce. The President has talked before about the significant capabilities that the U.S. government has to both defend our systems in the United States, but also carry out offensive operations in other countries. So there are a range of responses that are available to the President, and he will consider a response that's proportional.<sup>43</sup>

Vice President Biden followed up on October 15, saying:

We're sending a message. We have the capacity to do it. . . . [President Putin wi]ll know it. And it will be at the time of our choosing. And under the circumstances that have the greatest impact. . . . And . . . to the extent that they [fundamentally alter the election], we will be proportional in what we do.<sup>44</sup>

Vice President Biden further stated that he “hope[d]” the public would not know it when the “message [wa]s . . . sent.”<sup>45</sup> In response, Putin said that “[t]here [wa]s nothing surprising about that [statement]. . . . You can expect anything from our US friends. But was there anything new in what he said? As if we didn't know that US government bodies snoop on and wiretap everyone?”<sup>46</sup>

According to media reports, Obama contacted Putin privately in October to warn him about using cyberattacks to disrupt the election.<sup>47</sup> The White House also sent a message directly to the

<sup>42</sup> White House Press Release, Press Gaggle by Principal Deputy Press Secretary Eric Schultz En Route Atlanta, Georgia (Aug. 1, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/08/01/press-gaggle-principal-deputy-press-secretary-eric-schultz-en-route>. See also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 109 AJIL 419, 419–22 (2015) (describing U.S. response to North Korea hack of Sony Pictures Entertainment); 109 AJIL 880, 880–82 (2015) (describing U.S. response to cyberattacks from China, some of which were characterized as economic espionage).

<sup>43</sup> White House Press Release, Press Gaggle by Press Secretary Josh Earnest En Route Greensboro, NC (Oct. 11, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/11/press-gaggle-press-secretary-josh-earnest-en-route-greensboro-nc>. This statement is consistent with language used by President Obama before the statement was released. See White House Press Release, Remarks by President Obama and Prime Minister Lee of Singapore in Joint Press Conference (Aug. 2, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/08/02/remarks-president-obama-and-prime-minister-lee-singapore-joint-press> (“[W]e have provisions in place where if we see evidence of a malicious attack by a state actor, we can impose potentially certain proportional penalties.”).

<sup>44</sup> *Meet the Press - October 16, 2016*, NBC NEWS (Oct. 16, 2016), at <http://www.nbcnews.com/meet-the-press/meet-press-october-16-2016-n667251>.

<sup>45</sup> *Id.*

<sup>46</sup> President of Russ. Press Release, Vladimir Putin Answered Questions from Russian Journalists (Oct. 16, 2016), at <http://en.kremlin.ru/events/president/news/53103>.

<sup>47</sup> David Ignatius, *In Our New Cold War, Deterrence Should Come Before Détente*, WASH. POST (Nov. 15, 2016), at [https://www.washingtonpost.com/opinions/global-opinions/in-our-new-cold-war-deterrence-should-come-before-detente/2016/11/15/051f4a84-ab79-11e6-8b45-f8e493f06fcd\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/in-our-new-cold-war-deterrence-should-come-before-detente/2016/11/15/051f4a84-ab79-11e6-8b45-f8e493f06fcd_story.html); see also David E. Sanger, *Under the Din of the Presidential Race Lies a Once and Future Threat: Cyberwarfare*, N.Y. TIMES (Nov. 6, 2016), at <http://www.nytimes.com/2016/11/07/us/politics/under-the-din-of-the-presidential-race-lies-a-once-and-future-threat-cyberwarfare.html>. President Obama later stated that he had also raised the issue with President Putin even earlier, in September 2016. See White House Press Release, Press Conference by the President (Dec. 16, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/16/press-conference-president> [hereinafter Dec. 16 Press Conference] (“[I]n early September, when I saw President Putin in

Russian government on October 31 regarding “malicious cyberactivity” that was “targeting U.S. state election-related systems.”<sup>48</sup> It did so using a special channel created as part of the Nuclear Risk Reduction Center, using a template intended for crisis communication; use of this particular channel “was part of the messaging,” according to a senior administration official.<sup>49</sup>

Following the election, legislators called for further investigation into Russia’s influence on the election. Senator Lindsey Graham demanded Senate hearings to determine if the Russian government interfered with the election, asserting that “Putin should be punished” if that was the case.<sup>50</sup> Similarly, Representative Elijah Cummings, a member of the House Oversight Committee, wrote to the committee’s chairman to ask for a “bipartisan” look at Russia’s involvement in the election.<sup>51</sup> However, neither the Senate nor the House of Representatives appeared to take any immediate steps in response to these requests.

On November 26, in response to questions regarding an investigation into the integrity of the presidential election, a senior administration official stated:

The Kremlin probably expected that publicity surrounding the disclosures that followed the Russian Government-directed compromises of e-mails from U.S. persons and institutions, including from U.S. political organizations, would raise questions about the integrity of the election process that could have undermined the legitimacy of the President-elect. Nevertheless, we stand behind our election results, which accurately reflect the will of the American people.

The Federal government did not observe any increased level of malicious cyber activity aimed at disrupting our electoral process on election day. . . . [W]e remained confident in the overall integrity of electoral infrastructure, a confidence that was borne out on election day. As a result, we believe our elections were free and fair from a cybersecurity perspective.

That said, since we do not know if the Russians had planned any malicious cyber activity for election day, we don’t know if they were deterred from further activity by the various warnings the U.S. government conveyed.<sup>52</sup>

Nonetheless, on December 9, it was reported that the CIA and other intelligence agencies had determined with “high confidence” that the Russian government conducted the cyberattacks in order to benefit Donald Trump in the election and to harm Hillary Clinton’s candidacy.<sup>53</sup>

China, I . . . talk[ed] to him directly and t[old] him to cut it out, and there were going to be some serious consequences if he didn’t.”

<sup>48</sup> David E. Sanger, *White House Confirms Pre-election Warning to Russia over Hacking*, N.Y. TIMES (Nov. 16, 2016), at <http://www.nytimes.com/2016/11/17/us/politics/white-house-confirms-pre-election-warning-to-russia-over-hacking.html>.

<sup>49</sup> Ignatius, *supra* note 47.

<sup>50</sup> Marina Fang, *Lindsey Graham Calls for Senate Investigation into Whether Russia Hacked DNC*, HUFFINGTON POST (Nov. 15, 2016), at [http://www.huffingtonpost.com/entry/russia-dnc-hack-lindsey-graham\\_us\\_582bb306e4b0e39c1fa703d5](http://www.huffingtonpost.com/entry/russia-dnc-hack-lindsey-graham_us_582bb306e4b0e39c1fa703d5).

<sup>51</sup> Tal Kopan, *Top Democrat Calls for Investigation into Russia’s Role in US Election*, CNN (Nov. 17, 2016), at <http://www.cnn.com/2016/11/17/politics/house-oversight-democrat-investigate-russia>.

<sup>52</sup> *U.S. Statement on Reliability of Election Results*, N.Y. TIMES (Nov. 26, 2016), at <http://www.nytimes.com/2016/11/26/us/politics/us-statement-on-reliability-of-election-results.html>.

<sup>53</sup> See Entous, Nakashima & Miller, *supra* note 16; Sanger & Shane, *supra* note 9. The FBI apparently did not initially join in this conclusion. See Mark Mazzetti & Eric Lichtblau, *C.I.A. Judgment on Russia Built on Swell of Evidence*, N.Y. TIMES (Dec. 11, 2016), at <https://www.nytimes.com/2016/12/11/us/politics/cia-judgment-intelligence-russia-hacking-evidence.html>. However, an email sent by CIA Director John Brennan on December 16 said that Brennan had “met separately with FBI [Director] . . . Comey and DNI . . . Clapper, and there [wa]s strong consensus among [them] on the scope, nature, and intent of Russian interference in our presidential election.” Adam Entous & Ellen Nakashima, *FBI in Agreement with CIA that Russia Aimed to Help Trump Win White House*, WASH. POST (Dec. 16, 2016), at <https://www.washingtonpost.com/politics/clinton-blames-putins->



Those agencies had previously indicated that they believed Russia had sought to undermine confidence in the U.S. electoral system.<sup>54</sup> However, the agencies reached a different conclusion—that Russia also acted with the goal of electing Mr. Trump—based on significant circumstantial evidence supporting that inference.<sup>55</sup> That evidence included another intelligence finding, reached with high confidence, that the Russian government had also hacked the computer systems of the Republican National Committee (RNC) but, according to a senior administration official, “conspicuously released no documents.”<sup>56</sup> One report indicated that intelligence officials believed that President Putin was personally involved in the Russian interference with the election, in part because of a “vendetta” against Mrs. Clinton.<sup>57</sup> Putin had previously accused Mrs. Clinton, as secretary of state, of personally inciting protests against him following Russia’s parliamentary elections.<sup>58</sup>

President-elect Trump immediately denounced the agencies’ conclusion and the quality of the underlying evidence. The same day the reports emerged, Trump’s transition office released a statement criticizing the agencies:

These are the same people that said Saddam Hussein had weapons of mass destruction. The election ended a long time ago in one of the biggest Electoral College victories in history. It’s now time to move on and ‘Make America Great Again.’<sup>59</sup>

personal-grudge-against-her-for-election-interference/2016/12/16/12f36250-c3be-11e6-8422-eac61c0ef74d\_story.html (first alteration in original).

<sup>54</sup> Entous, Nakashima & Miller, *supra* note 16; *see also* Sanger & Shane, *supra* note 9.

<sup>55</sup> Mazzetti & Lichtblau, *supra* note 53. The CIA had shared this assessment with key senators in a closed-door briefing the week before these reports were made public. Entous, Nakashima & Miller, *supra* note 16. On November 29, a group of seven Democrats from the Senate Intelligence Committee sent a letter to President Obama, which said: “We believe there is additional information concerning the Russian Government and the U.S. election that should be declassified and released to the public.” Letter from Ron Wyden et al. to the President (Nov. 29, 2016), *available at* <https://www.wyden.senate.gov/download/?id=D12DD589-5800-4BEF-9F93-A0A122F38D29>. According to administration officials, the senators specifically requested that the White House release parts of the CIA’s closed-door presentation. Entous, Nakashima & Miller, *supra* note 16. However, the White House did not take any apparent steps in response.

<sup>56</sup> Sanger & Shane, *supra* note 9. then-RNC Spokesperson Sean Spicer disputed this claim, stating that “The RNC was not ‘hacked’. The @nytimes was told and chose to ignore.” Sean Spicer (@seanspicer), TWITTER (Dec. 9, 2016, 8:29 PM), *at* <https://twitter.com/seanspicer/status/807442009778688000>; *see also* Sanger & Shane, *supra* note 9 (describing denials by RNC officials). FBI Director Comey later testified that

[t]here was evidence that there was hacking directed at . . . the RNC, but old domains of the RNC, that is, e-mail domains that they were no longer using, and that information was harvested from there, but that it was old stuff. None of that was released. We did not develop any evidence that the Trump campaign or the current RNC was successfully hacked.

Russian Intelligence Activities: Hearing Before the S. Select Comm. on Intelligence, 115th Cong. (2017), *available at* <https://www.intelligence.senate.gov/hearings/open-hearing-russian-intelligence-activities> [hereinafter Russian Intelligence Activities Hearing] (statement of James Comey, Director, Fed. Bureau of Investigation).

<sup>57</sup> William M. Arkin, Ken Dilanian & Cynthia McFadden, *U.S. Officials: Putin Personally Involved in U.S. Election Hack*, NBC NEWS (Dec. 15, 2016), *at* <http://www.nbcnews.com/news/us-news/u-s-officials-putin-personally-involved-u-s-election-hack-n696146>. When asked if he believed that President Putin had “authorized the hack,” President Obama said: “Not much happens in Russia without Vladimir Putin. This is a pretty hierarchical operation. Last I checked, there’s not a lot of debate and democratic deliberation, particularly when it comes to policies directed at the United States.” Dec. 16 Press Conference, *supra* note 47.

<sup>58</sup> Mazzetti & Lichtblau, *supra* note 53; *see also* David M. Herszenhorn & Ellen Barry, *Putin Contends Clinton Incited Unrest over Vote*, N.Y. TIMES (Dec. 8, 2011), *at* <http://www.nytimes.com/2011/12/09/world/europe/putin-accuses-clinton-of-instigating-russian-protests.html>.

<sup>59</sup> Sanger & Shane, *supra* note 9.

Addressing the reports a few days later, Trump reiterated his concerns:

I think it's ridiculous. I think it's just another excuse. . . .

[I]f you look at the story and you take a look at what they said, there's great confusion. Nobody really knows.

And hacking is very interesting. Once they hack, if you don't catch them in the act, you're not going to catch them. They have no idea if it's Russia or China or somebody. It could be somebody sitting in a bed some place. I mean, they have no idea. . . .

I think the Democrats are putting [these reports] out because they suffered one of the greatest defeats in the history of politics in this country. . . . It's ridiculous.<sup>60</sup>

Putin's response was similar. Questioning the strength of the agencies' evidence, he said:

The defeated party always tries to blame somebody on the outside. They should be looking for these problems closer to home.

Everybody keeps forgetting the most important point. For example, some hackers breached email accounts of the US Democratic Party leadership. Some hackers did that. But, as the President-elect rightly noted, does anyone know who those hackers were? Maybe they came from another country, not Russia. Maybe somebody just did it from their couch or bed. These days, it is very easy to designate a random country as the source of attack while being in a completely different location.<sup>61</sup>

Despite the reports, the Obama administration declined to blame the results of the election on the Russian government's interference. Obama acknowledged that

[t]here's no doubt that [the Russian hack of the DNC] contributed to an atmosphere in which the only focus for . . . months at a time . . . were Hillary's e-mails . . . [and] political gossip surrounding the DNC. And that whole swirl that ended up dominating the news meant that . . . issues weren't talked about a lot in the coverage. Huge policy differences were not debated and vetted. . . . And I think in that scrum, in that swirl, . . . Donald Trump and his celebrity and his ability to garner attention and obviously tap into a lot of the anxieties and fears that some voters . . . definitely made a difference.<sup>62</sup>

However, he pointed out that "elections can always turn out differently. You never know which factors are [going to] make a difference."<sup>63</sup> Likewise, the White House press secretary did not elaborate on the administration's position regarding the agencies' determination.<sup>64</sup> Nonetheless, he added that

you didn't need a security clearance to figure out who benefitted from malicious Russian cyber activity. The President-elect didn't call it into question. He called on Russia to hack his opponent. He called on Russia to hack Secretary Clinton.<sup>65</sup> So he certainly had a pretty good sense of whose side this activity was coming down on. The last several weeks of the election were focused on a

<sup>60</sup> *Exclusive: Donald Trump on Cabinet Picks, Transition Process*, FOX NEWS (Dec. 11, 2016), at <http://www.foxnews.com/transcript/2016/12/11/exclusive-donald-trump-on-cabinet-picks-transition-process>.

<sup>61</sup> President of Russ. Press Release, Vladimir Putin, Annual News Conference (Dec. 23, 2016, 3:55 PM), at <http://en.kremlin.ru/events/president/news/53573>.

<sup>62</sup> *Transcript and Video: NPR's Exit Interview with President Obama*, NPR (Dec. 19, 2016, 5:00 AM), at <http://www.npr.org/2016/12/19/504998487/transcript-and-video-nprs-exit-interview-with-president-obama>.

<sup>63</sup> *Id.*

<sup>64</sup> See White House Press Release, Press Briefing by Press Secretary Josh Earnest (Dec. 12, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/12/press-briefing-press-secretary-josh-earnest-121216> [hereinafter Dec. 12 Press Briefing] ("If that's something that can be shared publicly, that's going to come from the intelligence community. It's not going to come from here.")

<sup>65</sup> [Editors' note: In July 2016, Donald Trump said: "Russia, if you're listening, I hope you're able to find the 30,000 emails that are missing"—an apparent reference to Hillary Clinton's deleted emails. He added: "I think you will probably be rewarded mightily by our press." Ashley Parker & David E. Sanger, *Donald Trump Calls on*

discussion of emails that had been hacked and leaked by the Russians. These were emails from the DNC and John Podesta—not from the RNC and Steve Bannon.<sup>66</sup>

At the same time as the reports were published, a White House deputy press secretary announced that Obama had “instructed the intelligence community to conduct a full review of the pattern of malicious cyber activity related to our presidential election cycle,” and to ensure that the subsequent “report be completed and submitted to him before the end of his term.”<sup>67</sup> The review was ordered with a comprehensive scope: “to look at malicious activity timed to our presidential election cycle. And so it will be broader than just looking at this past election.”<sup>68</sup> In fact, the review would “put [malicious cyber activity] in a greater context. . . . dating all the way back to 2008.”<sup>69</sup> As a result, the press secretary confirmed, the review would not “be looking [just] at Russia,” but would instead “follow the facts wherever they may lead[,] if that includes other either state actors or non-state actors.”<sup>70</sup> Given that the 2008 election cycle, for example, involved cyber intrusions by Chinese actors, the review would “be looking at all foreign actors and any attempt to interfere with the elections.”<sup>71</sup> After the report was completed, the administration would

make public as much as we can. Obviously, . . . a report like this is going to contain highly sensitive and even classified information, perhaps, so when that report is submitted we’re going to take a look. We want to make sure we brief Congress and relevant stakeholders, like possibly state administrators who actually operationalize the elections.<sup>72</sup>

In addition, several congressional committees announced that they would conduct their own investigations into Russia’s interference with the 2016 election. Senator Mitch McConnell stated on December 12 that a panel of senators from the Senate Intelligence Committee, led by Senator Richard Burr, would pursue a bipartisan investigation of Russia’s interference in the election.<sup>73</sup> That inquiry would examine, among other things,

- [T]he intelligence that informed the Intelligence Community Assessment [ordered by the White House];

*Russia to Find Hillary Clinton’s Missing Emails*, N.Y. TIMES (July 27, 2016), at <https://www.nytimes.com/2016/07/28/us/politics/donald-trump-russia-clinton-emails.html>.]

<sup>66</sup> Dec. 12 Press Briefing, *supra* note 64.

<sup>67</sup> White House Press Release, Press Briefing by Principal Deputy Press Secretary Eric Schultz (Dec. 9, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/09/press-briefing-principal-deputy-press-secretary-eric-schultz-12916> [hereinafter Dec. 9 Press Briefing]. Media reports indicated that DNI Clapper would lead the review. Entous, Nakashima & Miller, *supra* note 16.

<sup>68</sup> Dec. 9 Press Briefing, *supra* note 67.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; see also Ellen Nakashima, *National Intelligence Director: Hackers Have Targeted 2016 Presidential Campaigns*, WASH. POST (May 18, 2016), at [https://www.washingtonpost.com/world/national-security/national-intelligence-director-hackers-have-tried-to-spy-on-2016-presidential-campaigns/2016/05/18/2b1745c0-1d0d-11e6-b6e0-c53b7ef63b45\\_story.html](https://www.washingtonpost.com/world/national-security/national-intelligence-director-hackers-have-tried-to-spy-on-2016-presidential-campaigns/2016/05/18/2b1745c0-1d0d-11e6-b6e0-c53b7ef63b45_story.html) (summarizing previous election-related hacking incidents).

<sup>72</sup> Dec. 9 Press Briefing, *supra* note 67.

<sup>73</sup> Ed O’Keefe & Paul Kane, *McConnell Announces Senate Probe of Suspected Russian Election Interference: “The Russians Are Not Our Friends,”* WASH. POST (Dec. 12, 2016), at [https://www.washingtonpost.com/news/powerpost/wp/2016/12/12/schumer-on-congressional-probe-of-russia-i-dont-want-this-to-turn-into-a-benghazi-investigation; Jennifer Steinhauer, Senate and House Leaders Call for Inquiry of Russian Hacking in Election, N.Y. TIMES \(Dec. 12, 2016\), at https://www.nytimes.com/2016/12/12/us/politics/mcconnell-supports-inquiry-of-russian-hacking-during-election.html](https://www.washingtonpost.com/news/powerpost/wp/2016/12/12/schumer-on-congressional-probe-of-russia-i-dont-want-this-to-turn-into-a-benghazi-investigation; Jennifer Steinhauer, Senate and House Leaders Call for Inquiry of Russian Hacking in Election, N.Y. TIMES (Dec. 12, 2016), at https://www.nytimes.com/2016/12/12/us/politics/mcconnell-supports-inquiry-of-russian-hacking-during-election.html).

- Counterintelligence concerns related to Russia and the 2016 U.S. election, including any intelligence regarding links between Russia and individuals associated with political campaigns;
- Russian cyber activity and other “active measures” directed against the U.S., both as it regards the 2016 election and more broadly.<sup>74</sup>

House Speaker Paul D. Ryan also said that he supported an ongoing investigation by Rep. Devin Nunes, the chairman of the House Intelligence Committee.<sup>75</sup> That investigation would address:

- Russian cyber activity and other “active measures” directed against the U.S. and its allies;
- Counterintelligence concerns related to Russia and the 2016 U.S. election, including any intelligence regarding links between Russia and individuals associated with political campaigns;
- The United States Government response to these Russian active measures and any impact they may have on intelligence relationships and traditional alliances; and
- Possible leaks of classified information related to the Intelligence Community’s assessments of these matters.<sup>76</sup>

Finally, members of the Senate Armed Services Committee indicated that the committee would conduct a bipartisan inquiry regarding Russia’s cyberthreats to the military, which could shed light on its interference with the election.<sup>77</sup> Discussing these investigations, Press Secretary Earnest noted that the White House had “long supported the principle of congressional review of” Russian interference in the election.<sup>78</sup> He further stated that the Obama administration would “[a]bsolutely” cooperate in sharing information with the investigations, since “the [A]dministration and national security professionals, both high-ranking officials and those farther down the chain, have been in regular touch with members of Congress on this matter.”<sup>79</sup>

<sup>74</sup> Richard Burr, U.S. Senator for N.C. Press Release, Joint Statement on Committee Inquiry into Russian Intelligence Activities (Jan. 13, 2017), at <https://www.burr.senate.gov/press/releases/joint-statement-on-committee-inquiry-into-russian-intelligence-activities>.

<sup>75</sup> Steinhauer, *supra* note 73.

<sup>76</sup> U.S. House of Representatives, Permanent Select Comm. on Intelligence Press Release, Joint Statement on Progress of Bipartisan HPSCI Inquiry into Russian Active Measures (Jan. 25, 2017), at <http://democrats-intelligence.house.gov/news/documentsingle.aspx?DocumentID=211>.

