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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 Condemns Russia's Use of Force in Ukraine and Attempted Annexation of Crimea

On March 21, 2014, the Russian Federation celebrated the addition to its territory of the "Republic of Crimea."¹ The United States, together with other states and international organizations, condemned that addition as an illegal annexation² that followed Russia's use of force in contravention of international law.³ These developments occurred in the wake of dramatic changes to Ukraine's national government, which had been headed by President Viktor Yanukovich.⁴

European Integration, the Maidan Protests, and Ukrainian Regime Change. On August 22, 2013, U.S. Secretary of State John Kerry saluted the twenty-second anniversary of Ukraine's independence by urging Ukraine to fulfill the conditions for signature of a proposed European Union trade agreement.⁵ Although Ukraine had appeared ready to do just that, three months later Yanukovich abandoned plans to sign the EU trade agreement and instead sought closer cooperation with Moscow.⁶ At least partly in response to this decision, pro-EU protesters began to gather peacefully in late November 2013 at the Maidan Square in central Kyiv.⁷ The Ukrainian government responded harshly, with riot police, tear gas, and beatings.⁸

Over the next few months, the standoff escalated, eliciting criticism of the Ukrainian government by the United States and others.⁹ On January 16, 2014, the Ukrainian parliament,

¹ President of Russia Press Release, Ceremony Signing the Laws on Admitting Crimea and Sevastopol to the Russian Federation (Mar. 21, 2014), at <http://eng.kremlin.ru/news/6910>.

² White House Press Release, Background Briefing on Ukraine by Senior Administration Officials (Mar. 20, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/20/background-briefing-ukraine-senior-administration-officials> [hereinafter March 20 Background Briefing on Ukraine].

³ U.S. Dep't of State Press Statement, John Kerry, Secretary of State, Situation in Ukraine (Mar. 1, 2014), at <http://www.state.gov/secretary/remarks/2014/03/222720.htm>.

⁴ E.g., *On Self-Withdrawal of the President of Ukraine from Performing His Constitutional Duties and Setting Early Elections of the President of Ukraine*, VERKHOVNA RADA OF UKRAINE, Feb. 22, 2014, at <http://portal.rada.gov.ua/en/news/News/News/88138.html>; David M. Herszenhorn, *Ukraine Rushes to Shift Power and Mend Rifts*, N.Y. TIMES, Feb. 24, 2014, at A1.

⁵ U.S. Dep't of State Press Release No. 2013/1024, John Kerry, Secretary of State, On the Occasion of Ukraine's National Day (Aug. 22, 2013), at <http://www.state.gov/secretary/remarks/2013/08/213369.htm>; see also European Commission, EU-Ukraine Deep and Comprehensive Free Trade Area (Apr. 2013), at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150981.pdf.

⁶ Will Englund & Kathy Lally, *Ukraine, Under Pressure from Russia, Puts Brakes on E.U. Deal*, WASH. POST, Nov. 21, 2013, at http://www.washingtonpost.com/world/europe/ukraine-under-pressure-from-russia-puts-brakes-on-eu-deal/2013/11/21/46c50796-52c9-11e3-9ee6-2580086d8254_story.html; see also, e.g., Will Englund, *Russia Seeks to Derail Ukraine's Trade Deal with E.U., Deploying Taunts and Insults*, WASH. POST, Sept. 21, 2013, at http://www.washingtonpost.com/world/europe/russia-seeks-to-derail-ukraines-trade-deal-with-eu-deploying-taunts-and-insults/2013/09/21/85930d4e-22e3-11e3-ad1a-1a919f2ed890_story.html.

⁷ See Will Englund, *In Ukraine, Skepticism Greets New Vow on E.U.*, WASH. POST, Dec. 12, 2013, at http://www.washingtonpost.com/world/europe/in-ukraine-skepticism-greets-new-vow-on-eu/2013/12/12/b005705a-6355-11e3-af0d-4bb80d704888_story.html.

⁸ *Ukraine Protests: A New Revolution on Maidan Square*, ECONOMIST, Dec. 7, 2013, at 53, available at <http://www.economist.com/news/europe/21591217-has-ukrainians-defiance-presidents-european-policy-split-country-new-revolution>.

⁹ E.g., NATO Press Release, NATO Foreign Ministers' Statement on Ukraine (Dec. 3, 2013), at http://www.nato.int/cps/en/natolive/news_105435.htm?selectedLocale=en ("We condemn the use of excessive force against peaceful demonstrators in Ukraine. . . . We urge Ukraine, as the holder of the Chairmanship in Office of the [Organization for Security and Co-operation in Europe (OSCE)], to fully abide by its international commitments and to uphold the freedom of expression and assembly."); U.S. Dep't of State Press Release No. 2013/1555, John Kerry,

known as the Verkhovna Rada (Rada), adopted new restrictions on public assembly without following proper parliamentary procedure.¹⁰ These new laws triggered further clashes between civilians and security forces. On January 19, U.S. National Security Council spokesperson Caitlin Hayden stated:

We are deeply concerned by the violence taking place today on the streets of Kyiv and urge all sides to immediately de-escalate the situation. The increasing tension in Ukraine is a direct consequence of the government failing to acknowledge the legitimate grievances of its people. Instead, it has moved to weaken the foundations of Ukraine's democracy by criminalizing peaceful protest and stripping civil society and political opponents of key democratic protections under the law. . . . The U.S. will continue to consider additional steps—including sanctions—in response to the use of violence.¹¹

At the urging of the international community, Yanukovich began negotiating with opposition leaders. These discussions initially led to the repeal of anti-protest laws, progress on amnesty for protesters, and a commitment by the Yanukovich regime to step down.¹² But the negotiations disintegrated in early February, and violent clashes between the government and protesters followed.¹³

On February 21, Yanukovich and opposition leaders finally reached agreement on a process to end the crisis. Brokered by representatives of France, Germany, Poland, and Russia, the agreement called for a de-escalation of violence, restoration of the 2004 Ukrainian Constitution (which had sharply limited the president's powers), formation of a new unity government, and early elections.¹⁴ While the European ministers formally witnessed the agreement, Russian envoy Vladimir Lukin refused to do so, criticizing the European ministers for having sided with “nationalist-revolutionary terrorist Maidan,” referring to the square” in Kyiv where the protests against Yanukovich started.¹⁵

Secretary of State, Statement on Events in Ukraine (Dec. 10, 2013), at <http://www.state.gov/secretary/remarks/2013/12/218585.htm> (“The United States expresses its disgust with the decision of Ukrainian authorities to meet the peaceful protest in Kyiv’s Maidan Square with riot police, bulldozers, and batons, rather than with respect for democratic rights and human dignity. This response is neither acceptable nor does it befit a democracy.”); White House Press Release, Statement by NSC Spokesperson Caitlin Hayden on Ukraine (Jan. 19, 2014), at <http://www.whitehouse.gov/the-press-office/2014/01/19/statement-nsc-spokesperson-caitlin-hayden-ukraine> [hereinafter January 19 Statement by NSC Spokesperson Caitlin Hayden] (“From its first days, the Maidan movement has been defined by a spirit of non-violence and we support today’s call by opposition political leaders to reestablish that principle.”).

¹⁰ Will Englund, *Harsh Anti-Protest Laws in Ukraine Spur Anger*, WASH. POST, Jan. 17, 2014, at http://www.washingtonpost.com/world/harsh-laws-in-ukraine-spur-anger/2014/01/17/a1cdb89c-7f63-11e3-9556-4a4bf7bcbd84_story.html; see also U.S. Dep’t of State Press Release, Passage of Undemocratic Legislation in Ukrainian Parliament (Jan. 16, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/01/219920.htm> [hereinafter January 16 U.S. Dep’t of State Press Release].

¹¹ January 19 Statement by NSC Spokesperson Caitlin Hayden, *supra* note 9.

¹² U.S. Dep’t of State Press Release, Background Briefing on the Situation in Ukraine (Feb. 19, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/02/221817.htm>.

¹³ *Id.*

¹⁴ White House Press Release, Statement by the Press Secretary on Ukraine (Feb. 21, 2014), at <http://www.whitehouse.gov/the-press-office/2014/02/21/statement-press-secretary-ukraine>; U.S. Dep’t of State Press Release, Situation in Ukraine (Feb. 21, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/02/221917.htm>.

¹⁵ Steven Lee Myers, *Deeply Bound to Ukraine, Putin Watches and Waits for Next Move*, N.Y. TIMES, Feb. 24, 2014, at A9.

The same day, the Russian Ministry of Foreign Affairs explained:

The fact that Vladimir Lukin did not sign these agreements as a witness, as three European ministers did, does not mean that Russia is not interested in searching for compromises, which will allow a stop to be put to the bloodshed and a return to legal order as soon as possible. . . .

. . . [T]he [Ukrainian] Government and the opposition bear the main responsibility for their country. This involves the emerging political process and the need to edge away from extremists, without compromise and decisively stop all their illegal actions. We will welcome any steps agreed in this direction.¹⁶

On February 22, Yanukovych left Kyiv without notice, bound for an outpost in the semi-autonomous region of Crimea.¹⁷ In his absence, members of the Ukrainian opposition entered and occupied his official residence,¹⁸ and the Rada resolved that Yanukovych had unconstitutionally abdicated his position as president.¹⁹ In an emergency session the following day, the Rada voted to appoint its new speaker, Oleksandr V. Turchynov, interim president of Ukraine.²⁰ Later that evening, Yanukovych disappeared from the Crimean outpost with a handful of trusted associates.²¹ Two days later, the Ukrainian interim government charged Yanukovych and other officials with crimes against humanity, alleging more than one hundred killings and over two thousand injuries by government officials during the Maidan protests.²²

On February 24, the Russian Ministry of Foreign Affairs released a statement charging the Rada with disregarding the agreement reached several days earlier with Yanukovych:

There have been armed confrontations [in Ukraine] between violent youths, extreme right nationalist organisations and units of law enforcement agencies, who defended peaceful civilians and interests of the state, in the capital and several other cities recently.

The agreement on settlement of the crisis in Ukraine of the 21 February is not observed despite the fact that its signature was certified by Foreign Ministers of Germany, Poland and France, as well as the United States, the European Union and other international bodies welcomed this document.

Militants have not been unarmed, they refuse to leave the streets of cities, which are actually under their control, refuse to free administrative buildings, [and] continue acts of violence.

¹⁶ Ministry of Foreign Affairs of the Russian Federation Press Release, Comment by the Russian Ministry of Foreign Affairs (Feb. 21, 2014), at http://www.mid.ru/bdcomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/f0413fbd0581c10344257c8a0057860f?OpenDocument.

¹⁷ Alison Smale, *Just Like His Power, Ukrainian Ex-Leader Vanishes into Thin Air*, N.Y. TIMES, Feb. 25, 2014, at A10.

¹⁸ *Id.*

¹⁹ *On Self-Withdrawal of the President of Ukraine*, *supra* note 4.

²⁰ Herszenhorn, *supra* note 4.

²¹ Smale, *supra* note 17.

²² Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court on the Recognition of the Jurisdiction of the International Criminal Court by Ukraine over Crimes Against Humanity, Committed by Senior Officials of the State, Which Led to Extremely Grave Consequences and Mass Murder of Ukrainian Nationals During Peaceful Protests Within the Period 21 November 2013–22 February 2014, ICC Doc. No. 790-VII (Feb. 25, 2014) (unofficial translation), at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationVerkhovnaRadaEng.pdf.

We are surprised that several European politicians have already sprung to support the announcement of presidential elections in Ukraine this May, although the agreement of the 21 February envisages that these elections should take place only after the completion of the constitutional reform. It is clear that for this reform to succeed all the Ukrainian political forces and all regions of the country must become its part, but its results should be approved by a nationwide referendum. . . .

We are deeply concerned about the actions in the Ukrainian Verkhovna Rada in terms of their legitimacy. Actually referring to the “revolutionary appropriateness” only, they are stamping “decisions” and “laws,” including those aimed at deprivation of humanitarian rights of Russians and other national minorities living in Ukraine.²³

The statement also cited additional concerns:

There are calls to prohibit[] the Russian language almost fully, lustration, liquidation of parties and organisations, closing of undesirable mass media, removal of restrictions for propaganda of N[e]o-Nazi ideology.

The course is to suppress those, who do not agree to this, in different Ukrainian regions by dictatorship and even terrorist methods.

There are threats to Orthodox sanctities.

National radicals continue to scoff at monuments in different Ukrainian cities, while like-minded persons in some European countries besmear memorials to Soviet warriors.

Such development of events disrupts the Agreement of the 21 February, discredits its initiators and guarantors, and creates a threat to civil peace, stability in the community and safety of nationals.²⁴

The statement concluded:

We are forced to note that some of our western partners are not concerned about the fate of Ukraine, but rather their own unilateral geopolitical considerations. There are no principled assessments of criminal actions of extremists, including their Neo-Nazi and anti-Semitic manifestations. All the more so, such actions are intentionally or unintentionally promoted. We cannot but get a sustainable impression that the Agreement of the 21 February with silent consent of all its external sponsors is used as a cover only to promote the scenario of change of Ukrainian power by force through the creation of “facts on the ground,” without any wish to search for a Ukraine-wide consensus in the interests of national peace. We are especially worried about the attempts to involve international structures, including the UN Secretariat, into the approval of this position.²⁵

²³ Ministry of Foreign Affairs of the Russian Federation Press Release, Statement by the Russian Ministry of Foreign Affairs Regarding the Events in Ukraine (Feb. 24, 2014), at http://www.mid.ru/brp_4.nsf/0/86DDB7AF9CD146C844257C8A003C57D2 [hereinafter February 24 Ministry of Foreign Affairs of the Russian Federation Press Release].