<sup>77</sup> See *Face the Nation Transcript December 11, 2016: McCain, Conway, Sanders*, FACE THE NATION (Dec. 11, 2016), at <http://www.cbsnews.com/news/face-the-nation-transcript-december-11-2016-mccain-conway-sanders> (noting statement by Senator John McCain that “rogue states . . . view cyber as a form of warfare”); Jack Reed, U.S. Senator for R.I. Press Release, Reed Backs Bipartisan Probe into Russian Cyberthreats (Dec. 9, 2016), at <https://www.reed.senate.gov/news/releases/reed-backs-bipartisan-probe-into-russian-cyberthreats>.

Some senators also called for an independent commission to review Russian interference with the election. See Ben Cardin, U.S. Senator for MD Press Release, Senators Cardin, Feinstein, Leahy Call for Independent Nonpartisan Commission to Investigate Russian Interference in Election (Dec. 12, 2016), at <https://www.cardin.senate.gov/newsroom/press/release/senators-cardin-feinstein-leahy-call-for-independent-nonpartisan-commission-to-investigate-russian-interference-in-election>; see also Charles Schumer, U.S. Senator for N.Y. Press Release, Schumer Remarks Calling for Senate Select Committee to Investigate Russian Interference in 2016 Elections (Dec. 18, 2016), at <https://www.schumer.senate.gov/newsroom/press-releases/schumer-remarks-calling-for-senate-select-committee-to-investigate-russian-interference-in-2016-elections> (outlining benefits of independent committee). However, Senator McConnell and House Speaker Ryan asserted that the intelligence committees were capable of conducting an inquiry on their own, and they did not take any steps to form an independent commission. O’Keefe & Kane, *supra* note 73.

<sup>78</sup> Dec. 12 Press Briefing, *supra* note 64.

<sup>79</sup> *Id.*

In addition, in an unusual step, a bipartisan group of electors from the Electoral College wrote an open letter to DNI Clapper on December 12.<sup>80</sup> The letter stated:

The Electors require to know from the intelligence community whether there are ongoing investigations into ties between Donald Trump, his campaign or associates, and Russian government interference in the election, the scope of those investigations, how far those investigations may have reached, and who was involved in those investigations. We further require a briefing on all investigative findings, as these matters directly impact the core factors in our deliberations of whether Mr. Trump is fit to serve as President of the United States.

Additionally, the Electors will separately require from Donald Trump conclusive evidence that he and his staff and advisors did not accept Russian interference, or otherwise collaborate during the campaign, and conclusive disavowal and repudiation of such collaboration and interference going forward.<sup>81</sup>

Nonetheless, it does not appear that the Obama administration, the intelligence community, or Trump himself disclosed any information in response to this request.

On December 29, the administration took several public actions to respond to Russian interference with the election.<sup>82</sup> First, Obama issued Executive Order 13,757, which amended Executive Order 13,694 in order to allow sanctions against foreign actors engaging in “cyber-enabled malicious activities that . . . [t]amper with, alter, or cause a misappropriation of information with the purpose or effect of interfering with or undermining election processes or institutions.”<sup>83</sup> Second, pursuant to the new executive order, Obama “sanctioned nine entities and individuals: two Russian intelligence services (the GRU and the FSB); four individual officers of the GRU; and three companies that provided material

<sup>80</sup> Letter from Christine Pelosi, Cal. Presidential Elector et al. to James Clapper, Director of Nat’l Intelligence (Dec. 12, 2016), *available at* <https://extranewsfeed.com/bipartisan-electors-ask-james-clapper-release-facts-on-outside-interference-in-u-s-election-c1a3d11d5b7b#.f5yd5dpsq>.

<sup>81</sup> *Id.*

<sup>82</sup> *See supra* notes 42–45 and corresponding text.

<sup>83</sup> White House Press Release, Fact Sheet: Actions in Response to Russian Malicious Cyber Activity and Harassment (Dec. 29, 2016), *at* <https://obamawhitehouse.archives.gov/the-press-office/2016/12/29/fact-sheet-actions-response-russian-malicious-cyber-activity-and> [hereinafter Fact Sheet]; *see also* Exec. Order No. 13,757 §1, 82 Fed. Reg. 1, 1 (Jan. 3, 2017). Executive Order 13,694 had stated, in relevant part:

- (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:
  - (i) any person determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be responsible for or complicit in, or to have engaged in, directly or indirectly, cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States that are reasonably likely to result in, or have materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States and that have the purpose or effect of:
    - (A) harming, or otherwise significantly compromising the provision of services by, a computer or network of computers that support one or more entities in a critical infrastructure sector;
    - (B) significantly compromising the provision of services by one or more entities in a critical infrastructure sector;
    - (C) causing a significant disruption to the availability of a computer or network of computers; or
    - (D) causing a significant misappropriation of funds or economic resources, trade secrets, personal identifiers, or financial information for commercial or competitive advantage or private financial gain . . . .

Exec. Order No. 13,694 §1(a)(i)(A)–(D), 3 C.F.R. §297, 297 (2015); *see also* Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 109 AJIL 643, 658 (2015) (describing order in detail).

support to the GRU's cyber operations."<sup>84</sup> Third, the Office of Foreign Assets Control imposed sanctions on two individuals pursuant to Executive Order 13,694 for "engag[ing] in significant malicious cyber-enabled misappropriation of financial information" or "personal identifiers" for private financial gain.<sup>85</sup>

Fourth, the State Department "declared persona non grata 35 Russian officials operating in the United States who were acting in a manner inconsistent with their diplomatic or consular status."<sup>86</sup> The State Department "also informed the Russian Government that it would deny Russian personnel access to two recreational compounds in the United States owned by the Russian Government."<sup>87</sup> A deputy spokesperson specified that the Department

took these actions as part of a comprehensive response to Russia's interference in the U.S. election and to a pattern of harassment of our diplomats overseas that has increased over the last four years, including a significant increase in the last 12 months. This harassment has involved arbitrary police stops, physical assault, and the broadcast on State TV of personal details about our personnel that put them at risk. In addition, the Russian Government has impeded our diplomatic operations by, among other actions: forcing the closure of 28 American corners which hosted cultural programs and English-language teaching; blocking our efforts to begin the construction of a new, safer facility for our Consulate General in St. Petersburg; and rejecting requests to improve perimeter security at the current, outdated facility in St. Petersburg.<sup>88</sup>

Finally, the Department of Homeland Security and FBI released a Joint Analysis Report (the JAR) that expanded on the Obama administration's October 7 statement accusing the Russian government of interfering in the election.<sup>89</sup> The JAR

<sup>84</sup> Fact Sheet, *supra* note 83; *see also* Exec. Order No. 13,757, *supra* note 83, at §1 & Annex, 82 Fed. Reg. at 1, 3 (adding entities and individuals to list of persons who could be sanctioned under Executive Order 13,694). The five entities sanctioned were the "Main Intelligence Directorate (a.k.a. Glavnoe Razvedyvatel'noe Upravlenie) (a.k.a. GRU)"; the "Federal Security Service (a.k.a. Federalnaya Sluzhba Bezopasnosti) (a.k.a. FSB)"; "Special Technology Center (a.k.a. STLC, Ltd. Special Technology Center St. Petersburg)"; "Zorsecurity (a.k.a. Esage Lab)"; and "Autonomous Noncommercial Organization 'Professional Association of Designers of Data Processing Systems' (a.k.a. ANO PO KSI)." *Id.*, at Annex, 82 Fed. Reg. at 3. "STLC . . . assisted the GRU in conducting signals intelligence operations; Zorsecurity . . . provided the GRU with technical research and development; and . . . ANO PO KSI . . . provided specialized training to the GRU." Fact Sheet, *supra* note 83. The four individuals sanctioned were Igor Valentinovich Korobov, Sergey Aleksandrovich Gizunov, Igor Olegovich Kostyukov, and Vladimir Stepanovich Alexseyev. Exec. Order No. 13,757, *supra* note 83, at Annex, 82 Fed. Reg. at 3. Korobov is the current chief of the GRU, and the other three individuals are deputy chiefs. Fact Sheet, *supra* note 83.

<sup>85</sup> Fact Sheet, *supra* note 83; *see also* *Issuance of Amended Executive Order 13694; Cyber-Related Sanctions Designations*, U.S. DEP'T OF THE TREASURY (Dec. 29, 2016), at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20161229.aspx>. The two individuals, Evgeniy Mikhailovich Bogachev and Aleksey Alekseyevich Belan, were sanctioned under Section 1(a)(i)(D) of Executive Order 13694. *See* Fact Sheet, *supra* note 83; Exec. Order No. 13,694, *supra* note 83, at §1(a)(i)(D), 3 C.F.R. §297, 297. "Bogachev and his cybercriminal associates [we]re responsible for the theft of over \$100 million from U.S. financial institutions, Fortune 500 firms, universities, and government agencies." Fact Sheet, *supra* note 83. "Belan compromised the computer networks of at least three major United States-based e-commerce companies." *Id.*

<sup>86</sup> U.S. Dep't of State Press Release, Department of State Actions in Response to Russian Harassment (Dec. 29, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266145.htm> [hereinafter Department of State Actions].

<sup>87</sup> *Id.* State Department officials indicated that these compounds—in Upper Brookville, New York, and Maryland's Eastern Shore—were used for Russian intelligence activities, but it is unclear whether they were used in connection with the election-related intrusions. David E. Sanger, *Obama Strikes Back at Russia for Election Hacking*, N.Y. TIMES (Dec. 29, 2016), at <https://www.nytimes.com/2016/12/29/us/politics/russia-election-hacking-sanctions.html>.

<sup>88</sup> Department of State Actions, *supra* note 86.

<sup>89</sup> U.S. Dep't of Homeland Sec. Press Release, Joint DHS, ODNI, FBI Statement on Russian Malicious Cyber Activity (Dec. 29, 2016), at <https://www.dhs.gov/news/2016/12/29/joint-dhs-odni-fbi-statement-russian-malicious-cyber-activity>.

provide[d] technical details regarding the tools and infrastructure used by the Russian civilian and military intelligence Services (RIS) to compromise and exploit networks and endpoints associated with the U.S. election, as well as a range of U.S. Government, political, and private sector entities.<sup>90</sup>

As a summary in the JAR explained further, “[t]his activity by RIS is part of an ongoing campaign of cyber-enabled operations directed at the U.S. government and its citizens.” Consequently, “[t]his JAR provide[d] technical indicators related to many of these operations, recommended mitigations, suggested actions to take in response to the indicators provided, and information on how to report such incidents to the U.S. Government.”<sup>91</sup>

Moreover, Obama asserted that “[t]hese actions are not the sum total of our response to Russia’s aggressive activities. We will continue to take a variety of actions at a time and place of our choosing, some of which will not be publicized.”<sup>92</sup> As a result, as a senior administration official said,

there may be things that commence while we’re in office in addition to what we’re saying today. When the [Trump] [A]dministration takes office, it’s entirely their judgment as to whether or not they continue down the course that we have set in a number of different areas.<sup>93</sup>

Russia’s planned response was not immediately clear. The Russian foreign minister initially said that Russia would

definitely respond to these actions. Reciprocity is a basic tenet of international diplomacy and international relations. Therefore, the Russian Foreign Ministry and colleagues from other agencies have submitted a proposal to the President of Russia to declare “persona non grata” 31 diplomats from the US Embassy in Moscow and four diplomats from the US Consulate General in St Petersburg. Furthermore, we have proposed shutting down the US dacha (recreation facility) in Serebryanny Bor and the US Embassy warehouse on Dorozhnaya Street. We hope these proposals will be considered as a priority.<sup>94</sup>

Less than two hours later, however, Putin issued a statement that seemed to take a softer line:

We regard the recent unfriendly steps taken by the outgoing US administration as provocative and aimed at further weakening the Russia-US relationship. This runs contrary to the fundamental interests of both the Russian and American people. Considering the global security responsibilities of Russia and the United States, this is also damaging to international relations as a whole.

<sup>90</sup> NAT’L CYBERSEC. & COMM’NS INTEGRATION CTR. & FED. BUREAU OF INVESTIGATION, GRIZZLY STEPPE – RUSSIAN MALICIOUS CYBER ACTIVITY 1 (2016), at [https://www.us-cert.gov/sites/default/files/publications/JAR\\_16-20296A\\_GRIZZLY%20STEPPE-2016-1229.pdf](https://www.us-cert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016-1229.pdf). A summary in the Joint Analysis Report (JAR) noted that “[p]revious JARs have not attributed malicious cyber activity to specific countries or threat actors. However, public attribution of these activities to RIS is supported by technical indicators from the U.S. Intelligence Community, DHS, FBI, the private sector, and other entities.” *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> White House Press Release, Statement by the President on Actions in Response to Russian Malicious Cyber Activity and Harassment (Dec. 29, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/29/statement-president-actions-response-russian-malicious-cyber-activity>.

<sup>93</sup> White House Press Release, Press Call on the Administration Response to Russian Malicious Cyber Activity and Harassment (Dec. 29, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/29/press-call-administration-response-russian-malicious-cyber-activity-and>.

<sup>94</sup> Ministry of Foreign Aff. of the Russ. Fed’n Press Release, Comment by Foreign Minister Sergey Lavrov on Recent US Sanctions and the Expulsion of Russian Diplomats, Moscow (Dec. 30, 2016), at [http://www.mid.ru/en/press\\_service/minister\\_speeches/-/asset\\_publisher/7OvQR5KJWVmR/content/id/2583996](http://www.mid.ru/en/press_service/minister_speeches/-/asset_publisher/7OvQR5KJWVmR/content/id/2583996).

As it proceeds from international practice, Russia has reasons to respond in kind. Although we have the right to retaliate, we will not resort to irresponsible ‘kitchen’ diplomacy but will plan our further steps to restore Russian-US relations based on the policies of the Trump Administration.<sup>95</sup>

Some legislators sought to impose greater sanctions on Russia. Senators McCain and Graham stated that these “retaliatory measures . . . [we]re a small price for Russia to pay.”<sup>96</sup> Consistent with this statement, on January 11, 2017, they cosponsored a bill with several other senators that would, among other things, impose certain sanctions on “persons engaging in significant activities undermining cybersecurity and democratic institutions,” as well as “persons engaging in transactions with the intelligence or defense sectors of the Government of the Russian Federation,” and would codify Executive Order 13694.<sup>97</sup> In addition, on February 8, Senator Graham introduced the Russia Sanctions Review Act of 2017.<sup>98</sup> That bill would require the Trump administration to submit two items to Congress before relaxing sanctions: (1) a description of any proposed sanctions relief; and (2) a certification that Moscow had stopped supporting actions to undermine the government of Ukraine and ceased cyberattacks against the United States.<sup>99</sup> Congress would then have 120 days either to pass a joint resolution of disapproval or to decline to act on the sanctions relief.<sup>100</sup>

During this period, President-elect Trump’s position on Russian interference in the election remained unclear. Responding to the Obama administration’s sanctions, President-elect Trump simply stated that the “country [should] . . . move on to bigger and better things.”<sup>101</sup> He then agreed to meet with intelligence officials so he could “be updated on the facts” of the hacking.<sup>102</sup> Before then, however, Julian Assange repeated his claim “that [WikiLeaks] source [wa]s not the Russian government and it [wa]s not a state party.”<sup>103</sup> In response, Trump noted that “Julian Assange . . . said Russians did not give him the info!”<sup>104</sup> He later clarified: “The dishonest media likes saying that I am in Agreement with Julian Assange - wrong. I simply state what he states, it is for the people . . .<sup>105</sup> to make up their

<sup>95</sup> President of Russ. Press Release, Statement by the President of Russia (Dec. 30, 2016, 3:15 PM), at <http://en.kremlin.ru/events/president/news/53678>. Later that day, President-elect Trump noted his approval of this statement on Twitter. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 30, 2016, 11:41 AM), at <https://twitter.com/realDonaldTrump/status/814919370711461890> (“Great move on delay (by V. Putin) - I always knew he was very smart!”).

<sup>96</sup> John McCain, U.S. Senator AZ Press Release, McCain & Graham on New Sanctions Against Russia (Dec. 29, 2016), at <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=DFAE6FFD-976A-468C-B53B-15D548E46BD7>.

<sup>97</sup> Counteracting Russian Hostilities Act of 2017, S. 94, 115th Cong. §§103–05 (2017).

<sup>98</sup> See Russia Sanctions Review Act of 2017, S. 341, 115th Cong. (2017).

<sup>99</sup> *Id.* §4(a).

<sup>100</sup> See *id.* §§4(b)–(c).

<sup>101</sup> Michael D. Shear, *Donald Trump, After Dismissing Hacking, Agrees to an Intelligence Briefing*, N.Y. TIMES (Dec. 29, 2016), at <https://www.nytimes.com/2016/12/29/us/politics/donald-trump-russia-hack.html>.

<sup>102</sup> *Id.*

<sup>103</sup> *Julian Assange: Our Source Is Not the Russian Government*, FOX NEWS (Jan. 3, 2017), at <http://www.foxnews.com/transcript/2017/01/03/julian-assange-our-source-is-not-russian-government>; see also *infra* note 15 (noting similar previous assertion by Mr. Assange).

<sup>104</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 4, 2017, 4:22 AM), at <https://twitter.com/realDonaldTrump/status/816620855958601730>.

<sup>105</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2017, 5:25 AM), at <https://twitter.com/realDonaldTrump/status/816999062562107392>.



own minds as to the truth.”<sup>106</sup> That same day, however, Trump again questioned the attribution of the election hacking to Russia: “The D[NC] would not allow the FBI to study or see its computer info after it was supposedly hacked by Russia . . . .”<sup>107</sup> So how and why are they so sure about hacking if they never even requested an examination of the computer servers? What is going on?”<sup>108</sup> Vice President-elect Mike Pence claimed that Trump had “expressed his very sincere and healthy American skepticism about intelligence conclusions.”<sup>109</sup> However, DNI Clapper subsequently asserted that “there is an important distinction here between healthy skepticism, which policymakers . . . should always have for intelligence, . . . and disparagement.”<sup>110</sup>

At the January 6 briefing, intelligence officials presented Trump with the original, classified version of the report that the CIA, FBI, and NSA had prepared based on the comprehensive review ordered by President Obama.<sup>111</sup> The declassified version of the report, released later that day, stated:

We assess with high confidence that Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election, the consistent goals of which were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.

- We also assess Putin and the Russian Government aspired to help President-elect Trump’s election chances when possible by discrediting Secretary Clinton and publicly contrasting her unfavorably to him. . . .<sup>112</sup>
- In trying to influence the US election, we assess the Kremlin sought to advance its longstanding desire to undermine the US-led liberal democratic order, the promotion of which Putin and other senior Russian leaders view as a threat to Russia and Putin’s regime.
- Putin publicly pointed to the Panama Papers disclosure and the Olympic doping scandal as US-directed efforts to defame Russia, suggesting he sought to use disclosures to discredit the image of the United States and cast it as hypocritical.

<sup>106</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2017, 5:45 AM), at <https://twitter.com/realDonaldTrump/status/817004210529116160>.

<sup>107</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2017, 4:30 PM), at <https://twitter.com/realDonaldTrump/status/817166353266262016>.

<sup>108</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 5, 2017, 4:40 PM), at <https://twitter.com/realDonaldTrump/status/817168818539757568>. Adding to these statements, the day before the intelligence briefing, President-elect Trump stated that the focus on Russian interference with the election was a “political witch hunt” to distract from the Democratic Party’s loss in the presidential election. See Michael D. Shear & David E. Sanger, *Putin Led a Complex Cyberattack Scheme to Aid Trump, Report Finds*, N.Y. TIMES (Jan. 6, 2017), at <https://www.nytimes.com/2017/01/06/us/politics/donald-trump-wall-hack-russia.html>.

<sup>109</sup> Antonio José Vielma, *Vice President-Elect Pence: Trump Expressed “Healthy American Skepticism” About US Intelligence Conclusions*, CNBC (Jan. 4, 2017), at <http://www.cnbc.com/2017/01/04/vice-president-elect-pence-trump-expressed-healthy-american-skepticism-about-us-intelligence-conclusions.html>.

<sup>110</sup> Foreign Cyber Threats Hearing, *supra* note 35, at 51 (statement of James R. Clapper, Jr., Director of Nat’l Intelligence). Indeed, as DNI Clapper indicated, intelligence agencies in early January “st[ood] actually more resolutely on the strength of th[e] statement that we made on the 7th of October [attributing the hacks to the Russian government].” *Id.* at 31.

<sup>111</sup> See Shear & Sanger, *supra* note 108; see also *supra* notes 67–72 and corresponding text.

<sup>112</sup> The NSA only had “moderate confidence” in this assessment, while the CIA and FBI both had “high confidence.” OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 1 (2017), available at <https://assets.documentcloud.org/documents/3254237/Russia-Hack-Report.pdf>.

- Putin most likely wanted to discredit Secretary Clinton because he has publicly blamed her since 2011 for inciting mass protests against his regime in late 2011 and early 2012, and because he holds a grudge for comments he almost certainly saw as disparaging him.

We assess Putin, his advisers, and the Russian Government developed a clear preference for President-elect Trump over Secretary Clinton.

- Beginning in June, Putin's public comments about the US presidential race avoided directly praising President-elect Trump, probably because Kremlin officials thought that any praise from Putin personally would backfire in the United States. Nonetheless, Putin publicly indicated a preference for President-elect Trump's stated policy to work with Russia, and pro-Kremlin figures spoke highly about what they saw as his Russia-friendly positions on Syria and Ukraine. Putin publicly contrasted the President-elect's approach to Russia with Secretary Clinton's "aggressive rhetoric."
- Moscow also saw the election of President-elect Trump as a way to achieve an international counterterrorism coalition against the Islamic State in Iraq and the Levant . . . .
- Putin, Russian officials, and other pro-Kremlin pundits stopped publicly criticizing the US election process as unfair almost immediately after the election because Moscow probably assessed it would be counterproductive to building positive relations.

We assess the influence campaign aspired to help President-elect Trump's chances of victory when possible by discrediting Secretary Clinton and publicly contrasting her unfavorably to the President-elect. When it appeared to Moscow that Secretary Clinton was likely to win the presidency the Russian influence campaign focused more on undercutting Secretary Clinton's legitimacy and crippling her presidency from its start, including by impugning the fairness of the election.