²⁴ *Id.*

²⁵ [Editors’ note: On February 24, the UN Secretariat’s press office voiced Secretary-General Ban Ki-moon’s support for a peaceful transition: “The Secretary-General, above all, calls for an inclusive political process that reflects the aspirations of all Ukrainians and preserves Ukraine’s unity and territorial integrity. In order to bring about a stable and prosperous future for Ukraine, the Secretary-General calls for a firm commitment, by all concerned, to uphold the key principles of democracy and human rights and thereby create a conducive environment for free and fair elections.” Secretary-General Ban Ki-moon Press Release, Statement Attributable to the Spokesperson for the Secretary-General on Ukraine (Feb. 24, 2014), at <http://www.un.org/sg/statements/?nid=7480>. In addition, to “assure Ukrainians of the support of the UN and the wider international community, the Secretary-General has sent

We insistently appeal to all those who are part of this crisis in Ukraine to demonstrate maximum responsibility and to prevent further degradation of the situation, to return it to the ambit of the law, and to decisively stop those extremists, who are seeking power.²⁶

Yanukovych resurfaced a few days later in Russia and held a press conference there, decrying the “gangster coup” in Kyiv and declaring himself the legitimate president of Ukraine.²⁷

Russian Troops in Crimea. Meanwhile, pro-Russian protests erupted on February 23, 2014, in the semiautonomous Ukrainian region of Crimea.²⁸ (Crimea is the only region of Ukraine where most of the population are ethnic Russian.²⁹) During an interview broadcast that same day, then-U.S. ambassador to the United Nations Susan Rice warned that it “would be a grave mistake” for Russia to respond to the protests in Ukraine with force.³⁰

Days later, Russian President Vladimir Putin ordered major military exercises near the Ukrainian border in western Russia.³¹ Masked gunmen in unmarked uniforms seized Crimea’s regional parliament on February 27³² and raised a Russian flag.³³ After other gunmen took control of a civilian airport and a military airport in Crimea the next day, Ukrainian Interior Minister Arsen Avakov blamed Russia, stating: “What is happening can be called an armed invasion and occupation. In violation of all international treaties and norms. This is a direct provocation for armed bloodshed in the territory of a sovereign state.”³⁴

On February 28, Obama voiced concern about reports of Russian military movements inside Ukraine: “[A]ny violation of Ukraine’s sovereignty and territorial integrity . . . would

his senior advisor Mr. Robert Serry to Ukraine. The Secretary-General expects all key international actors to work collaboratively to help Ukrainians at this challenging time in their country’s history.” *Id.*

²⁶ February 24 Ministry of Foreign Affairs of the Russian Federation Press Release, *supra* note 23.

²⁷ Steven Lee Myers, *Ousted Ukrainian Leader, Reappearing in Russia, Says, ‘Nobody Deposed Me,’* N.Y. TIMES, Feb. 28, 2014, at <http://www.nytimes.com/2014/03/01/world/europe/russia-ukraine.html>.

²⁸ Howard Amos, *Ukraine Crisis Fuels Secession Calls in Pro-Russian South,* GUARDIAN, Feb. 23, 2014, at <http://www.theguardian.com/world/2014/feb/23/ukraine-crisis-secession-russian-crimea>.

²⁹ Robert Coalson, *Pro-Russian Separatism Rises in Crimea as Ukraine’s Crisis Unfolds,* RADIO FREE EUROPE RADIO LIBERTY, Feb. 18, 2014, at <http://www.rferl.org/content/ukraine-crimea-rising-separatism/25268303.html>. In 1954, when Ukraine and Russia were both part of the Soviet Union, Crimea was transferred by decree from the then-Russian Soviet Federative Socialist Republic to the then-Ukrainian Soviet Socialist Republic. *Meeting of the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics*, WILSON CTR. DIGITAL ARCHIVE, Feb. 19, 1954, at 2 (Gary Goldberg trans.), available at <http://digitalarchive.wilsoncenter.org/document/119638.pdf?v=b6fb8379a89e40622dfc4d02509a6880> (“Considering the commonality of the economy, the territorial proximity, and the close economic and cultural ties between the Crimean Oblast’ and the Ukrainian SSR, and also bearing in mind the agreement of the Presidium of the Ukrainian SSR Supreme Soviet, the Presidium of the RSFSR Supreme Soviet considers it advisable to transfer the Crimean Oblast’ to the Ukrainian Soviet Socialist Republic.”); see also Krishnadev Calamur, *Crimea: A Gift to Ukraine Becomes a Political Flash Point*, NPR.ORG, Feb. 27, 2014, at <http://www.npr.org/blogs/parallels/2014/02/27/283481587/crimea-a-gift-to-ukraine-becomes-a-political-flash-point>.

³⁰ David Gregory, Meet the Press with David Gregory, NBC NEWS, Feb. 23, 2014, at <http://www.nbcnews.com/meet-the-press/meet-press-transcript-feb-23-2014-n36721> (transcript of interview with Susan Rice).

³¹ Harriet Salem, Shaun Walker & Oksana Grytsenko, *Russia Puts Military on High Alert as Crimea Protests Leave One Man Dead,* GUARDIAN, Feb. 26, 2014, at <http://www.theguardian.com/world/2014/feb/26/ukraine-new-leader-disbands-riot-police-crimea-separatism>.

³² *Timeline: Key Events in Ukraine’s Ongoing Crisis*, WASH. POST, May 12, 2014, at http://www.washingtonpost.com/world/europe/timeline-key-events-in-ukraines-ongoing-crisis/2014/05/07/a15b84e6-d604-11e3-8a78-8fe50322a72c_story.html.

³³ *Timeline: Ukraine Crisis and Russia’s Stand-off with the West*, REUTERS, Apr. 27, 2014, at <http://www.reuters.com/article/2014/04/27/us-ukraine-crisis-events-timeline-idUSBREA3Q0CC20140427>.

³⁴ William Booth, *Armed Men Take Control of Crimean Airport,* WASH. POST, Feb. 28, 2014, at http://www.washingtonpost.com/world/europe/pro-russia-separatists-flex-muscle-in-ukraines-crimean-peninsula/2014/02/27/dac10d54-9ff0-11e3-878c-65222df220eb_story.html.

represent a profound interference in matters that must be determined by the Ukrainian people. It would be a clear violation of Russia's commitment to respect the independence and sovereignty and borders of Ukraine, and of international laws."³⁵

Some Russian troops were already present in Crimea with the consent of Ukraine. In 1997, Ukraine and Russia agreed that Russia's Black Sea naval fleet would be stationed in Crimea pursuant to three separate Black Sea fleet agreements between Ukraine and Russia.³⁶ These agreements were renewed in 2010.³⁷

At least one of the Black Sea fleet agreements—the 1997 Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory—explicitly required that Russian “[m]ilitary formations . . . respect Ukraine's sovereignty, abide by its legislation, and do not allow interference in Ukraine's internal affairs.”³⁸ The same treaty permitted Russian forces to “conduct exercises and other measures of combat and operational training” under certain conditions.³⁹ It also provided that “[m]ilitary formations at their stationing locations and during transfers may implement protection measures in accordance with the procedure established in the Russian Federation Armed Forces and in cooperation with the competent Ukrainian organs.”⁴⁰ Finally, movements of Russian military formations “outside their stationing locations” were to be made “after being agreed with the competent Ukrainian organs.”⁴¹

According to the U.S. Department of State, by March 1, Russia had deployed to Crimea “some 6,000-plus airborne and naval forces with considerable materiel,” attaining “complete operational control” of the Crimean Peninsula without Ukraine's consent.⁴² That same day, Kerry issued a statement:

The United States condemns the Russian Federation's invasion and occupation of Ukrainian territory, and its violation of Ukrainian sovereignty and territorial integrity in

³⁵ White House Press Release, Statement by the President on Ukraine (Feb. 28, 2014), at <http://www.whitehouse.gov/the-press-office/2014/02/28/statement-president-ukraine>.

³⁶ *Bound by Treaty: Russia, Ukraine and Crimea*, DEUTSCHE WELLE, Mar. 11, 2014, at <http://www.dw.de/bound-by-treaty-russia-ukraine-and-crimea/a-17487632>. Russia unilaterally terminated the basing agreements on April 2. President of Russia Press Release, Termination of Agreements on the Presence of Russia's Black Sea Fleet in Ukraine (Apr. 2, 2014), at <http://eng.kremlin.ru/news/6955>. [Editors' note: Only one of the three 1997 Black Sea fleet treaties is available in English. See Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, Russ.-Ukr., May 28, 1997, reprinted in 1 RUSSIA & EURASIA DOCUMENTS ANNUAL 1997, at 129 (J. L. Black ed., 1998) [hereinafter Black Sea Fleet Agreement on Status and Conditions]; see also Eric Posner, The 1997 Black Sea Fleet Agreement Between Russia and Ukraine (Mar. 5, 2014), at <http://ericposner.com/the-1997-black-sea-fleet-agreement-between-russia-and-ukraine> (reproducing portions of the same agreement).]

³⁷ Clifford J. Levy, *Ukraine Woos Russia with Lease Deal*, N.Y. TIMES, Apr. 22, 2010, at A8; *Agreement Between Yanukovich and Medvedev on the Fleet Until 2042: Document Text*, UKRAYINSKA PRAVDA, Apr. 22, 2010, at <http://www.pravda.com.ua/articles/2010/04/22/4956018>. According to Ukrainian press reports, in exchange for the 1997 agreements' renewal until 2042, Russia agreed to pay an annual fee and to discount the price of natural gas sold to Ukraine. *Agreement Between Yanukovich and Medvedev*, *supra*.

³⁸ Black Sea Fleet Agreement on Status and Conditions, *supra* note 36, Art. 6.1.

³⁹ *Id.*, Art. 8.2 (permitting such exercises “within the limits of training centers, ranges, position areas, dispersal areas, and firing ranges and, apart from prohibited zones, in allocated airspace zones by agreement with the competent Ukrainian organs”).

⁴⁰ *Id.*, Art. 8.4.

⁴¹ *Id.*, Art. 15.5.

⁴² U.S. Dep't of State Press Release, Briefing on the Situation in Ukraine (Mar. 2, 2014), at <http://www.state.gov/pa/prs/ps/2014/03/222727.htm>.

full contravention of Russia's obligations under the UN Charter, the Helsinki Final Act, its 1997 military basing agreement with Ukraine, and the 1994 Budapest Memorandum. This action is a threat to the peace and security of Ukraine, and the wider region.⁴³

In the nonbinding 1975 Helsinki Final Act,⁴⁴ thirty-five countries—including the United States and the then-USSR—had declared ten guiding principles that included “respect for the rights inherent in sovereignty,” “refraining from the threat or use of force,” “inviolability of frontiers,” “territorial integrity of States,” “peaceful settlement of disputes,” “non-intervention in internal affairs,” and “self-determination of peoples.”⁴⁵

The 1994 Budapest Memorandum, which marked Ukraine's accession to the Treaty on the Non-proliferation of Nuclear Weapons, contained the following affirmations:

1. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe [i.e., the Helsinki Final Act], to respect the independence and sovereignty and the existing borders of Ukraine;

2. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations⁴⁶

The United States and Russia reaffirmed these 1994 commitments in a joint statement in 2009.⁴⁷

⁴³ U.S. Dep't of State Press Statement, John Kerry, Secretary of State, Situation in Ukraine (Mar. 1, 2014), at <http://www.state.gov/secretary/remarks/2014/03/222720.htm>. For Ukraine's stance with respect to Russian violations of the Black Sea fleet agreements, as well as the 1997 Treaty on Friendship, Cooperation, and Partnership Between Ukraine and the Russian Federation, see Ministry of Foreign Affairs of Ukraine Press Release, On Violations of Ukraine's Laws in Force and of Ukrainian-Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine (Mar. 3, 2014), at <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/18622-shhodo-porusheny-chinnogo-zakonodavstva-ukrajini-ta-ukrajinskyko-rosijsykih-ugod-vijsykovimi-formuvannyami-chf-rf-na-teritoriji-ukrajini>.

⁴⁴ Conference on Security and Co-operation in Europe, Final Act, Declaration on Principles Guiding Relations Between Participating States, Art. 1(a)(X) (Aug. 1, 1975), at <http://www.osce.org/mc/39501?download=true> [hereinafter Helsinki Final Act]. The agreement sought to improve relations between the Soviet Union and many European states, the United States, and Canada and provided in part: “The participating States, paying due regard to the principles above and, in particular, to the first sentence of the tenth principle, ‘Fulfillment in good faith of obligations under international law,’ note that the present Declaration does not affect their rights and obligations, nor the corresponding treaties and other agreements and arrangements.” *Id.*

⁴⁵ *Id.*, Art. 1(a) (capitalization adjusted). The Helsinki Final Act addressed broadly the then-USSR's relationship with Europe, the United States, and Canada. The document dealt with four categories of issues: (1) territoriality and sovereignty, which incorporated the ten guiding principles noted above; (2) economics; (3) human rights; and (4) implementation. Helsinki Final Act, 1975, U.S. Dep't of State Office of the Historian (undated), at <https://history.state.gov/milestones/1969-1976/helsinki>.

⁴⁶ Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum), UN Doc. A/49/765, S/1994/1399, Annex I (Dec. 19, 1994), at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/49/765.

⁴⁷ U.S. Dep't of State Press Release No. 2009/1230, U.S.-Russia Joint Statement on Expiration of the START Treaty (Dec. 4, 2009), at <http://www.state.gov/r/pa/prs/ps/2009/dec/133204.htm>.

The UN Security Council met on March 1, 2014, in response to a request by Yuriy Sergeyev, Ukraine's ambassador to the United Nations.⁴⁸ At that meeting, Sergeyev stated:

Russian troops illegally entered the territory of Ukraine in the Crimean peninsula on the ambiguous pretext of protecting the Russian-speaking population of Ukraine. . . .

[S]uch action by the Russian Federation constitutes an act of aggression against the State of Ukraine and a severe violation of international law, posing a serious threat to the sovereignty and territorial integrity of our country, as well as the peace and stability of the whole region. . . .

. . . .