- Before the election, Russian diplomats had publicly denounced the US electoral process and were prepared to publicly call into question the validity of the results. Pro-Kremlin bloggers had prepared a Twitter campaign, #DemocracyRIP, on election night in anticipation of Secretary Clinton's victory, judging from their social media activity.<sup>113</sup>

The report also addressed the scope of the Russian government's intrusion into election-related activities:

We assess Russian intelligence services collected against the US primary campaigns, think tanks, and lobbying groups they viewed as likely to shape future US policies. In July 2015, Russian intelligence gained access to Democratic National Committee (DNC) networks and maintained that access until at least June 2016.

- The General Staff Main Intelligence Directorate (GRU) probably began cyber operations aimed at the US election by March 2016. We assess that the GRU operations resulted in the compromise of the personal e-mail accounts of Democratic Party officials and political figures. By May, the GRU had exfiltrated large volumes of data from the DNC.<sup>114</sup>

Finally, it detailed the methods that the Russian government used to interfere:

<sup>113</sup> *Id.* at 1–2.

<sup>114</sup> *Id.* at 2.

We assess with high confidence that the GRU used the Guccifer 2.0 persona, DCLeaks.com, and WikiLeaks to release US victim data obtained in cyber operations publicly and in exclusives to media outlets.

- Guccifer 2.0, who claimed to be an independent Romanian hacker, made multiple contradictory statements and false claims about his likely Russian identity throughout the election. Press reporting suggests more than one person claiming to be Guccifer 2.0 interacted with journalists.
- Content that we assess was taken from e-mail accounts targeted by the GRU in March 2016 appeared on DCLeaks.com starting in June.

We assess with high confidence that the GRU relayed material it acquired from the DNC and senior Democratic officials to WikiLeaks. Moscow most likely chose WikiLeaks because of its self-proclaimed reputation for authenticity. Disclosures through WikiLeaks did not contain any evident forgeries.

- In early September, Putin said publicly it was important the DNC data was exposed to WikiLeaks, calling the search for the source of the leaks a distraction and denying Russian “state-level” involvement.<sup>115</sup>
- The Kremlin’s principal international propaganda outlet RT (formerly Russia Today) has actively collaborated with WikiLeaks. RT’s editor-in-chief visited WikiLeaks founder Julian Assange at the Ecuadorian Embassy in London in August 2013, where they discussed renewing his broadcast contract with RT, according to Russian and Western media. Russian media subsequently announced that RT had become “the only Russian media company” to partner with WikiLeaks and had received access to “new leaks of secret information.” RT routinely gives Assange sympathetic coverage and provides him a platform to denounce the United States.<sup>116</sup>

The report also indicated that, although “Russian intelligence accessed elements of multiple state or local electoral boards,” the Department of Homeland Security “assesses that the types of systems we observed Russian actors targeting or compromising are not involved in vote tallying.”<sup>117</sup> Beyond that finding, however, the agencies

did not make an assessment of the impact that Russian activities had on the outcome of the 2016 election. The US Intelligence Community is charged with monitoring and assessing the intentions, capabilities, and actions of foreign actors; it does not analyze US political processes or US public opinion.<sup>118</sup>

A significant amount of classified evidence was omitted from the public version of the report.<sup>119</sup> The agencies noted that the declassified report’s “conclusions [we]re identical to

<sup>115</sup> [Editors’ note: The report appears to refer to an interview that Putin gave to *Bloomberg* news. See Interview to *Bloomberg*, *supra* note 25 (“[D]oes it really matter who hacked Mrs. Clinton’s election campaign team database? Does it? What really matters is the content shown to the community. This is what the discussion should be held about.”) (quoting President Putin).]

<sup>116</sup> OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, *supra* note 112, at 2–3. The report also detailed how Russia’s “state-run propaganda machine—comprised of its domestic media apparatus, outlets targeting global audiences such as RT and Sputnik, and a network of quasi-government trolls—contributed to the influence campaign by serving as a platform for Kremlin messaging to Russian and international audiences.” See *id.* at 3.

<sup>117</sup> *Id.* at 3.

<sup>118</sup> *Id.* at i.

<sup>119</sup> A media report indicated that the classified report was over fifty pages long. Adam Entous & Greg Miller, *U.S. Intercepts Capture Senior Russian Officials Celebrating Trump Win*, WASH. POST (Jan. 5, 2017), *at*

the highly classified assessment, but this document d[id] not include the full supporting information, including specific intelligence on key elements of the influence campaign.”<sup>120</sup> The intelligence community “rarely can publicly reveal the full extent of its knowledge or the precise bases for its assessments, as the release of such information would reveal sensitive sources or methods and imperil the ability to collect critical foreign intelligence in the future.”<sup>121</sup>

Russian officials denounced the declassified report. A Kremlin spokesman said that “[t]hese are baseless allegations substantiated with nothing, done on a rather amateurish, emotional level.”<sup>122</sup> The Foreign Ministry’s spokeswoman added: “If ‘Russian hackers’ managed to hack anything in America, it’s two things: Obama’s brain and, of course, the report itself.”<sup>123</sup>

After the briefing, President-elect Trump released a brief statement that did not address the report in any detail. It said, in relevant part:

While Russia, China, other countries, outside groups and people are consistently trying to break through the cyber infrastructure of our governmental institutions, businesses and organizations including the D[NC], there was absolutely no effect on the outcome of the election[,] including the fact that there was no tampering whatsoever with voting machines. There were attempts to hack the R[NC], but the RNC had strong hacking defenses and the hackers were unsuccessful.<sup>124</sup>

Nonetheless, a few days later, Trump acknowledged that Russia might have been responsible: “As far as hacking, I think it was Russia, but I think we also get hacked by other countries and other people.”<sup>125</sup>

In the wake of new material reported by media outlets after the January 6 briefing, members of Congress called for investigation of links between Trump’s campaign and the Russian government.<sup>126</sup> The leaders of the Senate Intelligence Committee’s investigation into

[https://www.washingtonpost.com/world/national-security/us-intercepts-capture-senior-russian-officials-celebrating-trump-win/2017/01/05/d7099406-d355-11e6-9cb0-54ab630851e8\\_story.html](https://www.washingtonpost.com/world/national-security/us-intercepts-capture-senior-russian-officials-celebrating-trump-win/2017/01/05/d7099406-d355-11e6-9cb0-54ab630851e8_story.html).

<sup>120</sup> OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, *supra* note 112, at i. Such intelligence might have included, among other evidence, communications intercepted by U.S. intelligence agencies in which Russian officials—including those with knowledge of Russia’s election interference campaign—celebrated Mr. Trump’s election. See Entous & Miller, *supra* note 119.

<sup>121</sup> OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, *supra* note 112, at 1.

<sup>122</sup> Shaun Walker, *Russia Slates “Baseless, Amateurish” US Election Hacking Report*, GUARDIAN (Jan. 9, 2017), at <https://www.theguardian.com/world/2017/jan/09/vladimir-putin-slates-baseless-amateurish-us-election-hacking-report>.

<sup>123</sup> *Id.*

<sup>124</sup> *Donald Trump’s Statement After Intelligence Briefing on Hacking*, N.Y. TIMES (Jan. 6, 2017), at <https://www.nytimes.com/2017/01/06/us/politics/donald-trump-statement-hack-intelligence-briefing.html>.

<sup>125</sup> Natalia Wojcik, Mack Hogan & Mike Juang, *Transcript of President-Elect Trump’s News Conference*, CNBC (Jan. 11, 2017, 1:37 PM), at <http://www.cnbc.com/2017/01/11/transcript-of-president-elect-donald-j-trumps-news-conference.html>.

<sup>126</sup> Karoun Demirjian, *Democrats Press FBI to Investigate Trump-Russia Ties*, WASH. POST (Jan. 13, 2017), at <https://www.washingtonpost.com/news/powerpost/wp/2017/01/13/democrats-press-fbi-to-investigate-trump-russia-ties>. At the briefing, intelligence officials reportedly also presented President-elect Trump with a brief synopsis of two allegations: (1) that Russian operatives are in possession of compromising personal and financial information on him, and (2) that Mr. Trump’s surrogates exchanged information with individuals associated with the Russian government during the campaign. Evan Perez, Jim Sciutto, Jake Tapper & Carl Bernstein, *Intel Chiefs Presented Trump with Claims of Russian Efforts to Compromise Him*, CNN (Jan. 12, 2017), at <http://www.cnn.com/2017/01/10/politics/donald-trump-intelligence-report-russia/index.html>. The synopsis was drawn from a thirty-five-page dossier of memos written by a former British intelligence operative. See *id.* President-elect Trump has firmly denied the allegations. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 10, 2017, 5:19 PM), at <https://twitter.com/realDonaldTrump/status/818990655418617856> (calling reports “FAKE NEWS - A TOTAL POLITICAL WITCH HUNT!”).

Russian hacking indicated that they would also investigate those connections.<sup>127</sup> In addition, media reports stated that both law enforcement and intelligence agencies were examining intercepted communications and financial transactions as part of a broad investigation into ties between Russian officials and Trump's campaign associates, including Paul Manafort, Carter Page, and Roger Stone.<sup>128</sup> However, during a closed-door meeting with House leaders, FBI Director Comey reportedly refused to confirm whether the FBI was investigating the alleged links.<sup>129</sup> Similarly, when asked by the Senate Intelligence Committee about an FBI investigation of possible connections, Mr. Comey said that he "would never comment on investigations, whether we have one or not, in an open forum like this."<sup>130</sup>

The new administration's National Security Advisor, Lieutenant General Michael Flynn, resigned on February 13 following allegations that he improperly discussed certain issues with the Russian Ambassador to the United States, Sergey Kislyak, before President Trump took office.<sup>131</sup> The press had previously reported that Gen. Flynn and Mr. Kislyak spoke on the phone several times on December 29, when President Obama announced sanctions against Russia for its election interference.<sup>132</sup> Then, in early February, U.S. officials reportedly said that Gen. Flynn's statements might have suggested that the Russian government could expect relief from those sanctions, even if his statements did not convey an explicit promise.<sup>133</sup>

After these reports emerged, according to President Trump, he "asked for [Gen. Flynn's] resignation" because Gen. Flynn "didn't tell . . . Vice President [Pence] . . . the facts [about his

<sup>127</sup> See *supra* note 74 and corresponding text (noting that investigation would examine "any intelligence regarding links between Russia and individuals associated with political campaigns"). The House Intelligence Committee also stated that it would investigate those links. See *supra* note 76 and corresponding text (describing same update as Senate Intelligence Committee). Those committees lack the power to compel information disclosure. See Karoun Demirjian, *Senate Intel Chiefs Promise Investigation of Trump-Russia Ties as House Democrats Accuse FBI Director of Stonewalling*, WASH. POST (Jan. 13, 2017), at <https://www.washingtonpost.com/news/powerpost/wp/2017/01/13/democrats-accuse-fbi-director-of-stonewalling-on-trump-russia-ties-as-more-call-for-him-to-step-down> (noting limitations of Senate Intelligence Committee). However, they can investigate the links by examining information already collected by intelligence agencies. *Id.*

<sup>128</sup> See Michael S. Schmidt, Matthew Rosenberg, Adam Goldman & Matt Apuzzo, *Intercepted Russian Communications Part of Inquiry into Trump Associates*, N.Y. TIMES (Jan. 19, 2017), at <https://www.nytimes.com/2017/01/19/us/politics/trump-russia-associates-investigation.html>; U.S. *Inquiries into Russian Election Hacking Include Three FBI Probes*, REUTERS (Feb. 18, 2017), at <http://www.reuters.com/article/us-usa-trump-russia-cyber-idUSKBN15X0OE> (reporting that the FBI is pursuing at least three separate investigations, including one into financial transactions by Russian persons believed to have links to Trump's associates).

<sup>129</sup> Demirjian, *supra* note 127. Following that meeting, some House Democrats even called for Comey's resignation because they did not believe that he could capably lead any Russian hacking investigation. See *id.*

<sup>130</sup> Russian Intelligence Activities Hearing, *supra* note 56. Mr. Comey reiterated later in the hearing that "especially in a public forum, [the FBI] never confirm[s] or den[ies] a pending investigation." *Id.*

<sup>131</sup> See Maggie Haberman, Matthew Rosenberg, Matt Apuzzo & Glenn Thrush, *Michael Flynn Resigns as National Security Advisor*, N.Y. TIMES (Feb. 13, 2017), at <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html>; see also Greg Miller, Adam Entous & Ellen Nakashima, *National Security Adviser Flynn Discussed Sanctions with Russian Ambassador, Despite Denials, Officials Say*, WASH. POST (Feb. 9, 2017), at [https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5\\_story.html](https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5_story.html) (describing events preceding Mr. Flynn's resignation).

<sup>132</sup> David Ignatius, *Why Did Obama Dawdle on Russia's Hacking?*, WASH. POST (Jan. 12, 2017), at [https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e\\_story.html](https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e_story.html).

<sup>133</sup> Miller, Entous & Nakashima, *supra* note 131. Those officials had "access to reports from U.S. intelligence and law enforcement agencies that routinely monitor the communications of Russian diplomats." *Id.*

discussions with Mr. Kislyak], and then he didn't remember," which "just wasn't acceptable to me."<sup>134</sup> But he said that Gen. Flynn "didn't have to [resign], because what he [discussed] wasn't wrong."<sup>135</sup> Nonetheless, both congressional intelligence committees indicated that they would likely examine the nature of Gen. Flynn's discussions with Mr. Kislyak in the course of their broader investigations into Russian election interference.<sup>136</sup>

#### STATE JURISDICTION AND IMMUNITY

*Second Circuit Overturns \$655 Million Jury Verdict Against Palestine Liberation Organization and Palestinian Authority*  
doi:10.1017/ajil.2017.19

In its August 2016 decision in *Waldman v. Palestine Liberation Organization*, the U.S. Court of Appeals for the Second Circuit reversed a \$655 million jury verdict against the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA) for lack of personal jurisdiction.<sup>1</sup> The plaintiffs were individuals whose family members had been killed in terrorist attacks that took place in Jerusalem; defendants were alleged to have coordinated and carried out these attacks.<sup>2</sup> While the United States government took no position on the merits

<sup>134</sup> White House Press Release, Remarks by President Trump in Press Conference (Feb. 16, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/16/remarks-president-trump-press-conference> [hereinafter Feb. 16 Press Conference]. Vice President Pence had previously stated, based on his conversations with Gen. Flynn, that Gen. Flynn and Mr. Kislyak had not discussed the sanctions against Russia at all. See *Face the Nation Transcript January 15, 2017: Pence, Manchin, Gingrich*, FACE THE NATION (Jan. 15, 2017, 2:06 PM), at <http://www.cbsnews.com/news/face-the-nation-transcript-january-15-2017-pence-manchin-gingrich>; Miller, Entous & Nakashima, *supra* note 131. Gen. Flynn later denied ever discussing sanctions with Mr. Kislyak, both to the FBI and to media outlets, but then stated that he "had no recollection of discussing sanctions, [but] couldn't be certain that the topic never came up." Sari Horwitz & Adam Entous, *Flynn in FBI Interview Denied Discussing Sanctions with Russian Ambassador*, WASH. POST (Feb. 16, 2017), at [https://www.washingtonpost.com/world/national-security/flynn-in-fbi-interview-denied-discussing-sanctions-with-russian-ambassador/2017/02/16/e3e1e16a-f3d5-11e6-8d72-263470bf0401\\_story.html](https://www.washingtonpost.com/world/national-security/flynn-in-fbi-interview-denied-discussing-sanctions-with-russian-ambassador/2017/02/16/e3e1e16a-f3d5-11e6-8d72-263470bf0401_story.html).

<sup>135</sup> Feb. 16 Press Conference, *supra* note 134; see also White House Press Release, Press Briefing by Press Secretary Sean Spicer, #12 (Feb. 14, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/14/press-briefing-press-secretary-sean-spicer-2142017-12> ("The evolving and eroding level of trust as a result of this situation and a series of other questionable instances is what led the President to ask for General Flynn's resignation. Immediately after the Department of Justice notified the White House Counsel of the situation, the White House Counsel briefed the President and a small group of senior advisors. The White House Counsel reviewed and determined that there [wa]s not a legal issue, but rather a trust issue.").

<sup>136</sup> See Karoun Demirjian, *House Intelligence Committee Open to Probing Michael Flynn*, WASH. POST (Feb. 16, 2017), at [https://www.washingtonpost.com/powerpost/house-intelligence-committee-open-to-probing-michael-flynn/2017/02/16/b3d9ea0a-f496-11e6-a9b0-ecee7ce475fc\\_story.html](https://www.washingtonpost.com/powerpost/house-intelligence-committee-open-to-probing-michael-flynn/2017/02/16/b3d9ea0a-f496-11e6-a9b0-ecee7ce475fc_story.html); *Senate Republicans: Intelligence Committee Will Investigate Flynn Contact with Russia*, WASH. POST (Feb. 14, 2017), at [https://www.washingtonpost.com/video/national/senate-republicans-intelligence-committee-will-investigate-flynn-contact-with-russia/2017/02/14/b6f5dad2-f2ed-11e6-9fb1-2d8f3fc9c0ed\\_video.html](https://www.washingtonpost.com/video/national/senate-republicans-intelligence-committee-will-investigate-flynn-contact-with-russia/2017/02/14/b6f5dad2-f2ed-11e6-9fb1-2d8f3fc9c0ed_video.html). Leaders of the Senate Judiciary Committee "issued a letter requesting a Justice Department briefing and access to relevant documents concerning Mr. Flynn's resignation." Matt Flegenheimer, *Despite Democrats' Demands, Broad Inquiry on Russia Ties Isn't Assured*, N.Y. TIMES (Feb. 15, 2017), at <https://www.nytimes.com/2017/02/15/us/politics/trump-russia-inquiry.html>.

<sup>1</sup> *Waldman v. Palestine Liberation Organization*, 835 F.3d 317 (2d Cir. 2016).

<sup>2</sup> *Id.* at 324–25.

of the dispute, it filed a Statement of Interest in the district court “[o]n the limited issue of setting a bond amount in [the] case.”<sup>3</sup>

Title 18 U.S.C. §2333(a) authorizes “any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism” to “sue therefor in any appropriate district court of the United States” and to “recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.” The chief purposes of the provision were to give federal courts jurisdiction over certain foreign defendants and to make available the tort principle of vicarious liability in such actions.<sup>4</sup>

The provision—part of the Antiterrorism Act of 1991 (ATA)<sup>5</sup>—was enacted in response to the Southern District of New York’s ruling in the *Klinghoffer* case, which dealt with a terror attack on a cruise ship in the Mediterranean Sea.<sup>6</sup> Relying on admiralty jurisdiction,<sup>7</sup> the district court in that case had held that the U.S. plaintiffs stated a cognizable claim against the PLO.<sup>8</sup> Introducing the language that eventually became Section 2333(a), Senator Chuck Grassley emphasized that, while the court reached the correct result in *Klinghoffer*, its reliance on admiralty jurisdiction suggested potential problems for future plaintiffs who suffered harm on foreign *land*. “Unfortunately, victims who turn to the common law of tort or Federal statutes, find it virtually impossible to pursue their claims because of reluctant courts and numerous jurisdictional hurdles.”<sup>9</sup> To allow victims to recover from injuries caused by “terrorist activity . . . [that] occurred on land in a foreign country,”<sup>10</sup> Senator Grassley introduced the provision to expand federal jurisdiction in such cases. As one State Department official testified:

This bill [the ATA] . . . expands the *Klinghoffer* opinion. Whereas that opinion rested on the special nature of our admiralty laws, this bill will provide general jurisdiction to our Federal courts and a cause of action for cases in which an American has been injured by an act of terrorism overseas. This bill is a welcome addition to our arsenal against terrorists.<sup>11</sup>

Addressing the ATA’s consistency with international law, the official noted that the ATA “maintain[s] the status quo as regards sovereign States and their officials.”<sup>12</sup> The ATA did

<sup>3</sup> Declaration of Antony J. Blinken, attached to the Statement of Interest of the United States of America, at 3, *Sokolow v. Palestine Liberation Organization*, No. 1:04-cv-00397-GBD-RLE (S.D.N.Y. 2015). The United States filed the Statement of Interest in response to the defendants’ Rule 62 Motion to Stay Execution of the Judgment and to Waive the Bond Requirement. Although the United States did not “express a view on the ultimate merits of defendants’ Rule 62 motion (or any other issue in the case),” the statement included a declaration from Blinken raising “concerns about the harms that could arise if the Court were to impose a bond that severely compromised the Palestinian Authority’s (‘PA’) ability to operate as a governmental entity.” *Id.* at 2, 5.

<sup>4</sup> See generally S. REP. 102–342 (1992).

<sup>5</sup> Antiterrorism Act of 1991, Pub. L. No. 102–572, 106 Stat. 4506 (1992). For examples of other suits relying on 18 U.S.C. §2333(a), see, e.g., *Strauss v. Crédit Lyonnais, S.A.*, 175 F.Supp.3d 3 (E.D.N.Y. 2016) (finding jurisdiction over the defendants pursuant to Section 2333); *Linde v. Arab Bank*, 384 F.Supp.2d 571 (E.D.N.Y. 2005) (similar).

<sup>6</sup> *Klinghoffer v. Palestine Liberation Organization*, 739 F.Supp. 854, 856 (S.D.N.Y. 1990).

<sup>7</sup> *Id.* at 858–59.

<sup>8</sup> *Id.* at 867.

<sup>9</sup> 136 Cong. Rec. 7592 (1990).

<sup>10</sup> Brief for the United States as Amici Curiae Supporting Affirmance, at 13, *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002) (Nos. 01-1969, 01-1970).

<sup>11</sup> *Antiterrorism Act of 1990, Hearing Before the Subcommittee on Courts and Administrative Practice, Senate Committee on the Judiciary*, 101st Cong., at 12 (1990) (testimony of U.S. State Dep’t Official Alan Kreczko).

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

not authorize a plaintiff to bring a “cause of action for international terrorism . . . against [sovereign states]” because that would have been “inconsistent with international law.”<sup>13</sup>

Section 2333(a) was also meant to make applicable the common law tort principle of vicarious liability and abettor liability in suits against foreign terrorism defendants. Joseph Morris, testifying as a former high-ranking attorney at the Department of Justice, explained:

American victims seeking compensation for physical, psychological, and economic injuries naturally turn to the common law of tort. American tort law in general [speaks] quite effectively to the facts and circumstances of most terrorist actions not involving acts of state by foreign governments.<sup>14</sup>

As Morris explained,

[t]he tort law system . . . [attaches vicarious liability] to those who knowingly or negligently make it possible for some actor grievously to injure somebody else. As Section 2333(a) is drafted, it brings all of that tort law potential into any of these civil suits.<sup>15</sup>

In addition to incorporating vicarious liability into the statute, Congress also designed the ATA to extend liability not only “to defendants who actually commit a tort, but also those who aid and abet in its commission.”<sup>16</sup>

The *Waldman* case involved suits by multiple American families against the PLO and PA for seven terror attacks that killed or wounded plaintiffs’ family members.<sup>17</sup> The plaintiffs alleged that the perpetrators of the attacks were, directly or indirectly, affiliated with the PLO and/or the PA.<sup>18</sup> Section 2333(a) facilitated the plaintiffs’ lawsuit in two important ways. First, the plaintiffs relied on the provision’s vicarious liability principle to argue that the PLO and the PA should be held liable for terror attacks because of their affiliation with the perpetrators. Second, the plaintiffs relied on the provision to give the federal court jurisdiction to hear the claim. In response, the defendants argued that the exercise of personal jurisdiction over them violated the Due Process Clause.<sup>19</sup>

During the course of litigation, the Supreme Court substantially altered its jurisdiction jurisprudence in the *Daimler* and *Gucci* decisions, narrowing the scope of general personal jurisdiction.<sup>20</sup> Before *Daimler*, courts routinely exercised general jurisdiction over corporations that engaged in a substantial amount of business in the forum jurisdiction.<sup>21</sup> *Daimler* restricted the scope of general jurisdiction by limiting it to places where the defendants were

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

<sup>14</sup> *Id.* at 83 (testimony of Joseph A. Morris).

<sup>15</sup> *Id.* at 136.

<sup>16</sup> Brief for the United States as Amici Curiae Supporting Affirmance at 10, *Boim v. Quranic Literacy Institute*, 291 F.3d 1000.

<sup>17</sup> First Amended Complaint, *Sokolow*, 2005 WL 6699189 (S.D.N.Y. May 23, 2005).

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

<sup>19</sup> See Defendant’s Memorandum of Law in Support of Their Motion for Judgment as a Matter of Law, at 24, *Sokolow*, 2015 WL 1231805 (S.D.N.Y. Feb. 18, 2015).

<sup>20</sup> *Sokolow*, 2014 WL 6811395, at \*1.

<sup>21</sup> See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448–49 (1952) (holding that Ohio’s exercise of general jurisdiction was consistent with the Due Process Clause); see also Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 111–16 (2015).



essentially “at home”: typically the defendant’s state of incorporation and its principal place of business.<sup>22</sup>

Relying on this new precedent, the *Waldman* defendants moved for summary judgment on jurisdictional grounds. The district court denied the motion, reasoning that:

Under both *Daimler* and *Gucci*, the PA and PLO’s continuous and systematic business and commercial contacts within the United States are sufficient to support the exercise of general jurisdiction . . . . [The] record is therefore insufficient to conclude that either defendant is “at home” in a particular jurisdiction other than the United States.<sup>23</sup>

In light of the connections between the defendants and the United States, the district court ruled that this was just the type of “exceptional case” in which the *Daimler* Court would have found general personal jurisdiction.<sup>24</sup> Since the requirements for personal jurisdiction were satisfied, the district court held that it did not violate the defendants’ due process rights by hearing the case.<sup>25</sup> The case later went to trial, and the jury found for the plaintiffs. After the trial, the jury returned a verdict in favor of the plaintiffs for the amount of \$655 million, once the calculation of actual damages was trebled per the statutory mandate.<sup>26</sup>

After the jury delivered the verdict in February 2015,<sup>27</sup> the defendants filed a motion to stay the execution of the judgment and waive the bond requirement for appeal.<sup>28</sup> (While defendants must generally post a bond equivalent to the amount of the judgment plus interest and costs in order to stay the judgment during appeal,<sup>29</sup> the district court has discretion to reduce or even waive the bond requirement.<sup>30</sup>) During the ensuing proceedings to determine the bond requirement for appeal, Deputy Secretary of State Antony Blinken attached a declaration to a U.S. Statement of Interest “respectfully [urging] the Court to carefully consider the impact of its decision on the continued viability of the PA” in light of evidence showing the PA’s precarious financial situation.<sup>31</sup> The declaration warned that an exorbitant bond could “severely compromise the PA’s ability to operate as a governmental authority,” which would “undermine several decades of U.S. foreign policy and add a new destabilizing factor to the region, compromising national security.”<sup>32</sup> After receiving the statement, the district court ordered the judgment to be stayed pending appeal if defendants “post [ed] a bond or deposit[ed] cash with the Clerk of the Court in the amount of \$10 million

<sup>22</sup> *Id.* at 104 (“*Daimler* further signals that, except for truly exceptional circumstances, a corporation is ‘at home’ only in its states of incorporation and principal place of business.”).

<sup>23</sup> *Sokolow*, 2014 WL 6811395, at \*2.

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

<sup>25</sup> *See id.* at \*2 (holding that the district court could properly exercise personal jurisdiction over the defendants).

<sup>26</sup> Judgment, *Sokolow*, 2015 WL 10852003 (S.D.N.Y. Oct. 1, 2015).

<sup>27</sup> Jury Verdict Form, *Sokolow*, No. 1:04-cv-00397-GBD-RLE (S.D.N.Y. Feb. 25, 2015).

<sup>28</sup> Defendant’s Memorandum of Law in Support of Their Motion to Stay Execution of the Judgment and to Waive the Bond Requirement, *Sokolow*, No. 1:04-cv-00397-GBD-RLE (S.D.N.Y. May 4, 2015).

<sup>29</sup> FED. R. CIV. P. 62(a), (d).

<sup>30</sup> *See generally* Timothy S. Bishop, Joshua D. Yount & J. Bishop Grewell, *Protecting Your Assets During Appeal, FOR THE DEFENSE* (Jan. 2012), available at <https://m.mayerbrown.com/Files/News/0baf2446-4081-4788-bf04-9e76628439bc/Presentation/NewsAttachment/08e3de60-eda9-404b-a503-9f31ba1796a5/12094.pdf>.

<sup>31</sup> Declaration of Antony J. Blinken, attached to the Statement of Interest of the United States of America, at 3, *Sokolow*, No. 1:04-cv-00397-GBD-RLE (Aug. 10, 2015).

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

before September 23, 2015, and in the amount of \$1 million every thirty (30) days thereafter.”<sup>33</sup>

The Second Circuit overturned the jury verdict because it found that the district court’s exercise of personal jurisdiction violated the defendants’ due process rights. Although the Second Circuit found that “there was a statutory basis pursuant to the ATA for that service of process,”<sup>34</sup> it ultimately concluded that due process had been violated because the court lacked personal jurisdiction. The Second Circuit explained that the district court’s conclusion “that it had general jurisdiction over the defendants” relied “on a misreading of the Supreme Court’s decision in *Daimler*.”<sup>35</sup> As the court reasoned:

Pursuant to *Daimler*, the question becomes, where are the PA and the PLO “fairly regarded as at home”? . . . The overwhelming evidence shows that the defendants are “at home” in Palestine, where they govern. Palestine is the central seat of government for the PA and PLO. The PA’s authority is limited to the West Bank and Gaza, and it has no independently operated offices anywhere else. All PA governmental ministries, the Palestinian president, the Parliament, and the Palestinian security services reside in Palestine.

. . .

The activities of the defendants’ mission in Washington, D.C.—which the district court concluded simultaneously served as an office for the PLO and the PA—were limited to maintaining an office in Washington, promoting the Palestinian cause in speeches and media appearances, and retaining a lobbying firm. These contacts with the United States do not render the PA and the PLO “essentially at home” in the United States.<sup>36</sup>

Having concluded that “the district court could not properly exercise general personal jurisdiction over the defendants,”<sup>37</sup> the Second Circuit then examined whether the district court could properly exercise specific jurisdiction.

The Second Circuit rejected all the proffered grounds for specific personal jurisdiction, finding that the defendants’ actions—while “heinous”—“were not sufficiently connected to the United States to provide specific personal jurisdiction”:

There [was] no basis to conclude that the defendants participated [in the attacks] in the United States or that their liability for these acts resulted from their actions that did occur in the United States.

In short, the defendants were [held] liable [at the district court] for tortious activities that occurred outside the United States and affected United States citizens only because they were the victims of indiscriminate violence that occurred abroad . . . A focus on the relationship of the defendants, the forum, and the defendants’ suit-related conduct points to the conclusion that there is no specific personal jurisdiction over the defendants for the torts in this case.<sup>38</sup>

The court focused on three points in reaching this conclusion. First, the plaintiffs argued that the court could exercise jurisdiction under the *Calder* “effects test” because the defendants engaged in harmful conduct expressly aimed at the United States by supplying resources

<sup>33</sup> Order, *Sokolow*, No. 1:04-cv-00397-GBD-RLE (S.D.N.Y. Aug. 24, 2015).

<sup>34</sup> *Waldman*, 835 F.3d at 328.

<sup>35</sup> *Id.* at 332.

<sup>36</sup> *Id.* at 332–33.

<sup>37</sup> *Id.* at 335.

<sup>38</sup> *Id.* at 337.

to terrorists that killed U.S. citizens in order to influence U.S. foreign policy.<sup>39</sup> The court rejected this argument after determining that the effects on the United States were “fortuitous” rather than the result of targeted conduct.<sup>40</sup> Second, the plaintiffs argued that “the defendants purposefully availed themselves of the forum by establishing a continuous presence in the United States and pressuring United States government policy by conducting terror attacks in Israel and threatening further terrorism unless Israel withdrew from Gaza and the West Bank.”<sup>41</sup> The court declined to find jurisdiction on this basis, since the defendants’ purposeful contacts were unrelated to the plaintiffs’ particular claims.<sup>42</sup> Third, the plaintiffs argued that the defendants “consented to personal jurisdiction under the ATA by appointing an agent to accept process.”<sup>43</sup> The court dismissed this as a separate issue from the “constitutional question of whether due process is satisfied” by the exercise of personal jurisdiction.<sup>44</sup>

Since the U.S. courts could not constitutionally exercise general or specific jurisdiction over the foreign defendants, the Court of Appeals vacated the judgment of the district court and dismissed the case.<sup>45</sup>

The Second Circuit’s decision prompted quick reactions from the international community. Hanan Ashrawi, a member of the PLO’s executive committee, remarked that the court’s decision “restore[d] [her] faith in the judicial system.”<sup>46</sup> She thought the “American justice system proved its impartiality.”<sup>47</sup> Palestinian Finance Minister Shukri Bishara noted that “[t]his [was] a Palestinian victory that should not be underestimated[,] and it is a big blow to anyone who attempts to blackmail us.”<sup>48</sup> The reversal of the jury verdict, which Israeli Foreign Minister Avigdor Lieberman had described as a “moral victory for the State of Israel and victims of terrorism,”<sup>49</sup> disappointed Israeli officials. The plaintiffs’ lawyer called on Congress and the State Department to intervene to “ensure that [the plaintiffs] are compensated by the PA and PLO for these crimes. . . . This decision must be corrected so that these families may receive justice.”<sup>50</sup>

<sup>39</sup> *Id.* at 337–41.

<sup>40</sup> *Id.* at 337.

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

<sup>42</sup> *Id.* at 341–43.

<sup>43</sup> *Id.* at 343.

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

<sup>45</sup> *Id.* at 344.

<sup>46</sup> Benjamin Weiser, *Court Throws Out \$655.5 Million Terrorism Verdict Against Palestinian Groups*, N.Y. TIMES (Aug. 31, 2016), at <https://www.nytimes.com/2016/09/01/nyregion/appeals-court-terror-verdict-plo-palestinian-authority.html>.

<sup>47</sup> *Id.*

<sup>48</sup> Jonathan Stempel, *U.S. Court Voids \$655 Million Verdict Against PLO over Israel Attacks*, REUTERS (Aug. 31, 2016), at <http://www.reuters.com/article/us-israel-palestinians-decision-idUSKCN1161UU>.

<sup>49</sup> Shurat Hadin Israel Law Center, *Official Reactions to the Landmark Court Ruling in Sokolow v. Palestinian Authority* (Feb. 25, 2015), at <http://israelawcenter.org/pr/official-reactions-to-the-landmark-court-ruling-in-sokolow-v-palestinian-authority>.

<sup>50</sup> Nicole Hong, *U.S. Appeals Court Dismisses Ruling Against Palestinian Authority, PLO*, WALL ST. J. (Aug. 31, 2016), at <http://www.wsj.com/articles/u-s-appeals-court-dismisses-ruling-against-palestinian-authority-plo-1472660849>.

## STATE JURISDICTION AND IMMUNITY

*New Legislation Seeks to Confirm Immunity of Artwork and Facilitate Cultural Exchange*  
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On December 16, 2016, President Obama signed into law the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (FCEJICA).<sup>1</sup> This act amends the Foreign Sovereign Immunity Act (FSIA) in order to confirm the jurisdictional immunity of foreign states in connection with lending artwork to the United States for temporary exhibit. The FCEJICA contains two exceptions, described below, that introduce some uncertainty about the extent of protection the statute provides to foreign states.

The House Judiciary Committee report explained that the legislation was prompted by the increasingly problematic relationship between the FSIA as recently interpreted by the courts and the Immunity from Seizure Act (IFSA), which was enacted in 1965 and predates the FSIA:

The Immunity from Seizure Act (IFSA) provides the President, or the President's designee, with authority to grant a work of art or other object of cultural significance immunity from seizure by U.S. courts whenever it is determined that its temporary exhibition or display in the United States is within our national interest.<sup>2</sup> The intent of the IFSA is to encourage the cultural and educational exchange of artwork and other culturally significant objects which, in the absence of the legislation, would not be made available for exchange. In enacting IFSA, Congress recognized that cultural exchange can produce substantial benefits to the United States, both artistically and diplomatically.<sup>3</sup>

However, for artwork and cultural objects owned by foreign governments, the intent of IFSA is being frustrated by the Foreign Sovereign Immunities Act (FSIA). Recent court decisions have interpreted a provision of FSIA in a manner that opens foreign governments up to the jurisdiction of U.S. courts if foreign government-owned artwork is present in the United States in connection with a commercial activity and there is a claim that the artwork was taken in violation of international law.<sup>4</sup> Courts have determined that the non-profit exhibition or display of the artwork can be considered "present in the United States in connection with commercial activity" even if the artwork has been granted immunity under IFSA.<sup>5</sup>

The House Judiciary Committee had a particular case in mind: *Malewicz v. City of Amsterdam*. *Malewicz* concerns a dispute between the City of Amsterdam and the Malewicz family over the ownership of a group of paintings.<sup>6</sup> The plaintiffs were descendants of Kazimir Malewicz, "a world-renowned Russian artist in the years before World War II."<sup>7</sup> Because of unrest in the Soviet Union, Kazimir entrusted some of his paintings to friends in Germany after displaying them at an exhibit in Berlin in 1927.<sup>8</sup> Nearly three decades later,

<sup>1</sup> Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319 (2016) [hereinafter FCEJICA]; see also Alyssa Buffenstein, *Obama Signs Law that Could Reopen Cultural Exchange with Russia*, ARTNET NEWS (Jan. 5, 2017), at <https://news.artnet.com/art-world/obama-signs-law-cultural-exchange-russia-805304>; Ingrid Wuerth, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, LAWFARE (Jan. 2, 2017, 12:48 PM), at <https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act>.

<sup>2</sup> 22 U.S.C. §2459.

<sup>3</sup> H.R. REP. NO. 89-1070 (1965).

<sup>4</sup> 28 U.S.C. §1605(a)(3).

<sup>5</sup> H.R. REP. NO. 114-141, 2 (2015).

<sup>6</sup> *Malewicz v. City of Amsterdam*, 362 F.Supp.2d 298, 300 (D.D.C. 2005).

<sup>7</sup> *Id.* at 301.

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

after Malewicz's death in 1956, the Stedelijk Museum in the City of Amsterdam obtained the paintings.<sup>9</sup> In 2003, the city loaned the paintings to museums in New York and Houston after obtaining immunity under the IFSA from the State Department.<sup>10</sup> The plaintiffs filed suit for replevin and monetary damages in federal district court while the paintings were on display in the United States.<sup>11</sup> The city moved to dismiss for failure to state a claim because the artwork had been granted immunity under the IFSA.<sup>12</sup> The State Department filed a Statement of Interest cautioning the district court against allowing the suit to continue: "permitting jurisdiction over a foreign state in such cases threatens to undermine significantly the interests that [the IFSA] was designed to foster and to create friction in U.S. relations with other countries."<sup>13</sup>

Despite the State Department's concerns, the district court ruled that loaning artwork to museums in the United States could subject foreign states to litigation under the commercial activity exception to the FSIA.<sup>14</sup> Under the FSIA, foreign states are immune from the jurisdiction of U.S. courts unless an enumerated exception applies. The FSIA denies immunity in any case where "rights in property taken in violation of international law are in issue *and* that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state."<sup>15</sup> The district court ruled that all of the elements of the exception were satisfied, and denied the City of Amsterdam's claim of immunity under the FSIA.<sup>16</sup> Of particular relevance here, the district court concluded that lending the artworks constituted commercial activity. With respect to the concern about undermining the IFSA's purpose, the district court reasoned that

granting immunity [under the IFSA] and . . . establishing jurisdiction [under the FSIA] for certain claims against a foreign sovereign are both clear and not inconsistent . . . [b]ecause the Malewicz Heirs are not seeking judicial *seizure* of the artworks . . . . Immunity from seizure is not immunity from suit for a declaration of rights or for damages arising from an alleged conversion if the other terms for FSIA jurisdiction exist.<sup>17</sup>

In short, the district court allowed the claim to proceed because the IFSA immunized only the *paintings* from seizure; it did not bar claims simply because they *related to* the paintings. And since all of the elements of the FSIA expropriation exception were met, the city could not rely on the sovereign immunity defense.

This ruling chilled international art lending; the Russian government, for example, suspended all art loans into the United States in the aftermath of *Malewicz*.<sup>18</sup> The committee

<sup>9</sup> *Id.* at 301–03.

<sup>10</sup> *Id.* at 303.

<sup>11</sup> *Id.* at 300.

<sup>12</sup> *Id.* at 303.

<sup>13</sup> Statement of Interest of the United States at 6, *Malewicz*, No. 1:04-cv-00024-RMC, available at <https://www.state.gov/s/l/2004/78110.htm>.

<sup>14</sup> *Malewicz*, 362 F.Supp.2d at 315–16 (denying the first motion to dismiss); see also *Malewicz v. City of Amsterdam*, 517 F.Supp.2d 322, 340 (D.D.C. 2007) (denying the renewed motion to dismiss).

<sup>15</sup> 28 U.S.C. §1605(a)(3) (emphasis added).

<sup>16</sup> *Malewicz*, 517 F.Supp.2d at 340.

<sup>17</sup> *Malewicz*, 362 F.Supp.2d at 311–12.

<sup>18</sup> Carol Vogel and Clifford J. Levy, *Dispute Derails Art Loans from Russia*, N.Y. TIMES (Feb. 2, 2011), at <http://www.nytimes.com/2011/02/03/arts/design/03museum.html>; H.R. REP. NO. 114-141, 1–2 (2015) ("This has

report for the FCEJICA explained the view that decisions like *Malewicz* undermined the goals of the IFSA:

By allowing the presence in the United States of immunized works to form the basis for depriving foreign states of sovereign immunity, courts have turned IFSA on its head and paved the way for further lawsuits of the very sort Congress intended to prevent. As one scholar has observed, “[a] museum promotion or art loan into the United States is not the best mechanism to trap foreign sovereigns into U.S. courts. It mixes together two separate interests: promoting (by protecting) cross-cultural art and cultural heritage exchanges, and providing a forum for wronged individuals to seek justice for their private claims.”

In enacting IFSA, Congress made the policy decision to promote Americans’ exposure to objects of cultural significance over the potential rights of individual claimants. Congress’ aim was to ensure that foreign leaders would not be subject to the jurisdiction of U.S. courts when they loaned immunized cultural objects for temporary exhibits in the United States. As Representative Byron Rogers explained during floor debate on IFSA, the bill was designed to assure the foreign lender that it could lend cultural objects to the United States without incurring the risk that the objects would be seized or the lender would become subject to suit . . . . The ongoing effectiveness of IFSA to encourage foreign governments to lend cultural objects depends upon the ability to provide assurance to foreign lenders that participating in an immunized exhibit will, in fact, protect them from litigation in the United States based on the exhibit.<sup>19</sup>

With these aims in mind, the FCEJICA amended the FSIA by adding section 1605(h)(1).<sup>20</sup> This new section seeks to clarify the definition of “commercial activity” for purposes of the expropriation exception to the FSIA.<sup>21</sup> Specifically, the section provides that activities of a foreign state associated with the temporary exhibition or display of artwork shall not be considered to be commercial activity if the following conditions are met:

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States, [and]

(B) the President . . . has determined . . . that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest, and

(C) the notice thereof has been published . . . .<sup>22</sup>

Because the expropriation exception to the FSIA applies only where the property is “present in the United States in connection with a commercial activity carried on in the United States,”<sup>23</sup> the FCEJICA significantly restricts plaintiffs’ access to that exception.

The FCEJICA created two exceptions to the re-extension of sovereign immunity over artwork loans. First, the statute contained a “Nazi-Era Claims” exception denying foreign states immunity in litigation concerning art taken between 1933 and 1945 by a government affiliated with the Nazi regime.<sup>24</sup> The House Report explains: “This exception is included in the

led, in many instances, to foreign governments declining to export artwork and cultural objects to the United States for temporary exhibition or display.”)

<sup>19</sup> HOUSE REP. 114-141 at 6 (citations omitted).

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

<sup>21</sup> See *supra* note 15 and corresponding text.

<sup>22</sup> 28 U.S.C. §1605(h)(1).

<sup>23</sup> See *supra* note 15 and corresponding text.