. . . We call upon the Security Council to do everything possible now to stop aggression by the Russian Federation against Ukraine.⁴⁹

Vitaly Churkin, Russia's ambassador to the United Nations, responded. He blamed the crisis in Ukraine on the failure to implement the February 21 agreement.⁵⁰ Churkin cited "great concern in the eastern part of the country" that the regional governments would be replaced in the same way that Yanukovych's administration had been supplanted.⁵¹ For this reason, Churkin explained, the chairman of the Council of Ministers of Crimea went to the president of Russia with a request to restore peace in Crimea. Churkin continued: "According to available information, the appeal was also supported by Yanukovych, whose removal from office, we believe was illegal."⁵² As a result, Churkin explained, the Russian parliament authorized the deployment of armed forces on the territory of Ukraine "until the civic and political situation in Ukraine can be normalized."⁵³

Samantha Power, the United States ambassador to the United Nations, emphasized that Russia's military intervention in Crimea "is without legal basis."⁵⁴ She also contested Russian allegations of actions and threats against minority groups in Ukraine, stating that "[w]e see no evidence of such actions yet, but Russia's provocative actions could easily push a tense situation beyond the breaking point."⁵⁵

On March 2, the leaders of the G-7—without Putin—collectively issued a statement declaring Russia's military campaign a "clear violation" of international law:

We, the leaders of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States and the President of the European Council and President of the European Commission, join together today to condemn the Russian Federation's clear violation of

⁴⁸ Letter Dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations Addressed to the President of the Security Council, UN Doc. S/2014/136 (Feb. 28, 2014), at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/136.

⁴⁹ 7124th Meeting of the Security Council, UN Doc. S/PV.7124, at 3 (Mar. 1, 2014), at http://www.un.org/en/ga/search/view_doc.asp?symbol=s/pv.7124.

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 5.

⁵² *Id.*

⁵³ *Id.* (quoting request of Russian president).

⁵⁴ *Id.* at 6.

⁵⁵ *Id.*

the sovereignty and territorial integrity of Ukraine, in contravention of Russia's obligations under the UN Charter and its 1997 basing agreement with Ukraine. We call on Russia to address any ongoing security or human rights concerns that it has with Ukraine through direct negotiations, and/or via international observation or mediation under the auspices of the UN or the Organization for Security and Cooperation in Europe. We stand ready to assist with these efforts.

. . . .

We note that Russia's actions in Ukraine also contravene the principles and values on which the G-7 and the G-8 operate. As such, we have decided for the time being to suspend our participation in activities associated with the preparation of the scheduled G-8 Summit in Sochi in June, until the environment comes back where the G-8 is able to have meaningful discussion.⁵⁶

At a follow-up Security Council meeting on March 3, Sergeyev reported that Russia had deployed sixteen thousand troops in Crimea since February 24.⁵⁷ In response, Churkin again deplored the non-implementation of the February 21 agreement:

Instead of the promised establishment of a Government of national unity, a so-called Government of victors has been formed. The Parliament of Ukraine took a decision limiting the language rights of minorities; they have disbanded the judges of the Constitutional Court and insisted on their criminal prosecution. Demands have been made to limit or criminalize the use of the Russian language, to ban undesirable political parties and to make examples of them. The victors wish to exploit the fruits of their victory to trample the rights and basic freedoms of the people.

All of this has alarmed the authorities of eastern and southern Ukraine and the Autonomous Republic of Crimea, home to millions of Russians who do not wish to see such developments in their regions. In a situation of ongoing threats of violence by ultranationalists against the security, lives and legitimate interests of Russians and all Russian-speaking peoples, popular self-defence brigades have been established. They have already put down attempts to take over administrative buildings in Crimea by force and to funnel weapons and ammunition into the peninsula. We have information about the preparation of new provocations, including against the Russian Black Sea fleet in Ukraine.

In such circumstances, the legitimately elected authorities of the Republic have asked the President of Russia to help them to restore calm in Crimea.⁵⁸

Brandishing a photocopy of a letter from Yanukovych—then still considered by Russia to be the president of Ukraine—Churkin stated that Ukraine had requested troop deployment because “events in [Yanukovych's] country and capital have placed Ukraine on the brink of civil war.”⁵⁹

Ambassador Power responded:

. . . Let us begin with a clear and candid assessment of the facts.

⁵⁶ White House Press Release, G-7 Leaders Statement (Mar. 2, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/02/g-7-leaders-statement>.

⁵⁷ 7125th Meeting of the Security Council, UN Doc. S/PV.7125, at 3 (Mar. 3, 2014), at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7125.pdf.

⁵⁸ *Id.*

⁵⁹ *Id.*

It is a fact that Russian military forces have taken over Ukrainian border posts. It is a fact that Russia has taken over the ferry terminal in Kerch. It is a fact that Russian ships are moving in and around Sevastopol. It is a fact that Russian forces are blocking the mobile telephone services in some areas. It is a fact that Russia has surrounded or taken over practically all Ukrainian military facilities in Crimea. It is a fact that, today, Russian jets entered into Ukrainian airspace. It is also a fact that independent journalists continue to report that there is no evidence of violence against Russian or pro-Russian communities.

Russian military action is not a human rights protection mission. It is a violation of international law and of the sovereignty and territorial integrity of the independent nation of Ukraine and a breach of Russia's Helsinki commitments and its United Nations obligations. The central issue is whether the recent change of Government in Ukraine constitutes a danger to Russia's legitimate interests of such a nature and extent that Russia is justified in intervening militarily in Ukraine, seizing control of public facilities and issuing military ultimatums to elements of the Ukrainian military.

The answer of course is no. The Russian military are secure. The new Government in Kyiv has pledged to honour all of its existing international agreements, including those covering Russian bases. Russian mobilization is a response to an imaginary threat.

A second issue is whether the population of Crimea or other parts of eastern Ukraine are at risk because of the new Government. There is no evidence of that. Military action cannot be justified on the basis of threats that have not been made and are not being carried out. There is no evidence, for example, that churches in eastern Ukraine are being or will be attacked. The allegation is without basis. There is no evidence that ethnic Russians are in danger. On the contrary, the new government has placed a priority on internal reconciliation and political inclusivity.

....

I note that Russia has implied a right to take military action in Crimea if invited to do so by the Prime Minister of Crimea. As the Government of Russia well knows, that has no legal basis. The prohibition on the use of force would be rendered moot were subnational authorities able to unilaterally invite military intervention by a neighbouring State. Under the Ukrainian Constitution, only the Ukrainian Rada can approve the presence of foreign troops.

....

... Russia may well be displeased with the new Government, which was approved by Ukraine's Parliament by an overwhelming majority, including members of Yanukovich's own party. Russia has every right to wish that events in Ukraine had turned out differently but it does not have the right to express that unhappiness by using military force or by trying to convince the world community that up is down and black is white.⁶⁰

Putin first publicly spoke about—and defended—Russia's actions in a news conference the next day, characterizing Ukraine's transfer of power as a violation of Ukrainian law and Russia's military presence as legal under international law:

There can only be one assessment: this was an anti-constitutional takeover, an armed seizure of power. Does anyone question this? Nobody does. . . .

⁶⁰ *Id.*

. . . I would like to stress that under that agreement [of February 21] (I am not saying this was good or bad, just stating the fact) Mr Yanukovych actually handed over power. He agreed to all the opposition's demands: he agreed to early parliamentary elections, to early presidential elections, and to return to the 2004 Constitution, as demanded by the opposition. He gave a positive response to our request, the request of western countries and, first of all, of the opposition not to use force. He did not issue a single illegal order to shoot at the poor demonstrators. Moreover, he issued orders to withdraw all police forces from the capital, and they complied. He went to Kharkov to attend an event, and as soon as he left, instead of releasing the occupied administrative buildings, [opposition forces] immediately occupied the president's residence and the Government building—all that instead of acting on the agreement.

. . . What was the purpose of all those illegal, unconstitutional actions, why did they have to create this chaos in the country? Armed and masked militants are still roaming the streets of Kiev. This is a question to which there is no answer. . . . The result is the absolute opposite of what they expected, because their actions have significantly destabilised the east and southeast of Ukraine.

. . . .

[P]eople should have the right to determine their own future, that of their families and of their region, and to have equal participation in it. I would like to stress this: wherever a person lives, whatever part of the country, he or she should have the right to equal participation in determining the future of the country.

Are the current authorities legitimate? The Parliament is partially, but all the others are not. The current Acting President is definitely not legitimate. There is only one legitimate President, from a legal standpoint. Clearly, he has no power. However, as I have already said, and will repeat: Yanukovych is the only undoubtedly legitimate President.

There are three ways of removing a President under Ukrainian law: one is his death, the other is when he personally steps down, and the third is impeachment. The latter is a well-deliberated constitutional norm. It has to involve the Constitutional Court, the Supreme Court and the Rada. This is a complicated and lengthy procedure. It was not carried out. Therefore, from a legal perspective this is an undisputed fact.

. . . .

Regarding the deployment of troops, the use of armed forces. So far, there is no need for it, but the possibility remains. I would like to say here that the military exercises we recently held had nothing to do with the events in Ukraine. This was pre-planned, but we did not disclose these plans, naturally, because this was a snap inspection of the forces' combat readiness. We planned this a long time ago, the Defence Minister reported to me and I had the order ready to begin the exercise. As you may know, the exercises are over; I gave the order for the troops to return to their regular dislocations yesterday.

What can serve as a reason to use the Armed Forces? Such a measure would certainly be the very last resort.

First, the issue of legitimacy. As you may know, we have a direct appeal from the incumbent and, as I said, legitimate President of Ukraine, Mr Yanukovych, asking us to use the Armed Forces to protect the lives, freedom and health of the citizens of Ukraine.

What is our biggest concern? We see the rampage of reactionary forces, nationalist and anti-Semitic forces going on in certain parts of Ukraine, including Kiev. I am sure you,

members of the media, saw how one of the governors was chained and handcuffed to something and they poured water over him, in the cold of winter. After that, by the way, he was locked up in a cellar and tortured. What is all this about? Is this democracy? Is this some manifestation of democracy? He was actually only recently appointed to this position Even if we accept that they are all corrupt there, he had barely had time to steal anything.

And do you know what happened when they seized the Party of Regions building? There were no party members there at all at the time. Some two-three employees came out, one was an engineer, and he said to the attackers: "Could you let us go, and let the women out, please. I'm an engineer, I have nothing to do with politics." He was shot right there in front of the crowd. Another employee was led to a cellar and then they threw Molotov cocktails at him and burned him alive. Is this also a manifestation of democracy?

When we see this we understand what worries the citizens of Ukraine, both Russian and Ukrainian, and the Russian-speaking population in the eastern and southern regions of Ukraine. It is this uncontrolled crime that worries them. Therefore, if we see such uncontrolled crime spreading to the eastern regions of the country, and if the people ask us for help, while we already have the official request from the legitimate President, we retain the right to use all available means to protect those people. We believe this would be absolutely legitimate. This is our last resort.

Moreover, here is what I would like to say: we have always considered Ukraine not only a neighbour, but also a brotherly neighbouring republic, and will continue to do so. Our Armed Forces are comrades in arms, friends, many of whom know each other personally. I am certain, and I stress, I am certain that the Ukrainian military and the Russian military will not be facing each other, they will be on the same side in a fight.

Incidentally, the things I am talking about—this unity—is what is happening in Crimea. You should note that, thank God, not a single gunshot has been fired there; there are no casualties, except for that crush on the square about a week ago. What was going on there? People came, surrounded units of the armed forces and talked to them, convincing them to follow the demands and the will of the people living in that area. There was not a single armed conflict, not a single gunshot.

Thus the tension in Crimea that was linked to the possibility of using our Armed Forces simply died down and there was no need to use them. The only thing we had to do, and we did it, was to enhance the defence of our military facilities because they were constantly receiving threats and we were aware of the armed nationalists moving in. We did this, it was the right thing to do and very timely. Therefore, I proceed from the idea that we will not have to do anything of the kind in eastern Ukraine.

. . . [W]e firmly believe that all citizens of Ukraine, I repeat, wherever they live, should be given the same equal right to participate in the life of their country and in determining its future.⁶¹

The U.S. Department of State responded the next day with a press release contesting many of the facts on which Putin's legal arguments were based. The press release began: "As Russia spins a false narrative to justify its illegal actions in Ukraine, the world has not seen such startling Russian fiction since Dostoyevsky wrote, 'The formula "two times two equals five" is not without its attractions.'" It then contrasted Putin's claims with "The Facts":

⁶¹ President of Russia Press Release, Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine (Mar. 4, 2014), at <http://eng.kremlin.ru/news/6763>.

1. *Mr. Putin says:* Russian forces in Crimea are only acting to protect Russian military assets. It is “citizens’ defense groups,” not Russian forces, who have seized infrastructure and military facilities in Crimea.

The Facts: Strong evidence suggests that members of Russian security services are at the heart of the highly organized anti-Ukraine forces in Crimea. While these units wear uniforms without insignia, they drive vehicles with Russian military license plates and freely identify themselves as Russian security forces when asked by the international media and the Ukrainian military. Moreover, these individuals are armed with weapons not generally available to civilians.

2. *Mr. Putin says:* Russia’s actions fall within the scope of the 1997 Friendship Treaty between Ukraine and the Russian Federation.

The Facts: The 1997 [Treaty on Friendship, Cooperation, and Partnership Between Ukraine and the Russian Federation] requires Russia to respect Ukraine’s territorial integrity.⁶² Russia’s military actions in Ukraine, which have given them operational control of Crimea, are in clear violation of Ukraine’s territorial integrity and sovereignty.

....

5. *Mr. Putin says:* There is a humanitarian crisis and hundreds of thousands are fleeing Ukraine to Russia and seeking asylum.

The Facts: To date, there is absolutely no evidence of a humanitarian crisis. Nor is there evidence of a flood of asylum-seekers fleeing Ukraine for Russia. International organizations on the ground have investigated by talking with Ukrainian border guards, who also refuted these claims. Independent journalists observing the border have also reported no such flood of refugees.

6. *Mr. Putin says:* Ethnic Russians are under threat.

The Facts: Outside of Russian press and Russian state television, there are no credible reports of any ethnic Russians being under threat. The new Ukrainian government placed a priority on peace and reconciliation from the outset. President Oleksandr Turchynov refused to sign legislation limiting the use of the Russian language at [the] regional level. Ethnic Russians and Russian speakers have filed petitions attesting that their communities have not experienced threats. Furthermore, since the new government was established, calm has returned to Kyiv. There has been no surge in crime, no looting, and no retribution against political opponents.

7. *Mr. Putin says:* Russian bases are under threat.

The Facts: Russian military facilities were and remain secure, and the new Ukrainian government has pledged to abide by all existing international agreements, including those covering Russian bases. It is Ukrainian bases in Crimea that are under threat from Russian military action.