<sup>24</sup> §1605(h)(2)(A).

bill because of the systematic looting of artwork by the Nazis in Europe during Hitler's reign—looting that was 'on a historically unmatched level.'"<sup>25</sup>

A second exception was added later in the legislative process. Pursuant to that second exception, the FCEJICA does not extend immunity to foreign states where a work of art was "taken [after 1900] in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group."<sup>26</sup> This second exception appears intended to address critics who objected to the act's singling out of Nazi-era claims. In 2012, after Senators Feinstein and Hatch introduced legislation nearly identical to that in the FCEJICA but without the second exception, one international lawyer questioned: "Why are Nazi storm troopers looting art any different from Bolshevik storm troopers?"<sup>27</sup> Marc Masurovsky, the cofounder of the Holocaust Art Restitution Project, likewise questioned how Congress could "excuse 28 different kinds of plunder and only outlaw one subset of one subset."<sup>28</sup> Observing that "the phrase 'targeted and vulnerable group' may sweep broadly to include confiscations allegedly based on political opinion, membership in disfavored social groups, or (to borrow from the definition of genocide), in a 'national, ethnical, racial or religious group,'" some commentators noted that the ambiguity of the scope of the second exception threatened to undermine the asserted goals of the legislation by failing to "provide much certainty for foreign governments worried about loaning art to U. S. institutions."<sup>29</sup>

#### INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

*United States Confronts China over Seizure of Unmanned Drone in the South China Sea*  
doi:10.1017/ajil.2017.33

On December 15, 2016, China seized an American unmanned underwater vehicle (UUV) in the South China Sea.<sup>1</sup> The drone had been launched by an American naval vessel, the USNS *Bowditch*. According to press reports, "[t]he American crew was in the process of retrieving the device when a small boat dispatched from the Chinese vessel took it as the American sailors looked on."<sup>2</sup> China has made extensive—and contested—maritime and territorial claims in the South China Sea, including within an area delimited by the

<sup>25</sup> HOUSE REP. 114-141 at 7.

<sup>26</sup> §1605(h)(2)(B).

<sup>27</sup> Doreen Carvajal, *Dispute over Bill on Borrowed Art*, N.Y. TIMES (May 21, 2012), at <http://www.nytimes.com/2012/05/22/arts/design/dispute-over-bill-to-protect-art-lent-to-museums.html>.

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

<sup>29</sup> Wuerth, *supra* note 1. Wuerth also points out that, by excluding any explicit requirement for a violation of international law, this second exception to the FCEJICA "arguably supports the groundbreaking 2016 D.C. Circuit opinion in *Simon v. Republic of Hungary* . . . [which] held that confiscations of property can themselves constitute genocide and accordingly violate international law regardless of the nationality of the party from whom the property was taken." *Id.*

<sup>1</sup> Jane Perlez & Matthew Rosenberg, *China Agrees to Return Seized Drone, Ending Standoff, Pentagon Says*, N.Y. TIMES (Dec. 17, 2016), at <https://www.nytimes.com/2016/12/17/world/asia/china-us-drone.html>.

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

“nine-dash line.”<sup>3</sup> The incident occurred outside of this area,<sup>4</sup> and none of the Chinese government’s statements related to the seizure suggest any assertion of Chinese jurisdiction over the waters where the drone was seized.<sup>5</sup> After an exchange of diplomatic statements, China returned the drone to the U.S. Navy.

Neither the United States nor China specified the precise status of the waters in which the drone was seized under the law of the sea. The location, approximately fifty nautical miles from a major port in the Philippines’ Subic Bay, appears to be within the Philippines’ Exclusive Economic Zone (EEZ).<sup>6</sup> Pursuant to the UN Convention on the Law of the Sea (UNCLOS), states have certain rights of navigation within another state’s EEZ, including freedom of scientific research.<sup>7</sup> The Pentagon has maintained that the drone was being used to carry out scientific research, but both American and Chinese experts recognized that the drone could have been used to gather intelligence on Chinese submarine activity.<sup>8</sup> China declined to comment on this question.<sup>9</sup>

Regardless of the UUV’s purpose, analysts have argued that China had no legal basis to seize the UUV because UNCLOS and customary international law relating to sovereign immunity preclude such seizures.<sup>10</sup>

Immediately after the drone was seized, the Pentagon called on China to return the drone:

Using appropriate government-to-government channels, the Department of Defense has called upon China to immediately return an unmanned underwater vehicle (UUV) that China unlawfully seized on Dec. 15 in the South China Sea while it was being recovered by a U.S. Navy oceanographic survey ship. The USNS Bowditch (T-AGS 62) and the UUV—an unclassified “ocean glider” system used around the world to gather military oceanographic data such as salinity, water temperature, and sound speed—were conducting routine operations in accordance with international law about 50 nautical miles northwest of Subic Bay, Philippines, when a Chinese Navy PRC DALANG III-Class ship (ASR-510) launched a small boat and retrieved

<sup>3</sup> See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 108 AJIL 331, 331–34 (2014).

<sup>4</sup> Perlez & Rosenberg, *supra* note 1.

<sup>5</sup> One commentator pointed out that China might claim that the *Bowditch* and the UUV were operating inside China’s Exclusive Economic Zone (EEZ) because they were operating within two hundred nautical miles of the Scarborough Shoal. He explained that this “would be a very weak claim” given a recent tribunal decision rejecting the view that an EEZ could be calculated from the Scarborough Shoal because “the Scarborough Shoal is a rock that entitles its sovereign to only a 12 nautical mile territorial sea.” Julian Ku, *The Nonexistent Legal Basis for China’s Seizure of the U.S. Navy’s Drone in the South China Sea*, LAWFARE (Dec. 16, 2016), at <https://www.lawfareblog.com/nonexistent-legal-basis-chinas-seizure-us-navys-drone-south-china-sea>; see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 110 AJIL 795 (2016).

<sup>6</sup> United Nations Convention on the Law of the Sea Art. 57, Dec. 10, 1982, 1833 UNTS 397 [hereinafter UNCLOS] (“The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”).

<sup>7</sup> UNCLOS Arts. 58, 87, 245–57.

<sup>8</sup> Perlez & Rosenberg, *supra* note 1.

<sup>9</sup> Asked if the drone had been spying in Chinese waters, Foreign Ministry Spokesperson Hua Chungying noted:

US military aircraft and vessels have been conducting close-in reconnaissance and military surveys in waters facing China, posing threat to China’s sovereignty and security. The Chinese side is firmly opposed to that. As for what the drone was doing at that moment, you’d better raise this question with the US military.

Ministry of Foreign Affairs of the People’s Republic of China, at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1425479.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1425479.shtml).

<sup>10</sup> UNCLOS Art. 32; Ku, *supra* note 5.



the UUV. Bowditch made contact with the PRC Navy ship via bridge-to-bridge radio to request the return of the UUV. The radio contact was acknowledged by the PRC Navy ship, but the request was ignored. The UUV is a sovereign immune vessel of the United States. We call upon China to return our UUV immediately, and to comply with all of its obligations under international law.<sup>11</sup>

The next day, before the issue was resolved, then-President-elect Trump suggested he would take a different approach, tweeting: “China steals United States Navy research drone in international waters—rips it out of water and takes it to China in unprecedented act.”<sup>12</sup> He followed up: “We should tell China that we don’t want the drone they stole back.- let them keep it!”<sup>13</sup>

On December 18, 2016, the Chinese Defense Ministry issued a statement announcing its intention to return the drone:

Chinese Defense Ministry spokesperson Yang Yujun said late Saturday that China has decided to hand over the U.S. underwater drone it captured in its waters to the United States in an appropriate manner. According [to] Yang’s statement on the website of the defense ministry, on the afternoon of December 15, a Chinese naval lifeboat located an unidentified device in the waters of the South China Sea. In order to prevent the device from causing harm to the safety of navigation and personnel of passing vessels, the Chinese naval lifeboat verified and examined the device in a professional and responsible manner. Upon examination, Yang said, the device was identified as an underwater drone of the United States. The Chinese side has decided to hand over it to the U.S. in an appropriate manner. Both sides have been maintaining communication on the issue, Yang noted. The U.S. side’s unilateral move to dramatize the issue in the process is inappropriate, and not conducive to its settlement. “We regret that,” Yang added. It is worth emphasizing that for a long time, the U.S. military has frequently dispatched vessels and aircraft to carry out close-in reconnaissance and military surveys within Chinese waters, Yang said. “China resolutely opposes these activities, and demands that the U.S. side should stop such activities. China will continue to be vigilant against the relevant activities on the U.S. side, and will take necessary measures in response,” said the spokesperson.<sup>14</sup>

The next day, the State Department confirmed that military-to-military discussions had resulted in an agreement for the return of the UUV, while maintaining that China’s seizure of the craft had been in violation of international law:

The device that we’re talking about is—it’s a scientific research device. It’s meant to help us with oceanographic studies. . . . I don’t know what specifically they had tasked this UUV to do on that particular day, but it was doing oceanographic work and only oceanographic work. . . . [The UUV] absolutely was operating inside international waters, and it was absolutely performing necessary scientific research, certainly within the bounds of international law. And the absconding with it acted against that very international law, which is, again, why we’re going to get it back . . . . Ambassador Baucus, our ambassador in Beijing, personally was involved in the discussions

<sup>11</sup> U.S. Dep’t of Defense Press Release, Statement by Pentagon Press Secretary Peter Cook on Incident in the South China Sea (Dec. 16, 2016), at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1032611/statement-by-pentagon-press-secretary-peter-cook-on-incident-in-south-china-sea>.

<sup>12</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 17, 2016, 5:57 AM), at <https://twitter.com/realDonaldTrump/status/810121703288410112>.

<sup>13</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 17, 2016, 4:59 PM), at <https://twitter.com/realDonaldTrump/status/81028832188055520>.

<sup>14</sup> Ministry of Nat’l Defense of the People’s Republic of China Press Release, China to Hand over Underwater Drone to U.S. in Appropriate Manner (Dec. 18, 2016), at [http://eng.mod.gov.cn/TopNews/2016-12/18/content\\_4767099.htm](http://eng.mod.gov.cn/TopNews/2016-12/18/content_4767099.htm).

which led to our ability now to get it returned . . . . So yes, we were absolutely engaged right there at our ambassador's level.<sup>15</sup>

That same day, Foreign Ministry Spokesperson Hua Chunying fielded questions about the return of the UUV, stating that the decision had been made "via the military-to-military channel."<sup>16</sup> She deflected questions about then-President-elect Trump's comments:

There have been abundant comments from various parties on remarks made by US President-elect Trump on Twitter. I will not add to them. . . . An unidentified device was discovered by a lifeboat of the Chinese Navy in waters of the South China Sea. In order to prevent this device from posing danger to the safe navigation of passing ships and personnel, the Chinese side checked and verified the device in a professional and responsible attitude. After identifying the device as a UUV from the US, the Chinese side decided to hand it over to the US side in an appropriate manner. It is learnt that the two sides are in smooth communication through the military-to-military channel, which will definitely lead to a proper settlement of this issue.<sup>17</sup>

On December 20, 2016, a Chinese ship returned the UUV to the United States Navy off the shores of the Philippines near where it was taken.<sup>18</sup> The Pentagon was clear in calling the seizure "unlawful":

Today, the People's Liberation Army-Navy vessel 510 returned a U.S. Navy Ocean Glider Unmanned Underwater Vehicle (UUV) to the United States, near the location where it had been unlawfully seized on Dec. 15. USS *Mustin* (DDG 89) received the vehicle for the U.S. in international waters approximately 50 nautical miles northwest of Subic Bay. The seized UUV is a sovereign immune vessel of the U.S. Navy which was conducting routine operations in the international waters of the South China Sea in full compliance with international law. It had just completed a pre-programmed military oceanographic survey route and was returning to the nearby USNS *Bowditch* (T-AGS 62). Ocean Gliders such as this are used regularly by the U.S. Navy and other militaries throughout the world.

This incident was inconsistent with both international law and standards of professionalism for conduct between navies at sea. The U.S. has addressed those facts with the Chinese through the appropriate diplomatic and military channels, and [has] called on Chinese authorities to comply with their obligations under international law and to refrain from further efforts to impede lawful U.S. activities. The U.S. will continue to investigate the events surrounding this incident and address any additional findings with the Chinese, as part of our ongoing diplomatic dialogues and the Military Maritime Consultative Agreement Mechanism.

The U.S. remains committed to upholding the accepted principles and norms of international law and freedom of navigation and overflight and will continue to fly, sail, and operate in the South China Sea wherever international law allows, in the same way that we operate everywhere else around the world.<sup>19</sup>

<sup>15</sup> U.S. Dep't of State Press Release, Daily Press Briefing (Dec. 19, 2016), at <https://2009-2017.state.gov/t/pa/prs/dpb/2016/12/265787.htm>.

<sup>16</sup> Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on December 19, 2016 (Dec. 19, 2016), at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1425479.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1425479.shtml).

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

<sup>18</sup> Chris Buckley, *Chinese Navy Returns Seized Underwater Drone to U.S.*, N.Y. TIMES (Dec. 20, 2016), at <https://www.nytimes.com/2016/12/20/world/asia/china-returns-us-drone.html>.

<sup>19</sup> U.S. Dep't of Defense Press Release, Statement by Pentagon Press Secretary Peter Cook on Return of U.S. Navy UUV (Dec. 19, 2016), at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1034224/statement-by-pentagon-press-secretary-peter-cook-on-return-of-us-navy-uuv>.

The State Department addressed China's comment that the UUV posed a threat to the safety of navigation:

First of all, [the UUV] was identified. It's—I think it says U.S. Navy right on the side of it. I can check, but I'm pretty sure it does. But there's no dispute about who it belonged to, and while it might not be manned, it was being operated remotely by U.S. Naval personnel and research scientists on the *Bowditch*, the ship that—from which it was operating.

So look, . . . while this might be an interesting discussion to have, it's kind of a waste of your time and mine, okay? The UUV belonged to the United States Navy, it was operating in international waters in accordance with international law, it was doing research—valuable scientific research—there was no threat to navigation, it was never just off on its own. I mean, it wasn't like they weren't monitoring what it was doing, right? It . . . didn't decide to just go rogue and . . . become a problem for navigation. So this is an academic exercise that's going to be fruitless for both you and me. It belongs to the United States and we're glad we have it back, it should never have been taken in the first place, end of story.<sup>20</sup>

#### INTERNATIONAL CRIMINAL LAW

*International Criminal Court Prosecutor Recommends Investigation of Potential War Crimes in Afghanistan, Including Actions by U.S. Military and Central Intelligence Agency*  
doi:10.1017/ajil.2017.4

On November 14, 2016, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) released its annual Report on Preliminary Examination Activities (the Report).<sup>1</sup> The Report contained the OTP's updates on preliminary examinations of several situations, including in Afghanistan.<sup>2</sup> Of particular note, the OTP announced that it had identified a reasonable basis to seek Pre-Trial Chamber authorization for an investigation into allegations of war crimes committed by the United States—primarily from 2003 to 2004, but in some cases as recently as December 2014.<sup>3</sup>

The OTP's examination has focused on the conflict that began in Afghanistan in late 2001. At that time, a "United States-led coalition launched air strikes and ground operations in Afghanistan against the Taliban," eventually ousting that regime from power.<sup>4</sup> In May–June 2002, "a new transitional Afghan government regained sovereignty" and worked to establish order, aided by the International Security Assistance Force (ISAF).<sup>5</sup> Despite those efforts, the Taliban regained influence between 2003 and 2005.<sup>6</sup> As a result, armed conflict between Afghan and international military forces and organized armed groups—most

<sup>20</sup> U.S. Dep't of State Press Release, Daily Press Briefing (Dec. 20, 2016), at <https://2009-2017.state.gov/t/pa/prs/dpb/2016/12/265846.htm>.

<sup>1</sup> See generally OFFICE OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2016) (Nov. 14, 2016), available at [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

<sup>2</sup> See *id.*, paras. 17–20.

<sup>3</sup> See *infra* notes 18–21 and corresponding text (describing allegations in more detail).

<sup>4</sup> *Id.*, para. 195.

<sup>5</sup> *Id.* The ISAF was established by the UN Security Council in Resolution 1386, and later came under NATO command. *Id.*

<sup>6</sup> See *id.*, para. 196.

notably the Taliban, the Haqqani Network, and Hezb-e-Islami Gulbuddin—persisted throughout the country between May 2005 and December 2014.<sup>7</sup>

The ICC “may exercise its jurisdiction” over Rome Statute crimes if “[t]he State on the territory of which the conduct in question occurred” is a party to the statute.<sup>8</sup> The ICC therefore has jurisdiction over crimes committed in Afghanistan after May 1, 2003, since Afghanistan did not deposit its instrument of ratification to the Rome Statute until February 10, 2003.<sup>9</sup> However, some crimes may have occurred in Poland, Lithuania, and Romania, as “individuals captured in the context of the armed conflict in Afghanistan, such as presumed members of the Taliban or Al Qaeda, were allegedly transferred to detention centres located in those countries.”<sup>10</sup> The ICC has jurisdiction over crimes committed in Poland and Romania after July 1, 2002, and in Lithuania after August 1, 2003.<sup>11</sup> Accordingly, the OTP could examine crimes committed in those countries after those dates, as long as those crimes were “sufficiently linked to the situation in Afghanistan.”<sup>12</sup>

The OTP’s Report considered a series of challenges to actions taken by the Taliban, Afghan government forces, and U.S. military forces. The OTP “has received 112 communications [from sources not specified in the Report] pursuant to Article 15 in relation to the situation in Afghanistan.”<sup>13</sup> Before the OTP can ask the Pre-Trial Chamber to authorize a full-dress “investigation,” it must first “determine whether there is a reasonable basis to proceed with an investigation into the situation,”<sup>14</sup> taking into account the three factors identified in the Rome Statute: jurisdiction, admissibility, and the interests of justice.<sup>15</sup> If the OTP then files a request for authorization with the Pre-Trial Chamber, and if the Chamber likewise finds that “there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court,” then it “shall authorize the commencement of the investigation.”<sup>16</sup>

The OTP Report makes clear that the first step in this process has now taken place. Specifically, with respect to the United States, the Office determined:

... that there is a reasonable basis to believe that, at a minimum, the following crimes within the [ICC]’s jurisdiction have occurred:

...

<sup>7</sup> See *id.*

<sup>8</sup> Rome Statute of the International Criminal Court, Art. 12, para. 2(a), July 17, 1998, 2187 UNTS 3 [hereinafter Rome Statute].

<sup>9</sup> OFFICE OF THE PROSECUTOR, *supra* note 1, para. 193; see also Rome Statute, *supra* note 8, Art. 126, para. 2 (addressing ratification and entry into force).

<sup>10</sup> OFFICE OF THE PROSECUTOR, *supra* note 1, paras. 199–200.

<sup>11</sup> *Id.*, para. 194.

<sup>12</sup> *Id.*, para. 200.

<sup>13</sup> *Id.*, para. 192.

<sup>14</sup> *Id.*, para. 3; see also Rome Statute, *supra* note 8, Art. 15(3) (“If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.”).

<sup>15</sup> Rome Statute, *supra* note 8, Art. 53, para. 1(a)–(c). Admissibility requires consideration of two separate factors. OFFICE OF THE PROSECUTOR, *supra* note 1, para. 5. The first, complementarity, “involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the [OTP].” *Id.*, para. 6. The second, gravity, “includes an assessment of the scale, nature, manner of commission of the crimes, and their impact, bearing in mind the potential cases that would likely arise from an investigation of the situation.” *Id.*, para. 7.

<sup>16</sup> Rome Statute, *supra* note 8, Art. 15(4).

(c) War crimes of torture and related ill-treatment, by US military forces deployed to Afghanistan and in secret detention facilities operated by the Central Intelligence Agency, principally in the 2003–2004 period, although allegedly continuing in some cases until 2014.<sup>17</sup>

The Report then elaborated on the crimes within the ICC’s jurisdiction that the U.S. military forces might have committed. Discussing crimes committed by Afghan government authorities, the Report noted that

[m]ultiple sources have reported on the prevalence of torture in Afghan government detention facilities, including the Afghanistan Independent Human Rights Commission, UNAMA, and a fact-finding commission appointed by the President of Afghanistan in 2013. This conduct reflects a pattern of alleged criminality . . . for which a state of total impunity persists. At present, an estimated 35–50% of conflict-related detainees may be subjected to torture in Afghan detention facilities.<sup>18</sup>

Regarding U.S. actors, the Report stated:

The information available provides a reasonable basis to believe that, in the course of interrogating these detainees, and in conduct supporting those interrogations, members of the US armed forces and the . . . CIA . . . resorted to techniques amounting to the commission of the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape.

These acts are punishable under articles 8(2)(c)(i) and (ii) and 8(2)(e)(vi)<sup>19</sup> of the [Rome] Statute. Specifically:

- Members of US armed forces appear to have subjected at least 61 detained persons to torture, cruel treatment, outrages upon personal dignity on the territory of Afghanistan between 1 May 2003 and 31 December 2014. The majority of the abuses are alleged to have occurred in 2003–2004.
- Members of the CIA appear to have subjected at least 27 detained persons to torture, cruel treatment, outrages upon personal dignity and/or rape on the territory of Afghanistan and . . . Poland, Romania and Lithuania . . . between December 2002 and March 2008. The majority of the abuses are alleged to have occurred in 2003–2004.

These alleged crimes were not the abuses of a few isolated individuals. Rather, they appear to have been committed as part of approved interrogation techniques in an attempt to extract “actionable intelligence” from detainees. According to information available, the resort to such interrogation techniques was ultimately put to an end by the authorities concerned, hence the limited time-period during which the crimes allegedly occurred.

The O[TP] considers that there is a reasonable basis to believe these alleged crimes were committed in furtherance of a policy or policies aimed at eliciting information through

<sup>17</sup> OFFICE OF THE PROSECUTOR, *supra* note 1, para. 198; *see also* Rome Statute, *supra* note 8, Art. 5, para. 1(b)–(c) (noting that “[c]rimes against humanity” and “[w]ar crimes” fall within the ICC’s jurisdiction).

<sup>18</sup> OFFICE OF THE PROSECUTOR, *supra* note 1, para. 208.

<sup>19</sup> [Editors’ note: These provisions define “war crimes” to include, respectively, “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”; “[c]ommitting outrages upon personal dignity, in particular humiliating and degrading treatment”; and “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.” Rome Statute, *supra* note 8, Art. 8, para. 2(c)(i)–(ii), (e)(vi).]

the use of interrogation techniques involving cruel or violent methods which would support US objectives in the conflict in Afghanistan. Likewise, there is a reasonable basis to believe that all the crimes identified herein have a nexus to the Afghanistan conflict.<sup>20</sup>

According to the Report, the allegations rose to the level required to satisfy both elements of admissibility:<sup>21</sup>

*Complementarity:* US civilian and military courts can exercise their jurisdiction over conduct that would constitute a crime within ICC subject-matter jurisdiction (i.e. war crimes, crimes against humanity, and genocide), when committed abroad by US nationals.