8. *Mr. Putin says:* There have been mass attacks on churches and synagogues in southern and eastern Ukraine.

⁶² [Editors’ note: In the Treaty on Friendship, Cooperation, and Partnership Between Ukraine and the Russian Federation, signed shortly after the 1997 basing agreements, Russia and Ukraine unconditionally guaranteed the “inviolability of [each other’s] borders.” Treaty on Friendship, Cooperation, and Partnership Between Ukraine and the Russian Federation, Russ.-Ukr., Art. 2, May 31, 1997, UN Doc. A/52/174, Annex I (1997).]

The Facts: Religious leaders in the country and international religious freedom advocates active in Ukraine have said there have been no incidents of attacks on churches. All of Ukraine's church leaders, including representatives of the Ukrainian Orthodox Church-Moscow Patriarchate, have expressed support for the new political leadership, calling for national unity and a period of healing. Jewish groups in southern and eastern Ukraine report that they have not seen an increase in anti-Semitic incidents.

9. *Mr. Putin says:* Kyiv is trying to destabilize Crimea.

The Facts: Ukraine's interim government has acted with restraint and sought dialogue. Russian troops, on the other hand, have moved beyond their bases to seize political objectives and infrastructure in Crimea. The government in Kyiv immediately sent the former Chief of Defense to defuse the situation. Petro Poroshenko, the latest government emissary to pursue dialogue in Crimea, was prevented from entering the Crimean Rada.

10. *Mr. Putin says:* The Rada is under the influence of extremists or terrorists.

The Facts: The Rada is the most representative institution in Ukraine. Recent legislation has passed with large majorities, including from representatives of eastern Ukraine. Far-right wing ultranationalist groups, some of which were involved in open clashes with security forces during the EuroMaidan protests, are not represented in the Rada. There is no indication that the Ukrainian government would pursue discriminatory policies; on the contrary, they have publicly stated exactly the opposite.⁶³

On March 6, Obama signed an executive order declaring a state of national emergency with respect to events in Crimea⁶⁴ and granted the secretaries of the Treasury and State the collective power to sanction "individuals and entities responsible for violating the sovereignty and territorial integrity of Ukraine, or for stealing the assets of the Ukrainian people."⁶⁵ A senior administration official stated on the same day that the United States had also "cancelled discussions associated with keeping trade and commercial ties to Russia . . . [and] cancelled military exercises and joint consultations with Russia on those specific issues, while providing additional reassurance to our European allies about our commitment to their security."⁶⁶ The

⁶³ U.S. Dep't of State Fact Sheet, *President Putin's Fiction: 10 False Claims About Ukraine* (Mar. 5, 2014), at <http://www.state.gov/t/pa/prs/ps/2014/03/222988.htm> [hereinafter *Fact Sheet: President Putin's Fiction*]. The United States later added to its list of "fictions." U.S. Dep't of State Fact Sheet, *Russian Fiction the Sequel: 10 More False Claims About Ukraine* (Apr. 13, 2014), at <http://www.state.gov/t/pa/prs/ps/2014/04/224759.htm>.

⁶⁴ White House Press Release, *Executive Order—Blocking Property of Certain Persons Contributing to the Situation in Ukraine* (Mar. 6, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/06/executive-order-blocking-property-certain-persons-contributing-situation> (finding that individuals and entities "undermin[ing] democratic processes and institutions in Ukraine; threaten[ing] its peace, security, stability, sovereignty, and territorial integrity; and contribut[ing] to the misappropriation of its assets constitute[d] an unusual and extraordinary threat to the national security and foreign policy of the United States").

⁶⁵ White House Press Release, *Statement by the President on Ukraine* (Mar. 6, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/06/statement-president-ukraine>; see also White House Press Release, *Letter—Blocking Property of Additional Persons Contributing to the Situation in Ukraine* (Mar. 17, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/17/letter-blocking-property-additional-persons-contributing-situation-ukrai> [hereinafter *Letter—Blocking Property*]; see also White House Press Release, *Background Briefing by Senior Administration Officials on Executive Order on Ukraine—Via Conference Call* (Mar. 6, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/06/background-briefing-senior-administration-officials-executive-order-ukra> [hereinafter *March 6 Background Briefing*]. By mid-September 2014, approximately seventy individuals and entities had been sanctioned under Executive Order 13660. U.S. Dep't of the Treasury, *SDN List Sorted by OFAC Sanctions Program* (Sept. 12, 2014), at <http://www.treasury.gov/ofac/downloads/prgrmlst.txt> [hereinafter *SDN List*].

⁶⁶ March 6 Background Briefing, *supra* note 65.

United States also suspended preparation for the G-8 convention then scheduled to take place in Sochi later that month.⁶⁷

The Crimean Referendum. The Crimean regional legislature voted on March 6 to hold a referendum ten days later on the region's secession from Ukraine.⁶⁸ Putin lauded the referendum as an act of self-determination, which "was . . . in line with the precedent set by Kosovo."⁶⁹

White House Press Secretary Jay Carney stated on March 10 that such a referendum "will not be viewed by the United States as legitimate because it is inconsistent with the Ukrainian constitution, which makes clear that any change in Ukraine's borders has to be decided by all of Ukraine."⁷⁰ Carney continued:

What I would say is that it is up to the people of Ukraine to decide their future. And for any kind of decision to be made about the status of a region of Ukraine, only the people of Ukraine and their representatives can have that discussion and make that decision.

So what I can tell you is that the actions taken thus far are in violation of international law. This referendum that we've been talking about if it were to be carried out, its results would not be recognized by the United States or most nations across the country. And as the executive order signed by the President makes clear, we have put in place authorities to take actions, via sanctions, against those who are viewed as responsible for the violation of Ukraine's territorial integrity and sovereignty.⁷¹

On March 12, the G-7 leaders issued a second statement on the situation unfolding in Ukraine, this time explicitly addressing a proposed referendum on the status of Crimea:

We . . . call on the Russian Federation to cease all efforts to change the status of Crimea contrary to Ukrainian law and in violation of international law. We call on the Russian Federation to immediately halt actions supporting a referendum on the territory of Crimea regarding its status, in direct violation of the Constitution of Ukraine.

Any such referendum would have no legal effect. Given the lack of adequate preparation and the intimidating presence of Russian troops, it would also be a deeply flawed process which would have no moral force. For all these reasons, we would not recognize the outcome.

Russian annexation of Crimea would be a clear violation of the United Nations Charter; Russia's commitments under the Helsinki Final Act;⁷² its obligations to Ukraine under its 1997 Treaty of Friendship, Cooperation and Partnership;⁷³ the Russia-Ukraine 1997 basing agreement[s];⁷⁴ and its commitments in the Budapest Memorandum of 1994.⁷⁵ In addition to its impact on the unity, sovereignty and territorial integrity of Ukraine, the

⁶⁷ *Id.*

⁶⁸ Carol Morello & Anthony Faiola, *Crimea Sets Referendum on Joining Russia*, WASH. POST, Mar. 6, 2014, at http://www.washingtonpost.com/world/crimea-sets-referendum-on-joining-russia/2014/03/06/d06d8a46-a520-11e3-a5fa-55f0c77bf39c_story.html.

⁶⁹ President of Russia Press Release, Telephone Conversation with US President Barack Obama (Mar. 17, 2014), at <http://eng.kremlin.ru/news/6881>.

⁷⁰ White House Press Release, Press Briefing by Press Secretary Jay Carney (Mar. 10, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/10/press-briefing-press-secretary-jay-carney-31014>.

⁷¹ *Id.*

⁷² [Editors' note: See *supra* notes 44–45 and accompanying text.]

⁷³ [Editors' note: For full text, see Treaty on Friendship, Cooperation, and Partnership, *supra* note 62 and accompanying text.]

⁷⁴ [Editors' note: See *supra* notes 36–41 and accompanying text.]

⁷⁵ [Editors' note: See *supra* note 46 and accompanying text.]

annexation of Crimea could have grave implications for the legal order that protects the unity and sovereignty of all states. Should the Russian Federation take such a step, we will take further action, individually and collectively.⁷⁶

Similarly, on March 15, the UN Security Council voted on a U.S.-submitted draft resolution urging countries not to recognize the referendum's results.⁷⁷ The draft resolution provided:

The Security Council . . .

Noting with concern the intention to hold a referendum on the status of Crimea on 16 March 2014,

1. *Reaffirms* its commitment to the sovereignty, independence, unity, and territorial integrity of Ukraine within its internationally recognized borders;

. . . .

4. *Notes* that Ukraine has not authorized the referendum on the status of Crimea;

5. *Declares* that this referendum can have no validity, and cannot form the basis for any alteration of the status of Crimea; and calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of Crimea on the basis of this referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status⁷⁸

Among the Council's fifteen permanent and non-permanent members, thirteen voted in favor of the draft resolution, Russia vetoed the resolution, and China abstained.⁷⁹

The referendum nevertheless took place on March 16. According to Putin, "[M]ore than 82 percent of the electorate took part in the vote. Over 96 percent of them spoke out in favour of reuniting with Russia. These numbers speak for themselves."⁸⁰ The United States, however, "reject[ed]" the referendum.⁸¹ A White House spokesperson said: "The referendum is contrary to Ukraine's constitution, and the international community will not recognize the results of a poll administered under threats of violence and intimidation from a Russian military intervention that violates international law."⁸²

⁷⁶ White House Press Release, Statement of G-7 Leaders on Ukraine (Mar. 12, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/12/statement-g-7-leaders-ukraine>.

⁷⁷ UN Security Council Press Release No. SC/11319, Security Council Fails to Adopt Text Urging Member States Not to Recognize Planned 16 March Referendum in Ukraine's Crimea Region (Mar. 15, 2014), at <http://www.un.org/News/Press/docs/2014/sc11319.doc.htm>.

⁷⁸ Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution, UN Doc. S/2014/189, pmbll., paras. 1, 4, 5 (Mar. 15, 2014), at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/189.

⁷⁹ UN Security Council Press Release No. SC/11319, *supra* note 77.

⁸⁰ President of Russia Press Release, Address by President of the Russian Federation (Mar. 18, 2014), at <http://eng.kremlin.ru/news/6889> [hereinafter March 18 President of Russia Press Release]; *see also Crimea Declares Independence, Seeks UN Recognition*, RT NEWS, Mar. 17, 2014, at <http://rt.com/news/crimea-referendum-results-official-250>.

⁸¹ White House Press Release, Statement by the Press Secretary on Ukraine (Mar. 16, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/16/statement-press-secretary-ukraine>.

⁸² *Id.* ("In this century, we are long past the days when the international community will stand quietly by while one country forcibly seizes the territory of another."); *see also* White House Press Release, Background Briefing by

On March 16, Obama signed a new executive order that identified named individuals and classes of individuals and entities that could be targeted by the Departments of the Treasury and State for sanctions.⁸³ The White House characterized the sanctions as “proportional and responsive steps” in that they imposed costs on specific individuals and entities that had influenced the Russian government to annex Crimea.⁸⁴

Two days later, on March 18—and without the consent of the Ukrainian government in Kyiv—Russia and the “Republic of Crimea” signed an accession agreement. According to a Kremlin press release, the agreement was “based on the free and voluntary expression of will by the peoples of Crimea at a nationwide referendum, held in the Autonomous Republic of Crimea and the city of Sevastopol on March 16, 2014, during which the people of Crimea made the decision to reunite with Russia.”⁸⁵ That same day, Putin argued again that the Ukrainian regime change had been illegitimate and that the Russian intervention had occurred with consent and therefore aligned with international law:

It is . . . obvious that there is no legitimate executive authority in Ukraine now, nobody to talk to. . . .

Those who opposed the coup were immediately threatened with repression. Naturally, the first in line here was Crimea, the Russian-speaking Crimea. In view of this, the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives, in preventing the events that were unfolding and are still underway in Kiev, Donetsk, Kharkov and other Ukrainian cities.

Naturally, we could not leave this plea unheeded; we could not abandon Crimea and its residents in distress. This would have been betrayal on our part.

First, we had to help create conditions so that the residents of Crimea for the first time in history were able to peacefully express their free will regarding their own future. However, what do we hear from our colleagues in Western Europe and North America? They

Senior Administration Officials on Ukraine (Mar. 17, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/17/background-briefing-senior-administration-officials-ukraine> [hereinafter March 17 Background Briefing] (describing “massive anomalies in the vote”).

⁸³ White House Press Release, Executive Order—Blocking Property of Additional Persons Contributing to the Situation in Ukraine (Mar. 17, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/17/executive-order-blocking-property-additional-persons-contributing-situat> [hereinafter March 17 White House Press Release on Executive Order] (imposing sanctions on certain named individuals, as well as any persons determined by the secretaries of the Treasury and State to be either Russian government officials or persons operating in the Russian arms trade—or determined to be persons “materially assist[ing]” or working on behalf of such persons). As of September 12, 2014, approximately two hundred individuals and entities had been sanctioned pursuant to Executive Order 13661. SDN List, *supra* note 65. This executive order cited as justification “the recent deployment of Russian Federation military forces in the Crimea region of Ukraine,” which “undermine[s] democratic processes and institutions in Ukraine; threaten[s] its peace, security, stability, sovereignty, and territorial integrity; and contribute[s] to the misappropriation of its assets, and thereby constitute[s] an unusual and extraordinary threat to the national security and foreign policy of the United States.” March 17 White House Press Release on Executive Order, *supra*.

⁸⁴ March 17 Background Briefing, *supra* note 82; White House Press Release, Fact Sheet: Ukraine-Related Sanctions (Mar. 17, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/17/fact-sheet-ukraine-related-sanctions>.