In its most recent response to the Committee Against Torture . . . , the US indicated that “more than 70 investigations concerning allegations of detainee abuse by military personnel in Afghanistan conducted by the Department [of Defence] resulted in trial by courts-martial, close to 200 investigations of detainee abuse resulted in either non-judicial punishment or adverse administrative action, and many more were investigated and resulted in action at a lower level.” Specific public information on the incidents and persons forming the subject of those proceedings is, however, limited. According to the information available, the [OTP] was unable to identify any individual in the armed services prosecuted by courts martial for the ill-treatment of detainees within the Court’s temporal and territorial jurisdiction. The vast majority of investigations and prosecutions relating to detainee ill-treatment were for conduct in Iraq. A small number of court martial proceedings (7) were for ill-treatment in Afghanistan that took place in 2002.

The Department of Justice conducted a two-year preliminary review (from August 2009 to June 2011) of allegations related to the abuse of detainees in the custody of the . . . CIA . . . , which reviewed allegations regarding the ill-treatment of 101 detainees. According to the information available, the scope of this review appears to have been limited to investigating whether any unauthorised interrogation techniques were used by CIA interrogators, and if so, whether such conduct could constitute violations of any applicable criminal statutes. In his public statements about those proceedings, the US Attorney General further emphasized that “the Department of Justice . . . will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.” As a result of the review, the Attorney-General conducted full criminal investigations only into the cases of two detainees who had died in CIA custody. Both investigations were completed in August 2012 and did not result in any indictments or prosecutions because, according to the Attorney-General, “the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt.”<sup>22</sup>

While proceedings appear to have been limited to the conduct of interrogators and to incidents where interrogation methods were not authorised at the time, the O[TP] is seeking to obtain further clarifications on the scope of relevant preliminary reviews and investigations before finalising its determination on the admissibility of the related potential cases.

Criminal investigations are reportedly on-going in Poland, Romania and Lithuania regarding alleged crimes committed in relation to the CIA detention facilities on their respective territories. The information available has not allowed the O[TP] to discern the actual contours of such national cases, such that their scope could be said to cover the potential cases under the analysis.

*Gravity:* There is specific information indicating that at least 88 persons in US custody were allegedly tortured. The information available suggests that victims were deliberately subjected to

<sup>20</sup> OFFICE OF THE PROSECUTOR, *supra* note 1, paras. 211–13.

<sup>21</sup> See *supra* note 15 (discussing complementarity and gravity components of admissibility).

<sup>22</sup> See generally U.S. Dep’t of Justice Press Release, Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012), at <https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees> (providing more details about the background and results of the investigation, which was conducted by Assistant U.S. Attorney John Durham).

physical and psychological violence, and that crimes were allegedly committed with particular cruelty and in a manner that debased the basic human dignity of the victims. The infliction of “enhanced interrogation techniques,” applied cumulatively and in combination with each other over a prolonged period of time, would have caused serious physical and psychological injury to the victims. Some victims reportedly exhibited psychological and behavioural issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation. The gravity of the alleged crimes is increased by the fact that they were reportedly committed pursuant to plans or policies approved at senior levels of the US government, following careful and extensive deliberations.<sup>23</sup>

The Report then indicated that “[t]he O[TP] is concluding its assessment of factors set out in Article 53(1)(a)-(c), and will make a final decision on whether to request the Pre-Trial Chamber authorisation to commence an investigation into the situation in the Islamic Republic of Afghanistan since 1 May 2003, imminently.”<sup>24</sup>

The United States’ response to the Report was brief. The day after the release of the Report, State Department Press Office Director Elizabeth Trudeau stated that the United States “do [es] not believe that an ICC examination or investigation with respect to the actions of U.S. personnel in relation to the situation in Afghanistan is warranted or appropriate.”<sup>25</sup> She gave two reasons for this position. First, “the United States is not a party to the Rome Statute and has not consented to ICC jurisdiction.”<sup>26</sup> Second, the United States “ha[s] a robust system of accountability.”<sup>27</sup> It has

supported ICC investigations and prosecution of cases that we believe advance our values in accordance with U.S. law. . . . [B]ut we hold ourselves to the highest possible standards . . . . [W]e believe that we have national systems of accountability that are more than sufficient.<sup>28</sup>

Moreover, according to Trudeau, the United States had “extensively examined the conduct of our own forces in Afghanistan,” and “[i]n many cases, people were held accountable.”<sup>29</sup>

<sup>23</sup> OFFICE OF THE PROSECUTOR, *supra* note 1, paras. 219–24.

<sup>24</sup> *Id.*, para. 230.

<sup>25</sup> U.S. Dep’t of State Press Release, Daily Press Briefing by Elizabeth Trudeau (Nov. 15, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/11/264350.htm>.

<sup>26</sup> *Id.* Trudeau did not elaborate on the basis for this assertion regarding ICC jurisdiction.

<sup>27</sup> *Id.*

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

<sup>29</sup> *Id.* Worth recalling in this regard is President Obama’s Executive Order 13491, issued on January 22, 2009. See Exec. Order No. 13,491, 3 C.F.R. §199 (2009). That order made three primary changes to the United States’ interrogation program. First, it revoked Executive Order 13440, issued by President Bush, which had identified the acceptable “conditions of confinement and interrogation practices . . . to be used with an alien detainee who [wa]s determined . . . to be a member or part of or supporting al Qaeda, the Taliban, or associated organizations,” such that “a program of detention and interrogation approved by the Director of the C[IA] [would] fully compl[y] with the obligations of the United States under Common Article 3 [of the Geneva Conventions].” Exec. Order No. 13,440 §3(b), 3 C.F.R. §229, 230 (2007). Second, the order required:

Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340–2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture [and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100–20 (1988)], Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

In addition, the United States has entered into bilateral immunity agreements (BIAs) with numerous countries in order to “ensure that U.S. persons will not be surrendered to the I[CC] without [the United States’] consent.”<sup>30</sup> Of the countries referenced in the Report as possible locations for U.S. war crimes, only Afghanistan has a BIA with the United States.<sup>31</sup> That agreement states that, “[b]earing in mind Article 98 of the Rome Statute,” among other obligations, “[p]ersons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party, be surrendered or transferred by any means to the I [CC] for any purpose.”<sup>32</sup> Article 98(2), in turn, indicates that the ICC

may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the [ICC], unless the [ICC] can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>33</sup>

However, the proper interpretation of that provision remains in dispute, and it is unclear how the BIA with Afghanistan would affect the ICC’s jurisdiction.<sup>34</sup>

It remains unclear whether any investigation will actually take place. Even after the OTP determines that there is a reasonable basis to proceed with an investigation, it must submit a request to the Pre-Trial Chamber for authorization—which, as noted, it has not yet done.<sup>35</sup>

Exec. Order No. 13,491 §3(a), 3 C.F.R. §199, 200. In addition, the order stated that “an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2–22.3.” *Id.* §3(b), 3 C.F.R. §199, 200–01. Third, the order indicated that “[t]he CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.” *Id.* §4(a), 3 C.F.R. §199, 201.

<sup>30</sup> U.S. Dep’t of State Press Release, U.S. Signs 100th Article 98 Agreement (May 3, 2005), at <https://2001-2009.state.gov/t/pa/prs/ps/2005/45573.htm>.

<sup>31</sup> See *Resources: Bilateral Immunity Agreement Campaign*, AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT’L CRIM. CT., at <http://www.amicc.org/bilateral-immunity-agreements>. That BIA was signed on September 20, 2002, Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Afghanistan, Aug. 23, 2003, Temp. State Dep’t No. 03-119, KAV 6308, available at <https://www.state.gov/documents/organization/183325.pdf> [hereinafter Afghanistan BIA], and it is still in force, see U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2016 2, available at <https://www.state.gov/documents/organization/267489.pdf>. The United States also executed a BIA with Romania on August 1, 2002. Philip T. Reeker, *Press Statement, U.S. and Romania Sign Article 98 Agreement*, U.S. DEPT. OF STATE (Aug. 1, 2002), at <https://2001-2009.state.gov/t/pa/prs/ps/2002/12393.htm>. However, it appears that the United States does not currently view that BIA as being in force. See U.S. DEP’T OF STATE, TREATIES IN FORCE, *supra*, at 370–73 (listing agreements in force with Romania).

<sup>32</sup> Afghanistan BIA, *supra* note 31, at 1.

<sup>33</sup> Rome Statute, *supra* note 8, Art. 98, para. 2; see also *id.* Art. 89, para. 1 (“States Parties shall, in accordance with the provisions of . . . Part [IX of the Statute] and the procedure under their national law, comply with requests for arrest and surrender.”).

<sup>34</sup> See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 108 AJIL 547, 549–50 (2014) (summarizing background and criticism of United States’ use of BIAs); see also EMILY C. BARBOUR & MATTHEW C. WEED, THE INTERNATIONAL CRIMINAL COURT (ICC): JURISDICTION, EXTRADITION, AND U.S. POLICY 7–10 (Mar. 16, 2010), available at <https://fas.org/spp/crs/row/R41116.pdf> (discussing possible effects of BIAs with respect to Rome Statute provisions).

<sup>35</sup> See Rome Statute, *supra* note 8, Art. 15, paras. 3–4. The Pre-Trial Chamber applies the same factors as the OTP in deciding whether to authorize the investigation. It has interpreted the reasonable basis standard to require “a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed.’” Situation in the Republic of Kenya, Case No. ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 35 (Mar. 31, 2010).



The Chamber has approved all three previous investigative requests from the OTP, regarding situations in Kenya, Cote d'Ivoire, and Georgia.<sup>36</sup> However, the Chamber's review can take several months, and the judges might request more information from the OTP before making a decision.<sup>37</sup> Neither the ICC nor the OTP have made any indications since the Report was released that an investigation of the situation in Afghanistan is forthcoming.

#### USE OF FORCE AND ARMS CONTROL

*United States Strikes Houthi-Controlled Facilities in Yemen, Reaffirms Limited Support for Saudi-Led Coalition Notwithstanding Growing Concerns About Civilian Casualties*  
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Since March 2015, the United States has supported a Saudi-led military coalition fighting a Houthi insurgency that seized control of Yemen's capital and governmental institutions in 2014.<sup>1</sup> At the request of ousted Yemeni President Abdo Rabbo Mansour Hadi, the Saudi-led coalition launched an air campaign in Yemen to "defend Saudi Arabia's border and to protect Yemen's legitimate government."<sup>2</sup> To support these efforts, President Obama authorized the "provision of logistical and intelligence support to [coalition] military operations" and the establishment of a "Joint Planning Cell with Saudi Arabia to coordinate U.S. military and intelligence support."<sup>3</sup> The United States has disclaimed any direct offensive role in the conflict<sup>4</sup> while acknowledging that it has provided support by refueling coalition warplanes,<sup>5</sup> supplying targeting intelligence,<sup>6</sup> and sending U.S. military personnel to assist the planners of the coalition's air campaign.<sup>7</sup>

<sup>36</sup> David Bosco, *Exclusive: International Criminal Court Poised to Open Investigation into War Crimes in Afghanistan*, FOREIGN POLICY (Oct. 31, 2016), at <http://foreignpolicy.com/2016/10/31/exclusive-international-criminal-court-poised-to-open-investigation-into-war-crimes-in-afghanistan/>.

<sup>37</sup> *Id.*

<sup>1</sup> U.S. Dep't of State, Fact Sheet: U.S. Relations with Yemen (Feb. 2, 2017), at <https://www.state.gov/r/pa/eil/bgn/35836.htm>.

<sup>2</sup> White House Press Release, Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen (Mar. 25, 2015), at <https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen>.

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

<sup>4</sup> *Id.* (stating that "U.S. forces are not taking direct military action in Yemen in support of this effort").

<sup>5</sup> E.g., Matthew Rosenberg & Mark Mazzetti, *U.S. Ship off Yemen Fires Missiles at Houthi Rebel Sites*, N.Y. TIMES (Oct. 12, 2016), at <https://www.nytimes.com/2016/10/13/world/middleeast/yemen-rebels-missile-warship.html> (reporting that, as of October 2016, the U.S. military had "refueled more than 5,700 aircraft involved in the [Saudi-led] campaign").

<sup>6</sup> E.g., Missy Ryan, *Civilian Casualties in Yemen Bring Charges of U.S. Responsibility for Saudi Actions*, WASH. POST (Oct. 3, 2016), at [https://www.washingtonpost.com/world/national-security/civilian-casualties-in-yemen-bring-charges-of-us-responsibility-for-saudi-actions/2016/10/03/29a9b606-864d-11e6-ac72-a29979381495\\_story.html](https://www.washingtonpost.com/world/national-security/civilian-casualties-in-yemen-bring-charges-of-us-responsibility-for-saudi-actions/2016/10/03/29a9b606-864d-11e6-ac72-a29979381495_story.html) (reporting that the Pentagon provided the Saudi military lists of "no-strike" locations, including civilian targets and infrastructure).

<sup>7</sup> E.g., Robert Wall, *U.S. Military Working to Prevent Weapons Shortfall in Islamic State, Yemen Strikes*, WALL ST. J. (Nov. 10, 2015), at <https://www.wsj.com/articles/u-s-military-working-to-prevent-weapons-shortfall-in-islamic-state-yemen-strikes-1447143660> (reporting a November 2015 statement by a commander of the U.S. Air Force Central Command that the U.S. military had a small detachment of personnel helping coordinate activities in the Saudi Arabian center planning air strikes).

On October 12, 2016, however, the United States engaged in a more direct way: U.S. Armed Forces conducted missile strikes that destroyed three Houthi radar facilities on the Yemeni coast.<sup>8</sup> The strikes were carried out in response to a launch of anti-ship cruise missiles—apparently by the Houthis—into international waters patrolled by the U.S. Navy.<sup>9</sup> The attack marked the first direct U.S. military action against the Houthi rebels, as opposed to the supportive role it has played in the Saudi-led campaign to reinstate Yemen’s deposed government.<sup>10</sup> Given this new posture, the U.S. strikes raise questions about domestic and international legal authorization for such use of force, and about the United States’ role in the broader conflict between the Houthis and the Saudi-led coalition.

Then-President Obama authorized the October strikes at the recommendation of former Secretary of Defense Ash Carter and Chairman of the Joint Chiefs General Joseph Dunford.<sup>11</sup> Obama notified Congress of the military action on October 14, 2016, pursuant to the War Powers Resolution (WPR).<sup>12</sup> Obama invoked his “constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive” to justify the strikes as a matter of U.S. domestic law.<sup>13</sup> He also expressed “appreciat[ion for] the support of the Congress in this action,”<sup>14</sup> implicitly acknowledging the lack of express statutory authorization for the attacks.<sup>15</sup>

Obama’s WPR letter explained the administration’s justification for the strikes in terms of international law. It read:

I directed these strikes in response to anti-ship cruise missile launches perpetrated by Houthi insurgents that threatened U.S. Navy warships in the international waters of the Red Sea on October 9 and October 12. The targeted radar facilities were involved in the October 9 launches and other recent attacks. These limited and proportionate strikes were conducted to protect our personnel and our ships and will preserve our freedom of navigation in this important maritime passageway. The United States stands ready to take action in self-defense, as necessary and appropriate, to address further threats.<sup>16</sup>

<sup>8</sup> White House Press Release, Letter from the President – War Powers Resolution (Oct. 14, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/letter-president-war-powers-resolution> [hereinafter WPR Letter].

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

<sup>10</sup> See Zachary Burdette, *Today’s Headlines and Commentary*, LAWFARE (Oct. 13, 2016), at <https://www.lawfareblog.com/todays-headlines-and-commentary-1166>.

<sup>11</sup> U.S. Dep’t of Defense Press Release, Statement by Pentagon Press Secretary Peter Cook on U.S. Military Strikes Against Radar Sites in Yemen (Oct. 12, 2016), at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/972169/statement-by-pentagon-press-secretary-peter-cook-on-us-military-strikes-against>.

<sup>12</sup> War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

<sup>13</sup> WPR Letter, *supra* note 8.

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

<sup>15</sup> This was not the first time former President Obama relied on his Article II powers to justify the use of military force abroad. See, e.g., Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 587, 590 (2016) (discussing the administration’s invocation of “unit self-defense”—grounded in the president’s Article II authority as Commander in Chief—to justify air strikes in Somalia); Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 174, 206–07 (2015) (quoting a WPR letter by Obama, justifying air strikes against the Islamic State based on the president’s “constitutional authority to conduct U.S. foreign relations and [authority] as Commander in Chief and Chief Executive”); John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 568, 574 (2011) (discussing President Obama’s reliance on Article II powers to justify U.S. military actions in Libya).

<sup>16</sup> WPR Letter, *supra* note 8.

The “recent attacks” Obama referred to began on October 9, when two cruise missiles were launched from Yemen at the USS *Mason* and the USS *Ponce* in international waters near the Bab al-Mandeb strait, a heavily trafficked waterway between Yemen and Djibouti.<sup>17</sup> On October 12, at least one more missile was fired at the USS *Mason* from Houthi-controlled territory near the coastal city of Hudaydah.<sup>18</sup> Although none of the missiles reached their apparent U.S. targets, the USS *Mason* “employed defensive countermeasures.”<sup>19</sup> The Houthis reportedly denied responsibility for the October 9 and October 12 attacks,<sup>20</sup> but a senior administration official expressed “no doubt that the Houthis launched those missiles at our ships.”<sup>21</sup>

When asked about the extent of the threat posed, the same U.S. official explained that “it may not have been the first time that our ships had been targeted,” apparently referring to an October 1 Houthi attack that damaged an Emirati vessel that had previously been part of the U.S. Navy.<sup>22</sup> “[A]ll of this combined,” said the official, “represents an uptick in Houthi aggression on the maritime front. And given . . . the volume of shipping and the presence of our own ships which are in that area, we did regard it as a threat to the point where a firm response was necessary.”<sup>23</sup>

The administration emphasized the limited nature of the strikes as directly responsive to specific provocations by Houthi insurgents. Peter Cook, the Pentagon spokesman, explained that “[t]hese targets were chosen based on our assessment that they were involved in missile launches in recent days. And they were struck in order to defend our ships and their crews and to protect freedom of navigation through a waterway that is vitally important to international commerce.”<sup>24</sup> Cook described the Bab al-Mandeb strait as a “vital link connecting Asia and Europe,” noting that four million barrels of oil pass through it each day.<sup>25</sup> A senior administration official similarly characterized the U.S. action as a “very specific and targeted strike” against radar sites used in prior Houthi attacks, such that “the response was appropriate in both scope and immediacy.”<sup>26</sup> The official later added, “we also have a responsibility in terms

<sup>17</sup> See U.S. Dep’t of Defense News, *USS Mason Responds to Missile Threat off Yemen’s Coast* (Oct. 12, 2016), at <https://www.defense.gov/News/Article/Article/971904/uss-mason-responds-to-missile-threat-off-yemens-coast>; Dan Lamothe, *Navy Launches Tomahawk Missiles at Rebel Sites in Yemen After Attacks on U.S. Ships*, WASH. POST (Oct. 12, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/10/12/more-missiles-fired-from-rebel-held-territory-in-yemen-at-u-s-navy-ships>.

<sup>18</sup> U.S. Dep’t of Defense News, *supra* note 17.

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

<sup>20</sup> *Yemen Denies Targeting U.S. Warship*, SABA NEWS AGENCY (Yemen) (Oct. 13, 2016), at <https://www.saba-news.net/en/news443542.htm> (quoting a Houthi military official for the allegation that “[t]hese allegations are unfounded and the army as well [as] popular forces have nothing to do with this action”).

<sup>21</sup> U.S. Dep’t of State Special Briefing, Senior Administration Officials on Yemen (Oct. 14, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/10/263158.htm>.

<sup>22</sup> *Id.*; see also Lamothe, *supra* note 17. For the Houthis’ asserted responsibility for the October 1 attack, see *Army Destroys UAE Warship off Mocha Coast*, SABA NEWS AGENCY (Yemen) (Oct. 1, 2016), at <https://www.saba-news.net/en/news442035.htm>.

<sup>23</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

<sup>24</sup> U.S. Dep’t of Defense News Transcript, Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room (Oct. 13, 2016), at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/973367/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in>.

<sup>25</sup> *Id.*

<sup>26</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

of maritime shipping [in] a very, very heavily used waterway, with some many thousands of ships that traverse this area on a yearly basis involving many countries.”<sup>27</sup>

Although the administration’s initial references to self-defense suggested reliance on Article 51 of the UN Charter,<sup>28</sup> the United States promptly clarified that it acted with the consent of the Yemeni Government. In an October 15, 2016, letter to the UN Security Council, Samantha Power, the U.S. Ambassador to the United Nations, explained the U.S. strikes as follows:

These actions were taken with the consent of the Government of Yemen. Although the United States therefore does not believe notification pursuant to Article 51 of the Charter of the United Nations is necessary in these circumstances, the United States nevertheless wishes to inform the Council that these actions were taken consistent with international law.<sup>29</sup>

The United States did not provide any more detail about the nature of the consent obtained. As explained in prior White House statements and confirmed in its December 2016 Report on the Legal Frameworks Guiding the Use of Force, the United States had previously obtained consent from the Yemeni Government to carry out counterterrorism operations against Al-Qaeda in the Arab Peninsula (AQAP) and to support Saudi-led coalition military operations against Houthi insurgents in Yemen.<sup>30</sup> However, direct U.S. strikes

<sup>27</sup> *Id.* Although this point has not been discussed in relation to these strikes, the United States has in the past relied on the customary international law right of transit passage to navigate international straits like the Bab al-Mandeb. See, e.g., Bureau of Oceans & Int’l Envtl. & Sci. Affairs, U.S. Dep’t of State, No. 112, Limits in the Seas: United States Responses to Excessive National Maritime Claims 65–67 (Mar. 9, 1992), at <https://2009-2017.state.gov/documents/organization/58381.pdf> (citing Diplomatic Note No. 449, Oct. 6, 1986 from the American Embassy at Sanaa) (“[T]he Government of the Yemen Arab Republic may not legally condition the exercise of the right of transit passage through or over an international strait, such as Bab-el-Mandeb, upon obtaining prior permission. Transit passages is a right that may be exercised by ships of all nations . . .”). According to the UN Convention on the Law of the Sea, ships exercising the right of transit passage shall “refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait” and shall “refrain from any activities other than those incident to their normal modes of . . . transit unless rendered necessary by *force majeure* or by distress.” United Nations Convention on the Law of the Sea, Art. 39, Dec. 10, 1982, 1833 UNTS 397. Though not party to the Convention, the United States has claimed that the “normal mode” of transit for warships exercising their right of transit passage includes activities consistent with the security of their forces. Bureau of Oceans & Int’l Envtl. & Sci. Affairs, *supra* at 65.