⁸⁵ President of Russia Press Release, Agreement on the Accession of the Republic of Crimea to the Russian Federation Signed (Mar. 18, 2014), at <http://eng.kremlin.ru/news/6890>. Signatories for Crimea were Chairman of the State Council of the Republic of Crimea Vladimir Konstantinov, Prime Minister of the Republic of Crimea Sergei Aksyonov, and Chairman of the Coordinating Council for the Establishment of the Sevastopol Municipal Administration Alexei Chaly. *Id.*

say we are violating norms of international law. Firstly, it's a good thing that they at least remember that there exists such a thing as international law—better late than never.⁸⁶

Furthermore, Putin added, the number of Russian forces in Crimea did not exceed the limit permitted under the 1997 basing agreements:

Secondly, and most importantly—what exactly are we violating? True, the President of the Russian Federation received permission from the Upper House of Parliament to use the Armed Forces in Ukraine. However, strictly speaking, nobody has acted on this permission yet. Russia's Armed Forces never entered Crimea; they were there already in line with an international agreement. True, we did enhance our forces there; however—this is something I would like everyone to hear and know—we did not exceed the personnel limit of our Armed Forces in Crimea, which is set at 25,000, because there was no need to do so.⁸⁷

Putin then compared the Crimean conflict to past political upheavals in Eastern Europe and framed the referendum as an exercise of self-determination:

Next. As it declared independence and decided to hold a referendum, the Supreme Council of Crimea referred to the United Nations Charter, which speaks of the right of nations to self-determination. Incidentally, I would like to remind you that when Ukraine seceded from the USSR it did exactly the same thing, almost word for word. Ukraine used this right, yet the residents of Crimea are denied it. Why is that?

Moreover, the Crimean authorities referred to the well-known Kosovo precedent—a precedent our western colleagues created with their own hands in a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country's central authorities. Pursuant to Article 2, Chapter 1 of the United Nations Charter, the UN International Court agreed with this approach and made the following comment in its ruling of July 22, 2010, and I quote: “No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence,” and “General international law contains no prohibition on declarations of independence.” Crystal clear, as they say.

. . . Here is a quote from another official document: the Written Statement of the United States [of] America of April 17, 2009, submitted to the same UN International Court in connection with the hearings on Kosovo. Again, I quote: “Declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law.” End of quote. They wrote this, disseminated it all over the world, had everyone agree and now they are outraged. Over what? The actions of Crimean people completely fit in with these instructions, as it were. For some reason, things that Kosovo Albanians (and we have full respect for them) were permitted to do, Russians, Ukrainians and Crimean Tatars in Crimea are not allowed. Again, one wonders why.

We keep hearing from the United States and Western Europe that Kosovo is some special case. What makes it so special in the eyes of our colleagues? It turns out that it is the fact that the conflict in Kosovo resulted in so many human casualties. Is this a legal argument? The ruling of the International Court says nothing about this. This is not even double standards; this is amazing, primitive, blunt cynicism. One should not try so crudely to

⁸⁶ March 18 President of Russia Press Release, *supra* note 80.

⁸⁷ *Id.*

make everything suit their interests, calling the same thing white today and black tomorrow. According to this logic, we have to make sure every conflict leads to human losses.

I will state clearly—if the Crimean local self-defence units had not taken the situation under control, there could have been casualties as well. Fortunately this did not happen. There was not a single armed confrontation in Crimea and no casualties. Why do you think this was so? The answer is simple: because it is very difficult, practically impossible to fight against the will of the people. Here I would like to thank the Ukrainian military—and this is 22,000 fully armed servicemen. I would like to thank those Ukrainian service members who refrained from bloodshed and did not smear their uniforms in blood.

. . . They keep talking of some Russian intervention in Crimea, some sort of aggression. This is strange to hear. I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties.

. . . Our western partners, led by the United States of America, prefer not to be guided by international law in their practical policies, but by the rule of the gun. They have come to believe in their exclusivity and exceptionalism, that they can decide the destinies of the world, that only they can ever be right. They act as they please: here and there, they use force against sovereign states, building coalitions based on the principle “If you are not with us, you are against us.” To make this aggression look legitimate, they force the necessary resolutions from international organisations, and if for some reason this does not work, they simply ignore the UN Security Council and the UN overall.

This happened in Yugoslavia; we remember 1999 very well. It was hard to believe, even seeing it with my own eyes, that at the end of the 20th century, one of Europe’s capitals, Belgrade, was under missile attack for several weeks, and then came the real intervention. Was there a UN Security Council resolution on this matter, allowing for these actions? Nothing of the sort. And then, they hit Afghanistan, Iraq, and frankly violated the UN Security Council resolution on Libya, when instead of imposing the so-called no-fly zone over it they started bombing it too.⁸⁸

On March 20, the White House denounced the referendum as “illegal” and “bogus” and Russia’s attempted annexation of Crimea as “illegitimate.”⁸⁹ On a news program the same day, Kerry said:

[T]he key here is that this could have been worked out effectively through the legal process. There were many other alternatives other than forcing this masquerade of a referendum. No matter what the vote was, you don’t do this in the way that [Putin] did against the constitution of the country and against the international law.⁹⁰

The same day, Obama issued a third executive order relating to Ukraine. This executive order authorized blocking the entry and assets of additional Russian individuals, principally including business leaders in key sectors of the Russian economy, such as financial services, energy, metals and mining, engineering, and defense.⁹¹

⁸⁸ *Id.*

⁸⁹ March 20 Background Briefing on Ukraine, *supra* note 2.

⁹⁰ U.S. Dep’t of State Press Release, Interview [of John Kerry] with Nikole Killion of Hearst Television (Mar. 18, 2014), at <http://www.state.gov/secretary/remarks/2014/03/223667.htm>.

⁹¹ White House Press Release, Executive Order—Blocking Property of Additional Persons Contributing to the Situation in Ukraine (Mar. 20, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/20/executive-order-blocking-property-additional-persons-contributing-situat>; see also Letter—Blocking Property, *supra* note

In a March 20 speech at the White House, Obama stated that these latest sanctions did not reflect his administration's "preferred outcome" and reiterated that de-escalation via diplomacy remained a viable option.⁹² A senior U.S. administration official stated that the sanctions would create "great difficulty" for targets hoping to transact business outside of Russia.⁹³ The official also noted that the list of sanctioned individuals aligned with a similar list published by the European Union.⁹⁴ Kerry later said that "the President led an effort to try to keep Europe unified with the United States, to put difficult sanctions on the table. Europe wasn't thrilled with that, but they came along."⁹⁵

On March 21, the upper house of Russia's parliament ratified the March 18 accession treaty.⁹⁶ Alongside a domestic law titled "On Acceptance of the Republic of Crimea into the Russian Federation and the Creation of New Constituent Entities of the Russian Federation—the Republic of Crimea and the Federal City of Sevastopol," the treaty purported to provide a legal basis for Russia's annexation of Crimea.⁹⁷ To celebrate the "establishment" of these "new constituent entities," Putin ordered thirty-round gun salutes in Moscow, Simferopol, and Sevastopol on March 21.⁹⁸

On March 24, the United States and the other G-7 countries issued a joint statement that read, in part:

2. International law prohibits the acquisition of part or all of another state's territory through coercion or force. To do so violates the principles upon which the international system is built. We condemn the illegal referendum held in Crimea in violation of Ukraine's constitution. We also strongly condemn Russia's illegal attempt to annex

65. Over the next six months, the U.S. Department of the Treasury named specific individuals and entities pursuant to Executive Order 13662, ultimately sanctioning approximately eighty entities under that executive order as of September 12. U.S. Dep't of the Treasury, Office of Foreign Assets Control, Sectoral Sanctions Identifications List (Sept. 12, 2014), at <http://www.treasury.gov/ofac/downloads/ssi/ssi.pdf>.

⁹² White House Press Release, Statement by the President on Ukraine (Mar. 20, 2014), at <http://www.whitehouse.gov/photos-and-video/video/2014/03/20/president-obama-speaks-ukraine#transcript>; see also March 20 Background Briefing on Ukraine, *supra* note 2 ("[W]e escalated [the] designations because of Russian actions through the week in terms of pursuing annexation. But we also are laying down a marker with this [executive order] to anticipate any potential Russian escalation.").

⁹³ March 20 Background Briefing on Ukraine, *supra* note 2.

⁹⁴ *Id.*

⁹⁵ U.S. Dep't of State Press Release, John Kerry, Secretary of State, Interview with Gwen Ifill of PBS NewsHour (May 29, 2014), at <http://www.state.gov/secretary/remarks/2014/05/226890.htm> [hereinafter May 29 U.S. Dep't of State Press Release].

⁹⁶ Griff Witte & Will Englund, *Russia Celebrates Crimea Annexation While Ukraine Looks to West for Support*, WASH. POST, Mar. 21, 2014, at http://www.washingtonpost.com/world/national-security/putin-signs-bill-completing-annexation-of-crimea-as-sanctions-take-hold/2014/03/21/ef038a44-b0f3-11e3-a49e-76adc9210f19_story.html; Will Englund, *Kremlin Says Crimea Is Now Officially Part of Russia After Treaty Signing, Putin Speech*, WASH. POST, Mar. 18, 2014, at http://www.washingtonpost.com/world/russias-putin-prepares-to-annex-crimea/2014/03/18/933183b2-654e-45ce-920e-4d18c0ffec73_story.html.

⁹⁷ Ministry of Foreign Affairs of the Russian Federation Press Release, Speech by the Russian Foreign Minister, Sergey Lavrov, and His Answers to Questions from Deputies During the 349th Extraordinary Session of the Federation Council of the Federal Assembly of the Russian Federation (Mar. 21, 2014), at http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/1eb0f5937a80b6b444257ca500519090!OpenDocument ("These documents are envisaged as legally formalising the reunification of Crimea and the Russian Federation and creating two new constituent entities of the Federation in full compliance with international and Russian law.").

⁹⁸ President of Russia Press Release, Executive Order on Holding a Celebratory Gun Salute in Moscow, Simferopol and Sevastopol (Mar. 21, 2014), at <http://eng.kremlin.ru/acts/6913>.

Crimea in contravention of international law and specific international obligations. We do not recognize either.

3. Today, we reaffirm that Russia's actions will have significant consequences. This clear violation of international law is a serious challenge to the rule of law around the world and should be a concern for all nations. In response to Russia's violation of Ukraine's sovereignty and territorial integrity, and to demonstrate our determination to respond to these illegal actions, individually and collectively we have imposed a variety of sanctions against Russia and those individuals and entities responsible. We remain ready to intensify actions including coordinated sectoral sanctions that will have an increasingly significant impact on the Russian economy, if Russia continues to escalate this situation.

....

6. This Group came together because of shared beliefs and shared responsibilities. Russia's actions in recent weeks are not consistent with them. Under these circumstances, we will not participate in the planned Sochi Summit. We will suspend our participation in the G-8 until Russia changes course and the environment comes back to where the G-8 is able to have a meaningful discussion and will meet again in G-7 format at the same time as planned, in June 2014, in Brussels, to discuss the broad agenda we have together. We have also advised our Foreign Ministers not to attend the April meeting in Moscow. In addition, we have decided that G-7 Energy Ministers will meet to discuss ways to strengthen our collective energy security.⁹⁹

On March 26, Obama stated, "America and the world, and Europe, has an interest in a strong and responsible Russia, not a weak one. . . . But that does not mean that Russia can run roughshod over its neighbors. . . . No amount of propoganda can make right something that the world knows is wrong."¹⁰⁰

The next day, the UN General Assembly adopted a resolution captioned "Territorial Integrity of Ukraine," which "call[ed] on States, international organizations and specialized agencies not to recognize any change in the status of Crimea or the Black Sea port city of Sevastopol, and to refrain from actions or dealings that might be interpreted as such." The resolution also called on member states to "'desist and refrain' from actions aimed at disrupting Ukraine's national unity and territorial integrity, including by modifying its borders through the threat or use of force."¹⁰¹

Russia withdrew unilaterally from the Black Sea fleet agreements on April 2.¹⁰² To date, however, the United States continues to refuse to recognize the annexation. "Neither the United States nor the Europeans nor most of the civilized world has recognized what Russia did in Crimea," Assistant Secretary of State Victoria Nuland said in an interview in late May.

⁹⁹ White House Press Release, *The Hague Declaration* (Mar. 24, 2014), at <http://www.whitehouse.gov/the-press-office/2014/03/24/hague-declaration>.

¹⁰⁰ *Full Transcript: President Obama Gives Speech Addressing Europe, Russia on March 26*, WASH. POST, Mar. 26, 2014, at http://www.washingtonpost.com/world/transcript-president-obama-gives-speech-addressing-europe-russia-on-march-26/2014/03/26/07ae80ae-b503-11e3-b899-20667de76985_story.html.

¹⁰¹ UN Press Release GA/11493, *General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region: 100 Votes in Favour, 11 Against, 58 Abstentions for Text on Ukraine* (Mar. 27, 2014), at <http://www.un.org/News/Press/docs/2014/ga11493.doc.htm>; see also *Backing Ukraine's Territorial Integrity, UN Assembly Declares Crimea Referendum Invalid*, UN NEWS CENTRE, Mar. 27, 2014, at <http://www.un.org/apps/news/story.asp?NewsID=47443#.VBTIUWSwLuU>.

¹⁰² President of Russia Press Release, *Termination of Agreements on the Presence of Russia's Black Sea Fleet in Ukraine* (Apr. 2, 2014), at <http://eng.kremlin.ru/news/6955>.

“We still respect the full sovereignty and territorial integrity of Ukraine.”¹⁰³ Similarly, Obama characterized Russia’s annexation of Crimea as an “attempted” one.¹⁰⁴

The Joint Geneva Statement and Its Aftermath. After Russia’s purported annexation of Crimea, the United States’ attention and concern shifted to what the administration described as Russian efforts to destabilize eastern Ukraine.¹⁰⁵ Kerry met in Geneva on April 16 with Ukrainian Foreign Minister Andriy Deshchychsya, Russian Foreign Minister Sergey Lavrov, and EU High Representative Catherine Ashton in an effort “to get real dialogue going between Russia and Ukraine.”¹⁰⁶ At the close of the talks, the parties issued a joint statement¹⁰⁷ that read in full:

The Geneva meeting on the situation in Ukraine agreed on initial concrete steps to de-escalate tensions and restore security for all citizens.

All sides must refrain from any violence, intimidation or provocative actions. The participants strongly condemned and rejected all expressions of extremism, racism and religious intolerance, including anti-semitism.

All illegal armed groups must be disarmed; all illegally seized buildings must be returned to legitimate owners; all illegally occupied streets, squares and other public places in Ukrainian cities and towns must be vacated.

Amnesty will be granted to protestors and to those who have left buildings and other public places and surrendered weapons, with the exception of those found guilty of capital crimes.¹⁰⁸

One week after the conclusion of the Geneva talks, Kerry charged Russia with undermining the expectations reflected in the joint Geneva statement:

The simple reality is you can’t resolve a crisis when only one side is willing to do what is necessary to avoid a confrontation. Every day since we left Geneva—every day, even up to today, when Russia sent armored battalions right up the Luhansk Oblast border—the world has witnessed a tale of two countries, two countries with vastly different understandings of what it means to uphold an international agreement.

¹⁰³ U.S. Dep’t of State Press Release, Interview of Victoria Nuland for the Charlie Rose Show with David Remnick (May 27, 2014), at <http://www.state.gov/p/eur/rls/rm/2014/may/226628.htm>. Nuland stated that Putin “decide[d] in about three weeks’ notice that [Crimea] was Russia’s and he was going to take it.” *Id.* But she also rebuffed a statement by her interviewer that Putin had actually annexed Crimea: “Let me take issue with one thing you said there, which is with regard to Crimea. Neither the United States nor the Europeans nor most of the civilized world has recognized what Russia did in Crimea. We still respect the full sovereignty and territorial integrity of Ukraine. And as part of the sanctions that we have imposed on Russia we’ve imposed harsh sanctions on those running Crimea now and on the economic relationship with Crimea and that will continue.” *Id.*

¹⁰⁴ White House Press Release, Fact Sheet: European Reassurance Initiative & Other U.S. Efforts in Support of NATO Allies & Partners (June 3, 2014), at <http://www.whitehouse.gov/the-press-office/2014/06/03/fact-sheet-european-reassurance-initiative-and-other-us-efforts-support->

¹⁰⁵ U.S. Dep’t of State Press Release, Evidence of Russian Support for Destabilization of Ukraine (Apr. 13, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/04/224762.htm>.

¹⁰⁶ U.S. Dep’t of State Press Release, Background Briefing on Secretary’s Travel to Geneva (Apr. 16, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/04/224918.htm>.

¹⁰⁷ Karen DeYoung & Anne Gearan, *Diplomats Reach Deal on Defusing Ukraine Crisis*, WASH. POST, Apr. 17, 2014, at http://www.washingtonpost.com/world/europe/ukraine-prepared-to-offer-autonomy-to-eastern-regions-if-russia-pulls-back-troops/2014/04/17/53c64bc0-c5f7-11e3-bf7a-be01a9b69cf1_story.html.

¹⁰⁸ U.S. Dep’t of State Media Note, Geneva Statement on Ukraine (Apr. 17, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/04/224957.htm>; see also DeYoung & Gearan, *supra* note 107.

One week later, it is clear that only one side, one country, is keeping its word. . . .

....

From day one, the Government of Ukraine started making good on its commitments—from day one. From day one, Prime Minister Yatsenyuk has kept his word. He immediately agreed to help vacate buildings. He suspended Ukraine’s counterterrorism initiative over Easter, choosing de-escalation, despite Ukraine’s legitimate, fundamental right to defend its own territory and its own people. From day one, the Ukrainian Government sent senior officials to work with the OSCE, in keeping with the agreement, to send them to work in regions where Russia had voiced its most urgent concerns about the security of Russian speakers and ethnic Russians. And on day one, Prime Minister Yatsenyuk went on live television and committed his government publicly to all of the people of Ukraine that—and these are his words—committed them to undertake comprehensive constitutional reform that will strengthen the powers of the regions. He directly addressed the concerns expressed by the Russians, and he did so on day one.

. . . And in keeping with his Geneva commitments, Prime Minister Yatsenyuk has publicly announced amnesty legislation—once more, in his words—for all those who surrender arms, come out of the premises and will begin with the Ukrainian people to build a sovereign and independent Ukraine. . . .

....

The world has rightly judged that Prime Minister Yatsenyuk and the Government of Ukraine are working in good faith. And the world, sadly, has rightly judged that Russia has put its faith in distraction, deception, and destabilization. For seven days, Russia has refused to take a single concrete step in the right direction. Not a single Russian official, not one, has publicly gone on television in Ukraine and called on the separatists to support the Geneva agreement, to support the stand-down, to give up their weapons, and get out of the Ukrainian buildings. They have not called on them to engage in that activity.

. . . Instead, in plain sight, Russia continues to fund, coordinate, and fuel a heavily armed separatist movement in Donetsk.

....

We have seen this movie before. We saw it most recently in Crimea, where similar subterfuge and sabotage by Russia was followed by a full invasion—an invasion, by the way, for which President Putin recently decorated Russian special forces at the Kremlin.

Nobody should doubt Russia’s hand in this. As NATO’s Supreme Allied Commander in Europe wrote this week, “What is happening in eastern Ukraine is a military operation that is well planned and organized and we assess that it is being carried out at the direction of Russia.” Our intelligence community tells me that Russia’s intelligence and military intelligence services and special operators are playing an active role in destabilizing eastern Ukraine with personnel, weapons, money, operational planning, and coordination. The Ukrainians have intercepted and publicized command-and-control conversations from known Russian agents with their separatist clients in Ukraine. Some of the individual special operations personnel, who were active on Russia’s behalf in Chechnya, Georgia, and Crimea have been photographed in Slovyansk, Donetsk, and Luhansk. Some are even bragging about it by themselves on their Russian social media sites. And we’ve seen weapons and gear on the separatists that matches those worn and used by Russian special forces.

So following today’s threatening movement of Russian troops right up to Ukraine’s border, let me be clear: If Russia continues in this direction, it will not just be a grave mistake,

it will be an expensive mistake. Already the international response to the choices made by Russia's leaders is taking its toll on Russia's economy. Prime Minister Medvedev has alluded to the cost Russia is already paying. Even President Putin has acknowledged it.

As investors' confidence dwindles, some \$70 billion in capital has fled the Russian financial system in the first quarter of 2014, more than all of last year. Growth estimates for 2014 have been revised downward by two to three percentage points. And this follows a year in which GDP growth was already the lowest since 2009. Meanwhile, the Russian Central Bank has had to spend more than \$20 billion to defend the ruble, eroding Russia's buffers against external shocks. Make no mistake that what I've just described is really just a snapshot and is also, regrettably, a preview of how the free world will respond if Russia continues to escalate what they had promised to de-escalate.¹⁰⁹

The G-7 leaders issued a joint statement the following day expressing "[their] deep concern at the continued efforts by separatists backed by Russia to destabilize eastern Ukraine and [the G-7 leaders'] commitment to taking further steps to ensure a peaceful and stable environment for the May 25 presidential election."¹¹⁰ Their statement continued:

We welcomed the positive steps taken by Ukraine to meet its commitments under the Geneva accord of April 17 by Ukraine, Russia, the European Union, and the United States. These actions include working towards constitutional reform and decentralization, proposing an amnesty law for those who will peacefully leave the buildings they have seized in eastern Ukraine, and supporting the work of the Organization for Security and Cooperation in Europe (OSCE). We also note that the Government of Ukraine has acted with restraint in dealing with the armed bands illegally occupying government buildings and forming illegal checkpoints.

In contrast, Russia has taken no concrete actions in support of the Geneva accord. It has not publicly supported the accord, nor condemned the acts of pro-separatists seeking to destabilize Ukraine, nor called on armed militants to leave peacefully the government buildings they've occupied and put down their arms. Instead, it has continued to escalate tensions by increasingly concerning rhetoric and ongoing threatening military maneuvers on Ukraine's border.

We reiterate our strong condemnation of Russia's illegal attempt to annex Crimea and Sevastopol, which we do not recognize. We will now follow through on the full legal and practical consequences of this illegal annexation, including but not limited to the economic, trade and financial areas.

We have now agreed that we will move swiftly to impose additional sanctions on Russia. Given the urgency of securing the opportunity for a successful and peaceful democratic vote next month in Ukraine's presidential elections, we have committed to act urgently to intensify targeted sanctions and measures to increase the costs of Russia's actions.¹¹¹

On April 28, in response to Russia's "continued destabilizing, provocative, and dangerous actions in the Ukraine," the U.S. Department of the Treasury followed up on the G-7 statement by imposing additional "targeted sanctions" on "seven Russia government officials and

¹⁰⁹ U.S. Dep't of State Press Release, John Kerry, Secretary of State, Remarks on Ukraine (Apr. 24, 2014), at <http://www.state.gov/secretary/remarks/2014/04/225166.htm>.

¹¹⁰ White House Press Release, G-7 Leaders Statement on Ukraine (Apr. 25, 2014), at <http://www.whitehouse.gov/the-press-office/2014/04/25/g-7-leaders-statement-ukraine>.

¹¹¹ *Id.*

17 entities.”¹¹² “[W]e’ve already seen that these sanctions and the isolation of Russia has had an impact, a substantial impact on the Russian economy,” a senior U.S. administration official said.¹¹³ “We believe that with these additional steps, the impact on the Russian economy will only grow, just as Russia’s political isolation is growing because of its actions in violation of Ukraine’s sovereignty and territorial integrity.”¹¹⁴

On May 7, Obama notified Congress of his intent to withdraw Russia’s eligibility for trade benefits under the Generalized System of Preferences program.¹¹⁵ The next day, Nuland testified before the House Foreign Affairs Committee on Russia’s destabilization of Ukraine. She stated that although the Ukrainian government had begun immediately to implement its Geneva obligations, Russia had, in contrast, “fulfilled none of its commitments.”¹¹⁶ She described Russia’s actions:

Instead, since April 17th, all the efforts of the Ukrainian side and of the OSCE have been met with more violence, mayhem, kidnappings, torture and death. Pro-Russia separatists have seized at least 35 buildings and 3 TV/radio centers in 24 towns. Armed and organized Russian agents—sometimes described as “little green men”—appeared in cities and towns across Donetsk and into Luhansk. At least 22 kidnappings have been attributed to pro-Russia separatists—including the 8 Vienna Document inspectors and their Ukrainian escorts who were released after 8 days as hostages. The bodies of three Ukrainians were found near Slovyansk all bearing the signs of torture. Peaceful rallies have been beset by armed separatist thugs. Roma families have fled Slovyansk under extreme duress. . . . Last Friday, the Ukrainian government announced that separatists used [man-portable air-defense systems] to shoot down a Ukrainian helicopter, killing the pilots. And Friday also saw the deadliest tragedy of this conflict: the death of more than 40 in Odessa following violent clashes reportedly instigated by pro-Russian separatists attacking an initially peaceful rally in favor of national unity.

. . . As Secretary Kerry has stated, we continue to have high confidence that Russia’s hand is behind this instability. They are providing material support. They are providing

¹¹² White House Press Release, Background Conference Call on Ukraine Sanctions (Apr. 28, 2014), at <http://www.whitehouse.gov/the-press-office/2014/04/28/background-conference-call-ukraine-sanctions>. These sanctions targeted “Russian government officials as well as those who provide critical support to—or derive critical support from senior Russian government officials, or so-called oligarchs or cronies.” *Id.* Targets included “two key members of the Russian leadership’s inner circle”: Igor Sechin, president and chairman of Rosneft, Russia’s leading petroleum operation; and Sergey Chemezov, director general of Rostec, a Russian industrial conglomerate. *Id.* A senior administration official added: “In addition, each of the 17 entities sanctioned today are affiliated with the oligarchs we designated a few weeks ago, on March 20th, including the Rotenberg brothers and Gennady Timchenko. Among these entities are Timchenko’s holding company, the Volga Group, and three banks—Invest CapitalBank, SMP Bank, and JSB Sobinbank.” *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ White House Press Release, Message to the Congress—With Respect to Russia’s Status Under the Generalized System of Preferences (May 7, 2014), at <http://www.whitehouse.gov/the-press-office/2014/05/07/message-congress-respect-russia-s-status-under-generalized-system-prefer> (providing notice of his intent to use a presidential proclamation to withdraw such eligibility pursuant to section 502(f)(2) of the Trade Act of 1974 (19 U.S.C. 2462(f)(2))). Obama’s reasoning was facially unrelated to the Ukraine crisis: “I have determined that it is appropriate to withdraw Russia’s designation as a beneficiary developing country under the GSP program because Russia is sufficiently advanced in economic development and improved in trade competitiveness that continued preferential treatment under the GSP is not warranted.” *Id.*

¹¹⁶ U.S. Dep’t of State Press Release, Victoria Nuland, Assistant Secretary, Bureau of European and Eurasian Affairs, Statement Before the U.S. House Foreign Affairs Committee: Russia’s Destabilization of Ukraine (May 8, 2014), at <http://www.state.gov/p/eur/rls/rm/2014/may/225773.htm> [hereinafter May 8 U.S. Dep’t of State Press Release].

funding. They are providing weapons. They are providing coordination, and there are Russians agents on the ground in Ukraine involved in this.¹¹⁷

Nuland continued, addressing concerns raised by other Eastern European NATO members about Russia's intentions: "[W]e have worked with our NATO Allies to provide visible reassurance—on land, sea and in the air—that [the collective defense provision in] Article 5 of the NATO Treaty means what it says."¹¹⁸ Nuland noted that the United States had deployed twelve fighter jets and two hundred personnel to Poland, a "steady U.S. naval presence in the Black Sea," and a total of seven hundred, fifty troops deployed to Estonia, Latvia, Lithuania, Poland and Romania.¹¹⁹

On May 19, in response to a statement by Putin that Russian troops involved in "routine" training exercises along the Ukrainian border had been withdrawn, a senior U.S. Department of State official responded: "[T]he fact is that Russia has been maintaining significant forces in forward deployment areas along Ukraine's border. They have not been conducting routine training activities. They've been up on the border in a menacing posture."¹²⁰

Ukrainian Elections and the G-7 Summit: Gestures Toward Peace amid Continued Tensions. Ukrainian elections and the G-7 Leaders' Summit occurred in quick succession in May and June, followed by Ukraine's signing of a trade agreement with the European Union. Meanwhile, tensions continued between Russia and Ukraine—and between Russia and the West—throughout the summer.