<sup>28</sup> UN Charter, Art. 2(4), 51 (allowing limited use of force in another state’s territory based on the “inherent right” of self-defense).

<sup>29</sup> Letter dated 15 October 2016 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2016/869 (Oct. 15, 2016) [hereinafter Letter from Samantha Power].

<sup>30</sup> White House Press Release, *supra* note 2; REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 18 (Dec. 2016), available at <https://www.documentcloud.org/documents/3232529-Framework-Report-Final.html#document/p4> [hereinafter REPORT GUIDING THE USE OF FORCE] (stating that “U.S. support for the Saudi-led coalition . . . is being provided in the context of the Coalition’s military operations being undertaken in response to the Government of Yemen’s request for assistance, including military support, to protect the sovereignty, peace, and security of Yemen”). Claims about Yemen’s consent are complicated by the fact that the constitutionally elected president, President Abdo Rabbo Mansour Hadi, was exiled in 2014 after the Houthi rebels and loyalists to former President Ali Abdullah Saleh seized the capital city of Sana’a. U.S. Dep’t of State, 2015 Country Reports on Human Rights Practices: Yemen (Apr. 13, 2016), at <https://2009-2017.state.gov/j/drl/rls/hrrpt/2015/nea/252955.htm>; see also Alex Moorehead, *Yemen’s Consent for U.S. Counterterrorism Operations: Questions for the Trump Administration*, JUST SECURITY (Feb. 9, 2017), at <https://www.justsecurity.org/37530/yemens-consent-u-s-counterterrorism-operations-questions-trump-administration> (discussing the uncertainty about the legal validity of consent by the Hadi administration). The United States has not publicly questioned the legitimacy of the exiled government’s consent, though the recent White House Report acknowledged general challenges in seeking consent from “countries where governments are rapidly changing [or] have lost control of significant parts of their territory. . . .” See REPORT GUIDING THE USE OF FORCE, *supra* at 30.

against Houthi insurgents—independent from the United States’ support for the Saudi-led forces—likely required additional consent from the Government of Yemen, which appears to have been granted.<sup>31</sup>

The Obama administration was careful to circumscribe the October 12 strikes as separate from the broader war in Yemen. According to a senior administration official, the U.S. government was “very clear that this was not meant to indicate support for coalition operations either in Yemen writ large or on the Red Sea. And [it] also made clear in public statements that [the United States was] not intending to be brought into the war in . . . any fashion.”<sup>32</sup> The Pentagon spokesperson echoed this stance, affirming that “these strikes are not connected to the broader conflict in Yemen” and that “[t]he United States continues to encourage all parties in the Yemen conflict to commit to a cessation of hostilities and to seek a political solution to that conflict.”<sup>33</sup>

Notwithstanding its care to limit the scope of its military action, the U.S. administration recognized the perceived relation between the October 12 strikes and the United States’ role in the greater conflict. As one senior official put it:

[T]hese particular strikes . . . sort of bring up to the present more than a year of activity by the Saudi-led coalition in Yemen which has had a number of unfortunate consequences which we have talked about publicly: one, our discomfiture with the way that the war has dragged out, the loss of life; and number two, particularly the civilian casualties. And so that’s been sort of an underpinning . . . of this conflict.<sup>34</sup>

The official also acknowledged that the Houthis “could manipulate this [U.S. attack] in all kinds of different ways . . . .”<sup>35</sup> Indeed, a Houthi news agency described the U.S. allegations of Houthi provocation as “false justifications to pave the way for [the] Saudi-led coalition to escalate their aggress[ive] attacks against Yemen . . . .”<sup>36</sup> To preempt similar conclusions by the international community, the United States “underscore[d its] public messages with private messages to various partners and actors in the region,” emphasizing that it was “serious in terms of responding when provoked, but also that [this was] a very limited and very particular, very focused response.”<sup>37</sup> The message of the U.S. official was clear: the United States is “not getting [involved] in the war,” is “not joining the coalition,” and is “continu[ing] to focus on . . . a ceasefire.”<sup>38</sup>

While its October 12 attacks apparently struck “in remote areas where there was little risk of civilian casualties,”<sup>39</sup> the United States has acknowledged the high number of civilian casualties resulting from attacks by the Saudi-led coalition it supports.

Prior to the October 12 attack, the United States had scaled back its support of the Saudi-led coalition due to increasing concerns about civilian casualties. According to the UN High

<sup>31</sup> See Letter from Samantha Power, *supra* note 29.

<sup>32</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

<sup>33</sup> U.S. Dep’t of Defense News Transcript, *supra* note 24.

<sup>34</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

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

<sup>36</sup> *Yemen Denies Targeting U.S. Warship*, SABA NEWS AGENCY (Yemen) (Oct. 13, 2016), at <https://www.saba-news.net/en/news443542.htm>.

<sup>37</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

<sup>38</sup> *Id.*

<sup>39</sup> Lamothe, *supra* note 17.

Commissioner for Human Rights, by October 10, 2016, more than four thousand civilians had been killed since the Saudi-led coalition entered the war in Yemen.<sup>40</sup> The High Commissioner singled out as “outrageous” airstrikes on a community hall where a funeral was being held.<sup>41</sup> The High Commissioner protested any continued support of the coalition, asserting that “[s]ince the beginning of this conflict . . . , weddings, marketplaces, hospitals, schools—and now mourners at a funeral—have been hit, resulting in massive civilian casualties and zero accountability for those responsible.”<sup>42</sup> Human Rights Watch (HRW) labeled the funeral attack “an apparent war crime” and identified a munition used in the strikes as a U.S.-made bomb.<sup>43</sup>

In response to the funeral attack, the White House issued the following statement:

We are deeply disturbed by reports of today’s airstrike on a funeral hall in Yemen, which, if confirmed, would continue the troubling series of attacks striking Yemeni civilians. U.S. security cooperation with Saudi Arabia is not a blank check. Even as we assist Saudi Arabia regarding the defense of their territorial integrity, we have and will continue to express our serious concerns about the conflict in Yemen and how it has been waged. In light of this and other recent incidents, we have initiated an immediate review of our already significantly reduced support to the Saudi-led Coalition and are prepared to adjust our support so as to better align with U.S. principles, values and interests, including achieving an immediate and durable end to Yemen’s tragic conflict. We call upon the Saudi-led Coalition, the Yemeni government, the Houthis and the Saleh-aligned forces to commit publicly to an immediate cessation of hostilities and implement this cessation . . . .<sup>44</sup>

The Saudi-led coalition initially denied responsibility for the strikes,<sup>45</sup> but soon after the White House’s response, Saudi Arabia sent a letter to the UN Security Council expressing its “deep[] regrets” about the attack, committing to an immediate investigation, and affirming its “full respect for . . . and compliance with international humanitarian law and international human rights law.”<sup>46</sup> Within a week, the Saudi-led Joint Incidents Assessment Team (JIAT) released the results of its investigation, which found that coalition aircraft had “wrongly targeted the location, resulting in civilian deaths and injuries” due to “the issuing of incorrect information.”<sup>47</sup> It concluded that “appropriate action . . . must be taken against those who caused the incident, and that compensation must be offered to the families of the victims.”<sup>48</sup>

<sup>40</sup> UN Human Rights Office of the High Comm’r, *Outrageous Attack on Funeral Makes International Investigation into Yemen Even More Vital – Zeid*, OHCHR (Oct. 10, 2016), at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20662&LangID=E>.

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

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

<sup>43</sup> *Yemen: Saudi-Led Funeral Attack Apparent War Crime: Credible International Investigation Urgently Needed*, HUMAN RIGHTS WATCH (Oct. 13, 2016), at <https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime>.

<sup>44</sup> White House Press Release, Statement by NSC Spokesperson Ned Price on Yemen (Oct. 8, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/08/statement-nsc-spokesperson-ned-price-yemen>.

<sup>45</sup> See *Coalition to Probe Yemen Raid that Killed 140*, AL ARABIYA (Saudi Arabia) (Oct. 9, 2016), at <https://english.alarabiya.net/en/News/middle-east/2016/10/08/Saudi-denies-Yemeni-funeral-bombing.html> (quoting coalition sources denying involvement).

<sup>46</sup> Letter from Abdallah Al-Mouallimi, Permanent Representative of Saudi Arabia to the United Nations, to the President of the United Nations Security Council (Oct. 11, 2016), UN Doc. S/2016/850 [hereinafter Saudi Letter to UN].

<sup>47</sup> *Press Statement by the Joint Incidents Assessment Team (JIAT) on the Great Hall Incident in Sana’a*, SAUDI PRESS AGENCY (Oct. 15, 2016), at <http://www.spa.gov.sa/1548647>.

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

Multiple human rights groups have challenged the credibility of JIAT's investigations and the coalition's willingness to implement its recommendations.<sup>49</sup>

Since announcing its top-to-bottom review of its coalition support in October, the United States has taken steps to limit the scope of such assistance and to advance a peaceful resolution to the Yemen conflict. The Obama administration encouraged and welcomed temporary cease-fires between the Houthis and the Saudi-led coalition in October and November,<sup>50</sup> though none of them gave way to lasting peace. The coalition continued conducting air strikes in Yemen, many of which allegedly struck civilian targets and infrastructure.<sup>51</sup> For instance, in late October the coalition struck a Yemeni compound, reportedly killing more than forty men being held as prisoners.<sup>52</sup> Human rights groups questioned the lawfulness of the attack,<sup>53</sup> but the coalition insisted that the compound was used as a "command and control center for [Houthi] military operations" and that "targeting protocols and procedures were followed fully."<sup>54</sup>

By mid-December 2016, the administration's review gave rise to interim adjustments in its strategy for assisting the Saudi-led coalition. According to press reports, the United States decided to decrease the number of personnel working with the coalition in Riyadh.<sup>55</sup> It did not, however, curtail its refueling of Saudi warplanes.<sup>56</sup> In a White House press briefing, Press Secretary Josh Earnest summarized the administration's updated position:

<sup>49</sup> See, e.g., *Amnesty International Response to the Saudi Arabia-Led Coalition's Investigations*, AMNESTY INT'L (Jan. 16, 2017), at <https://www.amnesty.nl/actueel/amnesty-international-response-saudi-arabia-led-coalitions-investigations>; *Letter to Saudi-Led Coalition Joint Incidents Assessment Team Regarding Yemen Investigations*, HUMAN RIGHTS WATCH (Jan. 13, 2017), at <https://www.hrw.org/news/2017/01/16/letter-saudi-led-coalition-joint-incidents-assessment-team-regarding-yemen>. For JIAT's findings on other challenged coalition attacks, see *Joint Incidents Assessment Team (JIAT) on Yemen Responds to Claims on Coalition Forces' Violations in Decisive Storm Operations*, SAUDI PRESS AGENCY (Aug. 5, 2016), at <http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1524799>.

<sup>50</sup> See U.S. Dep't of State Press Statement, *Announcement of Cessation of Hostilities in Yemen* (Oct. 18, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/10/263252.htm> (welcoming a seventy-two-hour cease-fire beginning on October 19, 2016); U.S. Dep't of State Press Statement, *On the Cessation of Hostilities in Yemen* (Nov. 20, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/11/264466.htm> (welcoming the renewal of a forty-eight-hour cease-fire that began on November 19, 2016).

<sup>51</sup> E.g., Ben Hubbard, *U.S. Fingerprints on Attacks Obliterating Yemen's Economy*, N.Y. TIMES (Nov. 13, 2016), at <https://www.nytimes.com/2016/11/14/world/middleeast/yemen-saudi-bombing-houthis-hunger.html> (enumerating various civilian targets attacked by the coalition—including hospitals, schools, bridges, power stations, poultry farms, seaports, factories, weddings, and funerals—and concluding that "hitting Yemen's economy is part of the coalition's strategy"); *Bombing Businesses: Saudi Coalition Airstrikes on Yemen's Civilian Economic Structures*, HUMAN RIGHTS WATCH (July 10, 2016), at <https://www.hrw.org/report/2016/07/10/bombing-businesses/saudi-coalition-airstrikes-yemens-civilian-economic-structures> (documenting attacks on "civilian economic structures" from March 2015 through February 2016).

<sup>52</sup> Ben Hubbard, *Airstrikes by Saudi-Led Coalition Kill Dozens in Western Yemen*, N.Y. TIMES (Oct. 30, 2016), at <https://www.nytimes.com/2016/10/31/world/middleeast/airstrikes-kill-dozens-in-western-yemen.html>; Sudarsan Raghavan, *Airstrikes Kill More Than 40 and Wound Scores in Yemeni Port City*, WASH. POST (Oct. 31, 2016), at [https://www.washingtonpost.com/world/airstrikes-kill-more-than-40-and-wound-scores-in-yemeni-port-city/2016/10/30/4666dbfd-afa3-4f8f-9542-7ad77664d4ee\\_story.html](https://www.washingtonpost.com/world/airstrikes-kill-more-than-40-and-wound-scores-in-yemeni-port-city/2016/10/30/4666dbfd-afa3-4f8f-9542-7ad77664d4ee_story.html).

<sup>53</sup> E.g., *Yemen: US-Made Bombs Used in Unlawful Airstrikes*, HUMAN RIGHTS WATCH (Dec. 8, 2016), at <https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes>.

<sup>54</sup> Raghavan, *supra* note 52.

<sup>55</sup> Missy Ryan, *With Small Changes, U.S. Maintains Military Aid to Saudi Arabia Despite Rebukes over Yemen Carnage*, WASH. POST (Dec. 13, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/12/13/with-small-changes-u-s-maintains-military-aid-to-saudi-arabia-despite-rebukes-over-yemen-carnage>.

<sup>56</sup> *Id.*

Th[e] review is ongoing, but there are a couple of steps that the United States is prepared to take to change some of the assistance that we provide.

That includes refocusing our efforts to support the Saudis when it comes to enhancing their border security and their territorial integrity. The concerns that the Saudis have expressed, which is entirely legitimate, is that you have an organization that has overthrown the government of Yemen and has menaced Saudi Arabia, on a number of occasions even breaching their borders. . . . And so we are going to focus our efforts on helping the Saudis protect their border. We are also going to undertake steps to refocus our information-sharing and the responsibilities of our personnel in Saudi Arabia to be focused on this effort.<sup>57</sup>

That same day, the United States reportedly blocked a sale of precision munitions to Saudi Arabia, valued at over \$350 million.<sup>58</sup> That decision echoed a May 2016 determination to suspend all cluster-munitions sales to Saudi Arabia given the danger those weapons posed to civilians.<sup>59</sup> The December decision did not satisfy human rights groups that had long called for a complete suspension of U.S. arms sales to Saudi Arabia.<sup>60</sup> Other sales made clear that the United States was not halting the transfer of all military equipment to Saudi Arabia.<sup>61</sup> And U.S. members of Congress had even tried and failed to block similar arms sales to the Kingdom earlier in the year.<sup>62</sup>

The sale of U.S. munitions and other forms of U.S. support for the Saudi-led coalition have been controversial since the Saudis entered the war in Yemen. Human rights groups and international law scholars have debated whether various kinds of U.S. assistance might impose liability on the United States for legal violations by the coalition. According to HRW, the United States qualifies as “a party to the conflict in Yemen” given its provision of targeting intelligence and refueling of planes during bombing raids.<sup>63</sup> With respect to munitions, HRW has found remnants of U.S.-supplied weapons at twenty-three allegedly unlawful coalition air strikes, including the October funeral attack, and claims that “the repeated use of US-manufactured munitions in unlawful attacks could make the US

<sup>57</sup> White House Press Release, Press Briefing by Press Secretary Josh Earnest and Special Envoy for the Global Coalition to Counter ISIL, Brett McGurk (Dec. 13, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/13/press-briefing-press-secretary-josh-earnest-and-special-envoy-global>.

<sup>58</sup> Helene Cooper, *U.S. Blocks Arms Sale to Saudi Arabia Amid Concerns over Yemen War*, N.Y. TIMES (Dec. 13, 2016), at <https://www.nytimes.com/2016/12/13/us/politics/saudi-arabia-arms-sale-yemen-war.html>. When asked for details, a State Department spokesman refused to discuss pending arms sales. U.S. Dep’t of State Press Release, Daily Press Briefing (Dec. 13, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/12/265200.htm>.

<sup>59</sup> John Hudson, *Exclusive: White House Blocks Transfer of Cluster Bombs to Saudi Arabia*, FOREIGN POLICY (May 27, 2016), at <http://foreignpolicy.com/2016/05/27/exclusive-white-house-blocks-transfer-of-cluster-bombs-to-saudi-arabia/>.

<sup>60</sup> See, e.g., Cooper, *supra* note 58 (“The absence of a more comprehensive ban, given the ongoing unlawful strikes and the potential U.S. complicity, is deeply concerning.”) (quoting the Washington director of Human Rights Watch).

<sup>61</sup> U.S. Dep’t of State Press Release, Daily Press Briefing (Dec. 9, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/12/265016.htm> (confirming approval of military sales to Saudi Arabia worth \$3.5 billion, mostly for Chinook helicopters not intended for combat roles).

<sup>62</sup> See H.R.J. Res. 98, 114th Cong. (2016); S.J. Res. 32, 114th Cong. (2016).

<sup>63</sup> Letter from Sarah Margon, Washington Director of Human Rights Watch, to Barack Obama, President of the United States (Oct. 31, 2016), available at [https://www.hrw.org/sites/default/files/supporting\\_resources/review\\_of\\_the\\_armed\\_conflict\\_in\\_yemen\\_letter\\_to\\_president\\_obama\\_english.pdf](https://www.hrw.org/sites/default/files/supporting_resources/review_of_the_armed_conflict_in_yemen_letter_to_president_obama_english.pdf) [hereinafter HRW Letter]; *Yemen: US-Made Bombs Used in Unlawful Airstrikes*, HUMAN RIGHTS WATCH (Dec. 8, 2016), at <https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes>.



complicit for future transfers of arms to Saudi forces.”<sup>64</sup> The senators who spearheaded the 2016 resolutions to block arms sales to Saudi Arabia have also criticized the United States’ lack of oversight over its military support for the Saudi-led coalition.<sup>65</sup>

When asked about HRW’s claims, a State Department spokesperson acknowledged the administration’s concern with the Saudis’ “particular targeting . . . inaccuracies that put civilians clearly at great risk,” but emphasized that the “cooperation [it] provide[s] to Saudi Arabia does not include . . . target selection or review. And . . . none of it constitutes endorsement of offensive operations in Yemen that have harmed civilians.”<sup>66</sup> This response aligned with the administration’s continuing position that its support is meant to protect Saudi Arabia’s territorial integrity and to minimize civilian casualties without joining the Saudi-led coalition or entering the Yemen war.<sup>67</sup> In early October 2016—prior to the U.S. strikes against Houthi sites—defense officials reportedly explained that U.S. involvement in coalition targeting was limited to providing coordinates for “no-strike” locations (including civilian targets or infrastructure) and that American officials did not help the coalition select munitions for individual attacks.<sup>68</sup> According to news reports, a senior defense official said that

[f]or better or for worse, [the Saudis] own this campaign. . . . We want them to prosecute this campaign in a way compliant with the laws of armed conflict and in a way that minimizes casualties in Yemen, but ultimately we have our own campaign . . . to prosecute against the Islamic State.<sup>69</sup>

Despite the Obama administration’s delineation of its actions as distinct from those of the coalition, critics have suggested various theories under which the United States could be liable for coalition misconduct. To the extent these theories depend on the United States’ awareness of such wrongdoing, they may be bolstered by a report recently released by a panel of independent experts appointed by the UN Security Council. The panel conducted a detailed investigation of the Yemen conflict and found “sufficient grounds to believe that the coalition led by Saudi Arabia did not comply with international humanitarian law in at least 10 air strikes that targeted houses, markets, factories and a hospital.”<sup>70</sup>

Many commentators have argued that the United States could be responsible for aiding or assisting Saudi Arabia’s alleged violations of international law.<sup>71</sup> Article 16 of the International Law Commission’s (ILC) Articles on State Responsibility, which reflect customary international law, establishes that a state may be responsible for another state’s

<sup>64</sup> HRW Letter, *supra* note 63.

<sup>65</sup> Senator Rand Paul (R-Ky.) reportedly said “[w]e are complicit and actively involved with war in Yemen,” yet “[there has] been no debate in Congress . . . over whether or not we should be at war in Yemen.” Rosenberg & Mazzetti, *supra* note 5. Senator Ted Lieu (D-Calif.) reportedly asked: “Why would we be refueling a jet carrying bombs if we don’t know what target it’s about to strike? If we just refueled a jet that is hitting a hospital, that’s a problem.” Ryan, *supra* note 6.

<sup>66</sup> U.S. Dep’t of State Press Release, Daily Press Briefing, *supra* note 61.

<sup>67</sup> See U.S. Dep’t of State Press Release, Special Briefing, *supra* note 21.

<sup>68</sup> Ryan, *supra* note 6.

<sup>69</sup> *Id.*

<sup>70</sup> See Final Rep. of the Panel of Experts on Yemen, at 3, transmitted by Letter Dated 27 January 2017 from the Panel of Experts on Yemen Addressed to President of the Security Council, UN Doc. S/2017/81 (2017).

<sup>71</sup> E.g., Ryan Goodman & Miles Jackson, *State Responsibility for Assistance to Foreign Forces (aka How to Assess US-UK Support for Saudi Ops in Yemen)*, JUST SECURITY (Aug. 31, 2016), at <https://www.justsecurity.org/32628/state-responsibility-assistance-foreign-forces-a-k-a-assess-us-uk-support-saudi-military-ops-yemen>; Beth Van Schaack, *Evaluating Proportionality and Long-Term Civilian Harm Under the Laws of War*, JUST SECURITY (Aug. 29, 2016), at <https://www.justsecurity.org/32577/evaluating-proportionality-long-term-civilian-harm-law-war>.

internationally wrongful act when that act would also be wrongful if committed by the former state, and when the former state provided the aid or assistance with a view to facilitating the wrongful act.<sup>72</sup> Critics have also suggested that the United States has a duty under Common Article 1 of the Geneva Conventions to ensure that other states do not violate the laws of armed conflict (including the principles of distinction and proportionality).<sup>73</sup> Lastly, commentators have debated whether the United States could be liable for aiding and abetting war crimes allegedly committed by the Saudi-led coalition.<sup>74</sup>

Although the U.S. administration does not appear to have addressed any of these particular theories vis-à-vis its role in Yemen,<sup>75</sup> its December 2016 Report on the Legal Framework Guiding the Use of Force provides some insight into the White House's reasoning. A section titled "Working with Others in an Armed Conflict: International Law Considerations" reads, in part, as follows:

The U.S. military's ability to engage and work with partners can and often does turn on international legal considerations. The United States military seeks to work with partners that will comply with international law, and U.S. partners expect the same from the United States. The United States' commitment to upholding the law of armed conflict also extends to promoting compliance by U.S. partners with the law of armed conflict. Receiving credible and reliable assurances that U.S. partners will comply with applicable international law, including the law of armed conflict, is an important measure that the United States military routinely employs in its partnered operations. As a matter of policy, the United States always seeks to promote adherence to the law of armed conflict and encourages other States and partners to do the same.