On May 25, after much preparation and international support, Ukraine held its presidential election along with mayoral elections in thirty-eight cities.¹²¹ Kerry issued a statement characterizing the elections' conduct as "successful."¹²² He quoted the OSCE's finding that—excepting occupied Crimea and two areas of eastern Ukraine—"the election demonstrated 'the clear resolve of the authorities to hold what was a genuine election largely in line with international commitments and with a respect for fundamental freedoms.'"¹²³ He later described the elections as having had "a very large, significant turnout, with a huge vote that won on the first round with a supermajority for a newly elected president [Petro Poroshenko]."¹²⁴

¹¹⁷ *Id.*

¹¹⁸ *Id.*; see North Atlantic Treaty, Art. 5, Apr. 4, 1949, TIAS No. 1964, 34 UNTS 243 ("The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.").

¹¹⁹ May 8 U.S. Dep't of State Press Release, *supra* note 116. Nuland then noted on May 14 that all twenty-eight NATO countries had joined the effort to support Ukraine. U.S. Dep't of State Press Release, Victoria Nuland, Assistant Secretary, Bureau of European & Eurasian Affairs, Remarks at GLOBSEC 2014 (May 14, 2014), at <http://www.state.gov/p/eur/rls/rm/2014/may/226220.htm>.

¹²⁰ White House Press Release, Background Press Briefing by Senior Administration Officials on the Vice President and Dr. Jill Biden's Trip to Romania and Cyprus (May 19, 2014), at <http://www.whitehouse.gov/the-press-office/2014/05/19/background-press-briefing-senior-administration-officials-vice-president>.

¹²¹ U.S. Dep't of State Press Release, U.S. Department of State to Host Google+ Hangout May 23 on Ukrainian Elections (May 22, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/05/226456.htm>.

¹²² U.S. Dep't of State Press Release, John Kerry, Secretary of State, 2014 Presidential Elections in Ukraine (May 26, 2014), at <http://www.state.gov/secretary/remarks/2014/05/226543.htm>.

¹²³ *Id.*

¹²⁴ May 29 U.S. Dep't of State Press Release, *supra* note 95.

Having canceled the G-8 Summit in Sochi “due to Russia’s illegal annexation and occupation of Crimea,” the G-7 leaders met on June 4 and 5 in Brussels.¹²⁵ The G-7 issued a joint declaration on June 5, stating in part:

27. We are united in condemning the Russian Federation’s continuing violation of the sovereignty and territorial integrity of Ukraine. Russia’s illegal annexation of Crimea, and actions to de-stabilise eastern Ukraine are unacceptable and must stop. These actions violate fundamental principles of international law and should be a concern for all nations. . . . We call on the Russian Federation to meet the commitments it made in the Geneva Joint Statement and cooperate with the government of Ukraine as it implements its plans for promoting peace, unity and reform.

28. We confirm the decision by G-7 countries to impose sanctions on individuals and entities who have actively supported or implemented the violation of Ukraine’s sovereignty and territorial integrity and who are threatening the peace, security and stability of Ukraine. We are implementing a strict policy of non-recognition with respect to Crimea/Sevastopol, in line with UN General Assembly Resolution 68/262. We stand ready to intensify targeted sanctions and to implement significant additional restrictive measures to impose further costs on Russia should events so require.¹²⁶

On June 27, Ukraine—alongside Georgia and Moldova—finally signed the Association Agreement and established Deep and Comprehensive Free Trade Areas with the European Union.¹²⁷ Meanwhile, the violence in eastern Ukraine raged on. Vice President Joe Biden spoke with Ukrainian President Petro Poroshenko again on July 3 to discuss diplomatic efforts to pursue a “sustainable ceasefire that would be respected by the separatists and fully supported by Russia.”¹²⁸ Biden underscored that the United States “remained focused on Russia’s actions, not its words.”¹²⁹ He noted again that the United States was “prepared to impose further costs on Russia if it fails to withdraw its ongoing support for the separatists, including the provision of heavy weapons and materiel across the border.”¹³⁰ Meanwhile, the United States again made clear that it did not recognize Russia’s annexation of Crimea, and the violence continued.¹³¹

¹²⁵ White House Press Release, Statement by the Press Secretary on the President’s Travel to Europe in June 2014 (Apr. 30, 2014), at <http://www.whitehouse.gov/the-press-office/2014/04/30/statement-press-secretary-president-s-travel-europe-june-2014>.

¹²⁶ White House Press Release, The Brussels G-7 Summit Declaration, Brussels, Belgium (June 5, 2014), at <http://www.whitehouse.gov/the-press-office/2014/06/05/brussels-g-7-summit-declaration>.

¹²⁷ U.S. Dep’t of State Press Statement, John Kerry, Secretary of State, Congratulating Georgia, Moldova, and Ukraine on the Signing of Agreements with the European Union (June 27, 2014), at <http://www.state.gov/secretary/remarks/2014/06/228518.htm>; see also *supra* text accompanying notes 5–6.

¹²⁸ White House Press Release, Readout of the Vice President’s Call with Ukrainian President Petro Poroshenko (July 3, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/03/readout-vice-presidents-call-ukrainian-president-petro-poroshenko>.

¹²⁹ *Id.*

¹³⁰ *Id.* Obama spoke with French President François Hollande on July 7, agreeing that their preference remained “a bilateral ceasefire, fully supported by Russia, and with a peaceful resolution to the conflict, including the release of all hostages.” White House Press Release, Readout of the President’s Call with President Hollande of France (July 7, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/07/readout-president-s-call-president-hollande-france>.

¹³¹ U.S. DEP’T OF STATE, DEPARTMENT OF STATE: 2014 INVESTMENT CLIMATE STATEMENT 1 (June 2014), available at <http://www.state.gov/documents/organization/228199.pdf>.

On July 11, a rebel rocket strike killed nineteen Ukrainian soldiers and wounded almost one hundred more.¹³² Two days later, Russia warned Ukraine of “irreversible consequences” for allegedly killing a Russian civilian with a shell lobbed over the border.¹³³ The United States responded on July 16 by toughening sanctions on major Russian banks and energy companies and much of the Russian defense industry, as well as issuing new sanctions on individuals.¹³⁴ These sanctions were issued pursuant to existing executive orders.¹³⁵

In an address that day, Obama stated:

Along with our allies, with whom I’ve been coordinating closely the last several days and weeks, I’ve repeatedly made it clear that Russia must halt the flow of weapons and fighters across the border into Ukraine; that Russia must urge separatists to release their hostages and support a cease-fire; that Russia needs to pursue internationally-mediated talks and agree to meaningful monitors on the border. . . . [W]e have to see concrete actions and not just words that Russia, in fact, is committed to trying to end this conflict along the Russia-Ukraine border. So far, Russia has failed to take any of the steps that I mentioned. In fact, Russia’s support for the separatists and violations of Ukraine’s sovereignty has continued.¹³⁶

On July 17, at a cabinet meeting broadcast on Russian state television, Russian Prime Minister Dmitry Medvedev called the latest U.S. sanctions “evil” and added: “We may go back to the 1980s in our relations with the states that are declaring these sanctions.”¹³⁷ On July 19, Russian Foreign Ministry spokesman Alexander Lukashevich added: “We have repeatedly stated that talking to us in the language of sanctions is useless. . . . Such steps will not remain without consequences.”¹³⁸

Missile Attack on a Civilian Airliner over Separatist-Controlled Donetsk. On July 17, a surface-to-air missile apparently struck a civilian airliner flying over the separatist-controlled Donetsk region of eastern Ukraine, killing all 298 onboard.¹³⁹ Malaysia Airlines Flight 17 (MH17) had been en route to Kuala Lumpur from Amsterdam.

¹³² Michael Birnbaum, *Ukraine President Vows Revenge After 19 Soldiers Killed in Rebel Rocket Attack*, WASH. POST, July 11, 2014, at http://www.washingtonpost.com/world/ukraine-president-vows-revenge-after-19-soldiers-killed-in-rebel-rocket-attack/2014/07/11/28dde6c2-093e-11e4-a0dd-f2b22a257353_story.html.

¹³³ Karoun Demirjian & Michael Birnbaum, *Russia Warns Ukraine of ‘Irreversible Consequences’ After Cross-border Shelling*, WASH. POST, July 13, 2014, at http://www.washingtonpost.com/world/russia-warns-ukraine-of-irreversible-consequences-after-cross-border-shelling/2014/07/13/d2be1bb0-0a85-11e4-8341-b8072b1e7348_story.html.

¹³⁴ White House Press Release, Conference Call by Senior Administration Officials on Ukraine (July 16, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/16/conference-call-senior-administration-officials-ukraine>.

¹³⁵ *Id.* (citing Executive Orders 13660, 13661, and 13662).

¹³⁶ White House Press Release, Remarks by the President on Foreign Policy (July 16, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/16/remarks-president-foreign-policy>.

¹³⁷ Michael Birnbaum, *Russia Warns of Grave Consequences from New U.S. Sanctions*, WASH. POST, July 17, 2014, at http://www.washingtonpost.com/world/europe/russia-warns-of-grave-consequences-from-new-us-sanctions/2014/07/17/86228f6b-0a88-4fda-ab42-ef775be82999_story.html.

¹³⁸ Karoun Demirjian, *Russia Says It Will Bar Entry to Moran, 12 Others, to Retaliate for U.S. Punitive Actions*, WASH. POST, July 19, 2014, at http://www.washingtonpost.com/world/europe/russia-says-it-will-bar-entry-to-moran-12-others-to-retaliate-for-us-punitive-actions/2014/07/19/b461845e-0f44-11e4-b8e5-d0de80767fc2_story.html.

¹³⁹ Michael Birnbaum & Anthony M. Faiola, *Missile Downs Malaysia Airlines Plane over Ukraine, Killing 298; Kiev Blames Rebels*, WASH. POST, July 18, 2014, at http://www.washingtonpost.com/world/europe/malaysia-airlines-plane-disappears-over-ukraine-feared-shot-down-by-missile/2014/07/17/0fffe1e6-0dcb-11e4-8341-b8072b1e7348_story.html.

After negotiating with senior representatives of Russia, Ukraine, and the OSCE, the separatists who controlled the crash site agreed to “provide safe access and security guarantees to the national investigation commission, including international investigators, in the area under their control.”¹⁴⁰ In the weeks that followed, however, the OSCE’s access proved limited.

U.S. officials soon linked the jetliner attack to Russian-backed separatists in Ukraine.¹⁴¹ A press release issued two days later by the U.S. Embassy in Kyiv stated: “We assess that Flight MH17 was likely downed by a SA-11 surface-to-air missile from separatist-controlled territory in eastern Ukraine.”¹⁴² This type of missile, also known as the Buk-M1, was of Soviet origin.¹⁴³

Putin, on the other hand, blamed Ukraine for the strike: “Certainly the state over whose territory this happened bears responsibility for this terrible tragedy.”¹⁴⁴ The Russian Foreign Ministry issued a statement on July 19 that added: “We are puzzled that before the investigation started, official representatives of several states hurried to state their own versions of the causes of this plane crash without any evidence, thus affecting the course of the investigation.”¹⁴⁵

¹⁴⁰ Organization for Security and Co-operation in Europe (OSCE), Press Statement by the Trilateral Contact Group (July 18, 2014), at <http://www.osce.org/home/121390>.

¹⁴¹ *E.g.*, White House Press Release, Statement by the President on Ukraine (July 18, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/18/statement-president-ukraine> (stating that the plane was shot down by a surface-to-air missile “launched from an area that is controlled by Russian-backed separatists inside of Ukraine”); White House Press Release, Readout of the Vice President’s Call with Ukrainian President Petro Poroshenko (July 18, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/18/readout-vice-presidents-call-ukrainian-president-petro-poroshenko> (characterizing Russia as “the party responsible for arming the separatists”); Michael Birnbaum & Karen DeYoung, *Russia Supplied Missile Launchers to Separatists, U.S. Official Says*, WASH. POST, July 19, 2014, at http://www.washingtonpost.com/world/europe/ukrainian-officials-accuse-rebel-militias-of-moving-bodies-tampering-with-evidence/2014/07/19/bef07204-0f1c-11e4-b8e5-d0de80767fc2_story.html (quoting an unnamed U.S. official as confirming that Russia had supplied sophisticated missile launch systems to separatists in eastern Ukraine and attempted to move several Buk missile launchers back across the border after the jetliner attack); Karen DeYoung, *Russia Says It Backs Transparent International Probe of Jet Crash in Ukraine*, WASH. POST, July 19, 2014, at http://www.washingtonpost.com/world/national-security/russia-says-it-backs-transparent-international-probe-of-jet-crash-in-ukraine/2014/07/19/e73d7c12-0f7a-11e4-b8e5-d0de80767fc2_story.html (quoting a senior administration official as remarking that “[i]t’s another case of the Russians saying one thing and doing another”).

¹⁴² Embassy of the United States, Kyiv, Ukraine, Press Release, United States Assessment of the Downing of Flight MH17 and Its Aftermath (July 19, 2014), at <http://ukraine.usembassy.gov/statements/asmt-07192014.html>. Ukraine, too, assigned responsibility to Russia. “We call it neither an incident, nor a disaster, but a terrorist act,” Ukrainian President Poroshenko said. Petro Poroshenko, President of Ukraine Press Release, The President Calls on All Branches of Power to Unite in the Face of the Threat of External Aggression (July 17, 2014), at <http://www.president.gov.ua/en/news/30784.html>. The chief of Ukraine’s Security Service stated that the Ukrainian government had intercepted phone calls between Russia’s main intelligence directorate and pro-Russian separatists, allegedly discussing the strike; meanwhile, the Ukrainian government posted a YouTube video purportedly showing a Russian-made “Buk,” or SA-11 “Gadfly,” surface-to-air missile system en route on July 18 from eastern Ukraine to the Russian border. Thomas Gibbons-Neff, *New Video Allegedly Shows ‘Buk’ Missile System en Route to Russia*, WASH. POST, July 18, 2014, at <http://www.washingtonpost.com/news/checkpoint/wp/2014/07/18/new-video-allegedly-shows-buk-missile-system-en-route-to-russia>; see also Birnbaum & Faiola, *supra* note 139.

¹⁴³ Bill Sweetman, *Buk Missile System Lethal, but Undiscriminating*, AVIATION WEEK, July 23, 2014, at <http://aviationweek.com/defense/buk-missile-system-lethal-undiscriminating>.

¹⁴⁴ Birnbaum & Faiola, *supra* note 139.