As a matter of international law, the United States looks to the law of State responsibility and U.S. partners' compliance with the law of armed conflict in assessing the lawfulness of U.S. military assistance to, and joint operations with, military partners. The United States has taken the position that a State incurs responsibility under international law for aiding or assisting another State in the commission of an internationally wrongful act when: (1) the act would be internationally wrongful if committed by the supporting State; (2) the supporting State is both aware that its

<sup>72</sup> Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Art. 16 (2001). The text of Article 16 states only that the aid or assistance must be provided "with knowledge of the circumstances of the internationally wrongful act"; however, the Commentaries attached to the Draft Articles explain this limitation in part as requiring that the aid or assistance be provided "with a view to facilitating the commission of that act." *Id.* at cmt. 3. Commentators have noted and challenged the role of the Commentaries in substantially limiting this element of Article 16. *See, e.g.,* Daniel Bodansky & John R. Crook, *Symposium: The ILC's State Responsibility Articles*, 96 AJIL 733, 789 (2002). *See infra* notes 77–79 and corresponding text for further discussion of Article 16.

<sup>73</sup> *E.g.,* Harriet Moynihan, *State Complicity in Other States' Bad Acts—and How to Avoid It*, JUST SECURITY (Nov. 14, 2016), at <https://www.justsecurity.org/34379/state-complicity-states-bad-acts-and-avoid-2>; Nathalie Weizmann, *Are the U.S. and U.K. Parties to the Saudi-led Armed Conflict Against the Houthis in Yemen?*, JUST SECURITY (Sept. 22, 2016), at <https://www.justsecurity.org/33095/u-s-u-k-parties-saudi-led-armed-conflict-houthis-yemen>.

<sup>74</sup> *E.g.,* Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen*, JUST SECURITY (Sept. 1, 2016), at <https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen>.

<sup>75</sup> Against this backdrop, Reuters published an October 10, 2016, article detailing previously undisclosed material (obtained through the Freedom of Information Act) that illustrated U.S. officials' debates—spanning from mid-May 2015 to February 2016—as to whether the United States qualified as a "co-belligerent" in the Yemen war and whether the United States could be exposed to allegations of LOAC violations. *See* Warren Strobel & Jonathan Landay, *Exclusive: As Saudis Bombed Yemen, U.S. Worried About Legal Blowback*, REUTERS (Oct. 10, 2016), at <http://uk.reuters.com/article/uk-usa-saudi-yemen-exclusive-idUKKCN12A0BG>. These internal debates do not appear ever to have been discussed publicly.

assistance will be used for an unlawful purpose and intends its assistance to be so used; and (3) the assistance is clearly and unequivocally connected to the subsequent wrongful act.<sup>76</sup>

This position generally aligns with customary international law,<sup>77</sup> though the U.S. Report differs slightly from the ILC's explanation of Article 16 in its Commentaries attached to the Articles on State Responsibility. The Commentaries state: "There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act."<sup>78</sup> By requiring a "clear[] and unequivocal[]" nexus between the assistance and the wrongful act, the U.S. Report seems to set out a higher standard for establishing liability for aiding or assisting than does the ILC.

With the arrival of the Trump administration, it is unclear whether the United States will continue to support the Saudi-led coalition while disclaiming any direct role in regional hostilities. In a recent call between President Trump and King Salman bin Abd Al-Aziz Al Saud of Saudi Arabia, the two leaders "underscor[ed] their personal commitment to continued consultations on a range of regional and bilateral issues."<sup>79</sup>

#### USE OF FORCE AND ARMS CONTROL

*United States Expands Military Operations in North Africa and Classifies al-Shabaab as a Force "Associated" with Al Qaeda*  
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In late 2016, the United States took two steps to facilitate its confrontation with violent extremist groups in North Africa. In December, the United States classified al-Shabaab as a force "associated" with Al Qaeda for purposes of the 2001 Authorization to Use Military Force (AUMF).<sup>1</sup> And at some unspecified point earlier that year, it appears (but has not been officially confirmed) that the United States and Tunisia reached a memorandum of understanding under which U.S. forces are permitted to launch reconnaissance missions aimed at extremists in Libya from an air base in Tunisia.<sup>2</sup>

Al-Shabaab, a nonstate actor that was designated as a foreign terrorist organization by the United States in March 2008,<sup>3</sup> has captured large rural areas of south-central Somalia while

<sup>76</sup> See REPORT GUIDING THE USE OF FORCE, *supra* note 30, at 14.

<sup>77</sup> Compare Int'l Law Comm'n, *supra* note 72, with REPORT GUIDING THE USE OF FORCE, *supra* note 30, at 14.

<sup>78</sup> Int'l Law Comm'n, *supra* note 72, at cmt. 5; REPORT GUIDING THE USE OF FORCE, *supra* note 30, at 14.

<sup>79</sup> White House Press Release, Readout of the President's Call with King Salman bin Abd Al-Aziz Al Saud of Saudi Arabia (Jan. 29, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/29/readout-presidents-call-king-salman-bin-abd-al-aziz-al-saud-saudi-arabia>.

<sup>1</sup> The White House, *Report on the Legal and Policy Framework Guiding the United States' Use of Military Force and Related National Security Operations* 5 (Dec. 2016), at [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal\\_Policy\\_Report.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf) [hereinafter Legal Policy Report].

<sup>2</sup> Adam Entous & Missy Ryan, *U.S. Has Secretly Expanded Its Global Network of Drone Bases to North Africa*, WASH. POST (Oct. 26, 2016), at [https://www.washingtonpost.com/world/national-security/us-has-secretly-expanded-its-global-network-of-drone-bases-to-north-africa/2016/10/26/ff19633c-9b7d-11e6-9980-50913d68eacb\\_story.html](https://www.washingtonpost.com/world/national-security/us-has-secretly-expanded-its-global-network-of-drone-bases-to-north-africa/2016/10/26/ff19633c-9b7d-11e6-9980-50913d68eacb_story.html); Mark Hosenball & Andrea Shalal, *U.S. Using Tunisia to Conduct Drone Operations in Libya: U.S. Sources*, REUTERS (Oct. 26, 2016), at <http://www.reuters.com/article/us-usa-drones-tunisia-idUSKCN12Q2PW>.

<sup>3</sup> U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 401 (June 2, 2016), at <https://www.state.gov/documents/organization/258249.pdf> [hereinafter Country Reports on Terrorism].

fighting Somali government forces and the African Union's peacekeeping force (AMISOM).<sup>4</sup> Even before the December 2016 announcement, the United States had been relying on the AUMF—long interpreted by the executive branch to authorize force against “al Qaeda, the Taliban, and associated forces”<sup>5</sup>—to justify strikes against some members of al-Shabaab.<sup>6</sup> The theory was that these strikes were directed not against individuals in their capacity as members of al-Shabaab but as individuals who satisfied the AUMF targeting criteria independent of that membership.<sup>7</sup> In March 2016, the Defense Department relied on this theory to justify the bombing of an al-Shabaab training camp, noting that U.S. forces continued to rely on the AUMF “as authority for direct action against a limited number of targets in Somalia who, based on information about their current and historical activities, have been determined to be part of al-Qa’ida.”<sup>8</sup>

The United States has also justified strikes against al-Shabaab—including, it appears, as a matter of domestic law authorization—on the theories of self-defense and the defense of affiliated forces. The U.S. standing rules of engagement state that “[u]nit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”<sup>9</sup> Furthermore, the United States interprets the self-defense doctrine to authorize actions to protect affiliated foreign forces.<sup>10</sup> Pursuant to this self-defense framework, the United States has justified attacks against al-Shabaab because they protected U.S. personnel and fighters associated with AMISOM. For example, the Defense Department also described the training camp strike as being “in the tactical defense of U.S. and partner nation ground force units,” and as happening because “the fighters who were to depart the camp posed an imminent threat to U.S. and African Union Mission in Somalia (AMISOM) forces in Somalia.”<sup>11</sup> Additional strikes against al-Shabaab in June,

<sup>4</sup> *Id.* See also U.S. Mission in Geneva, *Secretary Kerry Remarks with Kenyan Foreign Minister Amina Mohamed – South Sudan, Somalia, Syria* (Aug. 22, 2016), at <https://geneva.usmission.gov/2016/08/23/secretary-kerry-remarks-with-kenyan-foreign-minister-amina-mohamed-south-sudan-somalia-syria>.

<sup>5</sup> Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 110 AJIL 587, 589 (2016).

<sup>6</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 (2006)) (authorizing the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . .”).

<sup>7</sup> See Daugirdas & Mortenson, *supra* note 5, at 589. See also U.S. Dep’t of Defense, *The Legal Framework for the United States’ Use of Military Force Since 9/11* (Apr. 10, 2015), at <https://www.defense.gov/News/Speeches/Speech-View/Article/606662> (noting that the 2001 AUMF authorized the United States to conduct strikes against “individuals who are part of al-Qa’ida in Somalia and Libya”).

<sup>8</sup> Question to the Pentagon from Charlie Savage (Mar. 8, 2016), Answer from Lt. Col. Joe Sowers (Mar. 10, 2016), at <https://assets.documentcloud.org/documents/2757459/Shabab-DOD-Statement.pdf> [hereinafter DOD Question-Answer].

<sup>9</sup> CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES 83 (June 13, 2005).

<sup>10</sup> *Id.*; Daugirdas & Mortenson, *supra* note 5, at 590.

<sup>11</sup> DOD Question-Answer, *supra* note 8. See also U.S. Dep’t of Defense Press Release, Statement from Pentagon Press Secretary Peter Cook on Airstrike in Somalia (Mar. 7, 2016), at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/687305/statement-from-pentagon-press-secretary-peter-cook-on-airstrike-in-somalia>.

July, and November 2015 were likewise justified as “in support of Somali forces, AMISOM forces, and U.S. forces . . . .”<sup>12</sup>

This legal structure changed significantly when the White House informed Congress in December 2016 that it had altered its classification of al-Shabaab and that it considered al-Shabaab an organization affiliated with Al Qaeda.<sup>13</sup> As part of a report to Congress regarding U.S. military commitments, the administration stated that “[i]n Somalia, U.S. forces continue to counter the terrorist threat posed by al-Qa’ida and its Somalia-based associated force, al-Shabaab.”<sup>14</sup> The Obama administration explained the legal basis for its new determination in a report summarizing the legal justifications for current U.S. uses of force overseas:

Although much of the intelligence underlying a determination that a group is covered by the 2001 AUMF is necessarily sensitive, many of these groups have made plain their continued allegiance and operational ties to al-Qa’ida. For example, this determination was made recently with respect to al-Shabaab because, among other things, al-Shabaab has pledged loyalty to al-Qa’ida in its public statements; made clear that it considers the United States one of its enemies; and been responsible for numerous attacks, threats, and plots against U.S. persons and interests in East Africa. In short, al-Shabaab has entered the fight alongside al-Qa’ida and is a cobelligerent with al-Qa’ida in hostilities against the United States, making it an “associated force” and therefore within the scope of the 2001 AUMF.<sup>15</sup>

Although the White House’s legal policy report did not contain specific examples of al-Shabaab attacks against U.S. forces, U.S. Africa Command in the past year has described multiple attacks and attempted attacks by al-Shabaab against U.S. military personnel.<sup>16</sup> Moreover, although al-Shabaab’s internal leadership has occasionally vacillated over whether to affiliate with Al Qaeda,<sup>17</sup> al-Shabaab’s leader in 2012 pledged allegiance to Al Qaeda in a recorded statement.<sup>18</sup> Reports by the State Department and at least one NGO suggest that this support has continued, even to the extent of purging members who sought to align the group with ISIL instead of Al Qaeda.<sup>19</sup>

<sup>12</sup> White House Press Release, Letter from the President—War Powers Resolution (Dec. 11, 2015), at <https://obamawhitehouse.archives.gov/the-press-office/2015/12/11/letter-president-war-powers-resolution>. See also DOD Question-Answer, *supra* note 8.

<sup>13</sup> White House Press Release, Letter from the President—Supplemental 6-month War Powers Letter (Dec. 5, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/05/letter-president-supplemental-6-month-war-powers-letter>.

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

<sup>15</sup> Legal Policy Report, *supra* note 1, at 5.

<sup>16</sup> U.S. Africa Command Press Release, U.S. Self-Defense Strikes in Somalia (Sep. 27, 2016), at <http://www.africom.mil/media-room/pressrelease/28414/u-s-self-defense-strikes-in-somalia>; U.S. Africa Command Press Release, U.S. Forces Conduct Defensive Fires in Somalia Against al-Shabaab Terrorists in May (June 17, 2016), at <http://www.africom.mil/media-room/article/28236/u-s-forces-conduct-defensive-fires-in-somalia-against-al-shabaab-terrorists-in-may>. See also Homeland Security Committee, *Terror Threat Snapshot 7* (Nov. 2016), at <https://homeland.house.gov/wp-content/uploads/2016/11/November-2016-Terror-Threat-Snapshot.pdf>.

<sup>17</sup> Aislinn Laing, *How al-Qaeda and Islamic State Are Competing for al-Shabaab in Somalia*, TELEGRAPH (Jan. 12, 2016), at <http://www.telegraph.co.uk/news/worldnews/islamic-state/12015075/How-al-Qaeda-and-Islamic-State-are-fighting-for-al-Shabaab-affections-in-Somalia.html>.

<sup>18</sup> *Al-Shabaab Joining al-Qaeda, Monitor Group Says*, CNN (Feb. 10, 2012), at <http://edition.cnn.com/2012/02/09/world/africa/somalia-shabaab-qaeda/index.html>.

<sup>19</sup> See, e.g., International Crisis Group, Zakaria Yusuf & Abdul Khalif, *The Islamic State Threat in Somalia’s Puntland State* (Nov. 17, 2016), at <https://www.crisisgroup.org/africa/horn-africa/somalia/islamic-state-threat-somalias-puntland-state> (“Al-Shabaab’s leaders have so far resisted bids by IS to switch their allegiance from al-Qaeda. . . . Many suspected IS supporters have either been arrested or killed, among them the prominent Al-

In addition to its discussion of domestic authorization, the administration's legal policy report also addressed the legality of attacks against al-Shabaab under international law. According to the report, "[a]s a matter of international law, U.S. counterterrorism operations in Somalia, including airstrikes, have been conducted with the consent of the Government of Somalia in support of Somalia's operations in the context of the armed conflict against al-Shabaab and in furtherance of U.S. national self-defense."<sup>20</sup> This explanation is consistent with the Obama administration's past explanations for attacks against terrorist groups. In an April 2016 speech at the American Society of International Law, the State Department legal adviser had emphasized the U.S. view that states may "invoke[] the right of self-defense to justify taking action on the territory of another State against non-State actors," and that "international law requires that States must either determine that they have the relevant government's consent or . . . determine that the territorial State is 'unable or unwilling' to address the threat posed by the non-State actor on its territory."<sup>21</sup>

In addition to the United States' expanded focus on al-Shabaab in Somalia, the media has reported—but the U.S. government has not confirmed—that the United States and Tunisia entered into a memorandum of understanding to facilitate reconnaissance of extremist groups in Libya.<sup>22</sup> According to the *Washington Post* and *Reuters*, the agreement allows the United States to use Tunisian bases to launch unmanned drones for reconnaissance missions in Libya.<sup>23</sup> U.S. officials hope that access to the Tunisian base will facilitate the surveillance of ISIL in Sirte, Libya—in particular by reducing travel distance and increasing "loiter" time for drone operations.<sup>24</sup> Although the agreement is not yet public, a spokesperson for U.S. Africa Command stated that "[t]here are U.S. service members working with the Tunisian security forces for counter terrorism and they are sharing intelligence from various sources, to include aerial platforms."<sup>25</sup>

Tunisian officials have acknowledged that the United States is conducting surveillance flights in Tunisia directed at ISIL targets in Libya. After a reporter asked Tunisian President Beji Caid Essebsi whether the United States was using Tunisian air space for reconnaissance missions, Essebsi stated "[y]es, and it was at our request."<sup>26</sup> Mr. Essebsi elaborated that "our agreement with the U.S. was to share intelligence information," and that the reconnaissance would help Tunisia prevent cross-border raids into Tunisian territory.<sup>27</sup> Tunisian officials also stated that the United States planned to provide Tunisia with drones to conduct

Shabaab commander, Abu Nu'man Sakow."). See also Country Reports on Terrorism, *supra* note 3, at 11 ("Later in the year, factions formed and defections increased as the appeal of the Islamic State of Iraq and the Levant (ISIL) created divisions within al-Shabaab's core leadership. The organization maintained its allegiance to al-Qa'ida, however, in spite of public appeals from other terrorist groups . . .").

<sup>20</sup> Legal Policy Report, *supra* note 1, at 17.

<sup>21</sup> Brian Egan, State Department Legal Adviser, *Keynote Address at the American Society of International Law Annual Meeting: International Law, Legal Diplomacy, and the Counter-ISIL Campaign* (Apr. 1, 2016), at <https://2009-2017.state.gov/s/l/releases/remarks/255493.htm>.

<sup>22</sup> Entous & Ryan, *supra* note 2; Hosenball & Shalal, *supra* note 2.

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

<sup>24</sup> Entous & Ryan, *supra* note 2.

<sup>25</sup> Hosenball & Shalal, *supra* note 2.

<sup>26</sup> Tarek Amara, *Tunisia Confirms U.S. Drones over Libyan Border, Monitor Islamic State*, REUTERS (Nov. 23, 2016), at <http://www.reuters.com/article/us-tunisia-security-usa-idUSKBN13114O>.

<sup>27</sup> *Id.*

its own surveillance missions. Tunisian Defense Minister Farhat Horchani told state news agency TAP that “Tunisia wants to initiate the National Army to the use of this equipment to monitor the southern borders and detect any suspected movement.”<sup>28</sup> Despite acknowledging cooperation with the United States, Tunisian officials denied that the United States had established bases in Tunisia or was launching attacks from Tunisia.<sup>29</sup> The Tunisian Defense Ministry stated, “[w]e refute what has been circulated in a number of foreign news outlets claiming the presence of US military bases in Tunisia and that the Tunisian soil is being used to strike targets in Libya.”<sup>30</sup>

The reported U.S. agreement with Tunisia follows the Obama administration’s decision in 2015 to designate Tunisia as a Major Non-NATO Ally (MNNA).<sup>31</sup> Tunisia became the sixteenth nation to be so designated.<sup>32</sup> According to the State Department, “MNNA status is a symbol of our close relationship [with Tunisia] and comes with tangible privileges including eligibility for training, loans of equipment for cooperative research and development, and Foreign Military Financing for commercial leasing of certain defense articles.”<sup>33</sup> Since the United States designated Tunisia a MNNA, the State Department preliminarily approved approximately \$100 million in foreign military assistance to Tunisia, including twenty-four OH-58D Kiowa Warrior Helicopters.<sup>34</sup> A manager for the U.S. AFRICOM Regional Operations Directorate stated that “[t]he Tunisian Air Force plan is to use the Kiowas as part of its main defense against violent extremist organizations conducting terrorist attacks on military and civilian targets in Tunisia from remote domestic bases and Libya.”<sup>35</sup>

<sup>28</sup> *Tunisia Takes Receipt of Reconnaissance and Surveillance Aircraft, Drones (Farhat Horchani)*, AGENCE TUNIS AFRIQUE PRESSE (Oct. 26, 2016), at <http://www.tap.info.tn/en/Portal-Politics/8362587-tunisia-takes-receipt-of-reconnaissance>.

<sup>29</sup> Ahmed Nadhif, *Where Does US-Tunisian Military Cooperation End?*, AL-MONITOR (Nov. 1, 2016), at <http://www.al-monitor.com/pulse/originals/2016/11/tunisia-us-military-cooperation-secret-base-fight-terrorism.html>. See also *Tunisia, Sovereign Country, It Is Not Home to Any Foreign Military Base (Harchani)*, AGENCE TUNIS AFRIQUE PRESSE (Oct. 27, 2016), at <http://www.tap.info.tn/en/Portal-Politics/8365234-tunisia-sovereign-country-it-is-not>.

<sup>30</sup> Nadif, *supra* note 29.

<sup>31</sup> U.S. Dep’t of State, *Designation of Tunisia As a Major Non-NATO Ally* (July 10, 2015), at <https://2009-2017.state.gov/t/pa/prs/ps/2015/07/244811.htm> [hereinafter State Dep’t Press Release on Designating Tunisia as an MNNA]; White House Press Release, Presidential Memorandum – Designation of the Republic of Tunisia as a Major Non-NATO Ally (July 10, 2015), at <https://obamawhitehouse.archives.gov/the-press-office/2015/07/10/presidential-memorandum-designation-republic-tunisia-major-non-nato-ally>.

<sup>32</sup> State Dep’t Press Release on Designating Tunisia as an MNNA, *supra* note 31.

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

<sup>34</sup> U.S. Dep’t of Defense, Defense Security Cooperation Agency, *Tunisia-OH-58D Kiowa Warrior Aircraft Equipment and Support* (May 3, 2016), at <http://www.dsca.mil/major-arms-sales/tunisia-oh-58d-kiowa-warrior-aircraft-equipment-and-support>.

<sup>35</sup> U.S. Army, *Security Enterprise Strengthens Tunisian Air Force* (Jan. 27, 2017), at [https://www.army.mil/article/181455/security\\_enterprise\\_strengthens\\_tunisian\\_air\\_force](https://www.army.mil/article/181455/security_enterprise_strengthens_tunisian_air_force). Tunisia received six of the Kiowa Helicopters in February 2017. *Chahed Inspects Helicopters Delivered to National Army*, AGENCE TUNIS AFRIQUE PRESSE (Feb. 4, 2017), at <http://www.tap.info.tn/en/Portal-Politics/8681783-chahed-inspects>.