¹⁴⁵ Ministry of Foreign Affairs of the Russian Federation Press Release, Comment by the Russian Ministry of Foreign Affairs Regarding the Investigation into the Malaysian Plane Crash in the Ukrainian Air Space (July 19, 2014), at http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcb3/3ed1137f57c602d644257d1d0059f0f0!OpenDocument.

On July 21, the Security Council unanimously adopted Resolution 2166, which

7. *Demands* that all military activities, including by armed groups, be immediately ceased in the immediate area surrounding the crash site to allow for security and safety of the international investigation;

....

9. *Calls* on all States and actors in the region to cooperate fully in relation to the international investigation of the incident . . . ;

....

11. *Demands* that those responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability;

12. *Urges* all parties to the Convention on International Civil Aviation to observe to the fullest extent applicable, the international rules, standards and practices concerning the safety of civil aviation, in order to prevent the recurrence of such incidents, and *demands* that all States and other actors refrain from acts of violence directed against civilian aircraft¹⁴⁶

The same day, Ambassador Power issued a statement explaining the U.S. perspective on Resolution 2166:

We condemn the actions of the separatists who control the site. Indeed, almost everyone has condemned this grotesque behavior.

But there is one party from which we have heard too little condemnation: and that is Russia.

Russia has been outspoken on other matters. Russian officials have publicly insinuated that Ukraine was behind the crash. On Friday, Russia blamed Ukrainian air traffic controllers for this attack rather than condemning the criminals who shot down the plane. Since then, Russia has begun to blame Ukraine for the attack itself, though the missile came from separatist territory that Russia knows full well Ukraine has not yet reclaimed.

But if Russia genuinely believed that Ukraine was involved in the shoot-down of Flight 17, surely President Putin would have told the separatists—many of whose leaders are from Russia—to guard the evidence at all costs, to maintain a forensically pure, hermetically-sealed crime scene.

We welcome Russia's support for today's resolution. But no resolution would have been necessary had Russia used its leverage with the separatists on Thursday, getting them to lay down their arms and leave the site to international experts. Or on Friday. Or on Saturday. Or even yesterday.

....

Russia's muteness over the dark days between Thursday and today sent a message to the illegal armed groups it supports: We have your backs. This is the message Russia has sent by providing separatists with heavy weapons, by never publicly calling on them to lay down those weapons, and by massing thousands of troops at the Ukrainian border. . . .

¹⁴⁶ SC Res. 2166, paras. 7, 9, 11, 12 (July 21, 2014); see also *Security Council Coalesces Around Resolution 2166 (2014) on Malaysian Jet Crash Demanding Accountability, Full Access to Site, Halt to Military Activities*, UN NEWS CENTRE, July 21, 2014, at <http://www.un.org/News/Press/docs/2014/sc11483.doc.htm>.

We have adopted a resolution today. But we are not naïve: if Russia is not part of the solution, it will continue to be part of the problem. For the past six months, Russia has seized Ukrainian territory and ignored the repeated requests of the international community to de-escalate—all in an effort to preserve influence in Ukraine, a country that has long made clear its desire to maintain constructive ties with Moscow.¹⁴⁷

The next day, the United States released satellite images—taken after the Malaysia Airlines crash—that it described as evidence “that Russian forces have fired across the border at Ukrainian military forces, and that Russia-backed separatists have used heavy artillery, provided by Russia, in attacks on Ukrainian forces from inside Ukraine.”¹⁴⁸ The same day, U.S. Ambassador to Ukraine Geoffrey Pyatt characterized Russia’s actions as “escalating the military confrontation, at a time when President Poroshenko has made very clear his desire to find a political solution.”¹⁴⁹

As of July 28, Alexander Hug, the deputy head of the OSCE monitoring team, lamented the continued fighting between Ukrainian and rebel troops surrounding the crash site. “There’s a job to be done,” he said. “We are sick and tired of being interrupted by gunfights, despite the fact that we have agreed that there should be a cease-fire.”¹⁵⁰ Interruptions continued for days afterward, with inspectors finally gaining access to the site during a one-day ceasefire on July 31.¹⁵¹

Looking Ahead as Tensions Simmer. As July drew to a close, disputes of law and fact persisted. The United States and European Union each heightened sanctions on Russia, with the United States alleging violations of international law, both new and old.

On July 27, the Obama administration released a series of overhead surveillance images. The administration said that the images showed that Russia had, in the preceding few days, fired artillery rounds from its side of the border against the Ukrainian military.¹⁵²

The following day, Obama underscored the gravity of U.S.-Russia tensions by issuing a letter to Putin stating that Russia had violated the Intermediate-Range Nuclear Forces Treaty, a 1987 treaty on intermediate-range missiles that was instrumental in bringing the Cold War to a close.¹⁵³ Russia denied the charge.¹⁵⁴

¹⁴⁷ Embassy of the United States, Kyiv, Ukraine, Press Release, Explanation of Vote by Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, After a Vote on Security Council Resolution 2166 on the Downing of Malaysian Airlines Flight 17 in Ukraine (July 21, 2014), at <http://ukraine.usembassy.gov/statements/power-ukraine-07212014.html>.

¹⁴⁸ U.S. Dep’t of State Press Release, Evidence of Russian Shelling into Ukraine (July 23, 2014), at <http://photos.state.gov/libraries/ukraine/895/pdf/evidence-russian-firing.pdf>.

¹⁴⁹ Embassy of the United States, Kyiv, Ukraine, Press Release, U.S.: Russia’s ‘Actions, Incredibly, Are Heading Towards Escalation of the Crisis’ (July 23, 2014), at <http://ukraine.usembassy.gov/statements/amb-cnn-07232014.html>.

¹⁵⁰ Karen DeYoung & Carol Morello, *Significant New European Sanctions on Russia Expected, U.S. Says*, WASH. POST, July 28, 2014, at http://www.washingtonpost.com/world/europe/ukraine-forces-capture-rebel-territory-close-to-malaysia-airlines-crash-site/2014/07/28/43b90a26-164a-11e4-9e3b-7f2f110c6265_story.html.

¹⁵¹ *New Day Transcripts*, CNN.COM, July 31, 2014, at <http://edition.cnn.com/TRANSCRIPTS/1407/31/nday.01.html>.

¹⁵² Karen DeYoung, *U.S. Releases Images It Says Show Russia Has Fired Artillery over Border into Ukraine*, WASH. POST, July 27, 2014, at http://www.washingtonpost.com/world/national-security/us-releases-images-it-says-show-russia-has-fired-artillery-over-border-into-ukraine/2014/07/27/190158-159d-11e4-9e3b-7f2f110c6265_story.html.

¹⁵³ See also *United States Claims That Russia Has Violated the INF Treaty*, this issue.

¹⁵⁴ *Id.*

On July 29, the European Union imposed new economic sanctions—the most expansive yet—on Russia, including an arms embargo and limits on access to European capital markets for Russian state-owned banks.¹⁵⁵ The United States, meanwhile, expanded the list of U.S.-sanctioned Russian banks and defense companies.¹⁵⁶ Both the United States and the European Union banned exports of technology for use in Russian oil exploration. Obama emphasized Russia's isolation from the international community but declined to characterize the situation as a “new Cold War.”¹⁵⁷

Putin, however, claimed the future looked bright:

No matter what the difficulties we may encounter, and to be honest, I do not really see any big difficulties so far, . . . and I think that they will ultimately work to our advantage because they will give us the needed incentive to develop our production capability in areas where we had not done so yet.¹⁵⁸

On July 31, the White House issued another joint statement with the other G-7 countries condemning Russia for its intervention in Ukraine.¹⁵⁹ Russia responded with allegations that the United State was fueling violence in eastern Ukraine.¹⁶⁰

Tensions continued unabated as this issue went to press.

In Wake of Espionage Revelations, United States Declines to Reach Comprehensive Intelligence Agreement with Germany

On July 2, 2014, a German federal government employee arrested on suspicion of spying for Russia claimed to have been passing German intelligence documents to the United States.¹ Shortly thereafter, German officials raided the apartment of another individual suspected of espionage; news reports suggested that U.S. intelligence agents had recruited another agent, this one linked to Germany's Defense Ministry.² In response, German Chancellor Angela Merkel publicly demanded the expulsion of the CIA's Berlin station chief,³ a decision described by German Foreign Minister Frank-Walter Steinmeier as “a necessary step and an

¹⁵⁵ See Neil MacFarquhar, *As Sanctions Pile Up, Russians' Alarm Grows over Putin's Tactics*, N.Y. TIMES, July 30, 2014, at A1.

¹⁵⁶ White House Press Release, Statement by the President on Ukraine (July 29, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/29/statement-president-ukraine>.

¹⁵⁷ *Id.*

¹⁵⁸ President of Russia Press Release, Meeting on Import Replacement (July 28, 2014), at <http://eng.kremlin.ru/news/22747>.

¹⁵⁹ White House Press Release, G-7 Leaders Statement on Ukraine (July 30, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/30/g-7-leaders-statement-ukraine>.

¹⁶⁰ Ministry of Foreign Affairs of the Russian Federation Press Release, Comment by the Russian Ministry of Foreign Affairs Regarding the Continuing Anti-Russian Moves of the US Administration (July 26, 2014), at http://www.mid.ru/bdcomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/f26edab8730c7da444257d240059a724!OpenDocument (“There is only one conclusion: the Administration of Barack Obama is responsible for the internal conflict in Ukraine and its severe consequences.”).

¹ Alison Smale, *German Man Is Held as Spy; U.S. Implicated*, N.Y. TIMES, July 5, 2014, at A1.

² Alison Smale, *New Case of Spying Is Alleged by Germany*, N.Y. TIMES, July 10, 2014, at A6.

³ Alison Smale, Mark Mazzetti & David E. Sanger, *Germany to Oust Top C.I.A. Officer as a Rift Deepens*, N.Y. TIMES, July 11, 2014, at A1.

appropriate response to the breach of trust that has taken place.”⁴ The U.S. Embassy in Berlin reported that the station chief left Germany on July 17.⁵

Tensions between Germany and the United States over espionage had already started to emerge in 2013 after documents leaked by former National Security Agency (NSA) operative Edward Snowden revealed that U.S. intelligence agencies had monitored the electronic data of millions of Germans and had tapped Merkel’s cell phone.⁶ After the Snowden leak, Germany requested a “no spy” agreement with the United States, alleging that similar agreements already existed with certain U.S. allies that are currently party to an intelligence-sharing arrangement.⁷

The existence of the intelligence-sharing arrangement, known as the “UKUSA Agreement,” has been a matter of public record since 2010, when the NSA declassified a document from 1955 titled “U.K.-U.S. Communications Intelligence Agreement.”⁸ That document, which addresses intelligence sharing between the United States, the United Kingdom, Australia, Canada, and New Zealand, includes provisions governing collection of signal traffic; acquisition of communications documents and equipment; traffic analysis; cryptanalysis; decryption and translation; and acquisition of information regarding communications organizations, procedures, practices, and equipment.⁹ In a statement accompanying the declassified document, the NSA noted:

The tradition of intelligence sharing between NSA and its Second party partners has deep and widespread roots that have been cultivated for almost three quarters of a century. During World War II, the U.S. Army and Navy each developed independent foreign SIGINT [signals intelligence] relationships with the British and the Dominions of Canada, Australia, and New Zealand. These relations evolved and continued across the decades. The bonds, forged in the heat of a world war and tempered by decades of trust and teamwork, remain essential to future intelligence successes.

The March 5, 1946, signing of the BRUSA (now known as UKUSA) Agreement marked the reaffirmation of the vital WWII cooperation between the United Kingdom and United States. Over the next 10 years, appendices to the Agreement, some of which are included with this release to the public, were drafted and revised. These appendices and their annexures provide details of the working relationship between the two partners and also address arrangements with the other Second Parties (Australia, Canada, and New Zealand).¹⁰

⁴ German Federal Chancellor Press Release, *We Must Discuss Our Divergent Views* (July 16, 2014), at http://www.bundeskanzlerin.de/Content/EN/Artikel/2014/07_en/2014-07-10-geheimdienste_en.html.

⁵ Melissa Eddy, *Germany: American Spy Chief Leaves*, N.Y. TIMES, July 18, 2014, at A9.

⁶ Alison Smale, *Ties Strained, Germans Press U.S. to Answer Spy Allegation*, N.Y. TIMES, July 7, 2014, at A4.

⁷ *Id.* Two members of Congress had earlier urged the president to include Germany in the Five Eyes pact. Letter from Rep. Charles W. Dent and Rep. Paul Ryan to President Barack Obama (Nov. 6, 2013), available at http://www.dent.house.gov/?a=Files.Serve&File_id=EA4825DA-E015-484F-A8FE-0C9EE112B798; see also Press Release, Congressman Charles Dent, *Continuing Surveillance Efforts Directed at Ally Merkel Could Damage U.S.-German Relations* (Nov. 6, 2013), at http://dent.house.gov/index.cfm?p=PressReleases&ContentRecord_id=B7BE6782-B45F-400D-9025-0A9CB314365D.

⁸ U.K.-U.S. Communications Intelligence Agreement (May 10, 1955), available at http://www.nsa.gov/public_info/_files/ukusa/new_ukusa_agree_10may55.pdf.

⁹ *Id.*, para. 4; *Id.*, App. J.

¹⁰ U.S. National Security Agency, *UKUSA Agreement Release, 1940–1956* (June 24, 2010), at http://www.nsa.gov/public_info/declass/ukusa.shtml (reproducing the full text of the UKUSA Agreement).

Over time, this group of nations became known as the “Five Eyes” allies, described by the U.S. director of national intelligence as “the commonwealth countries with whom we have the closest, most intimate intelligence relationships.”¹¹

A former Canadian military official has written that “sources indicate that the Agreement has evolved to keep abreast of modern threats and associated demands of sustaining a dominant cryptologic capability” and that the Five Eyes intelligence community resembles a “cooperative, complex network of linked autonomous intelligence agencies, interacting with an affinity strengthened by a profound sense of confidence in each other and a degree of professional trust so strong as to be unique in the world.”¹² While the group lacks a “formal, over-arching international agreement that governs all Five Eyes intelligence relationships,” the official noted that the “Five Eyes partners apparently do not target each other,” relying on a “gentleman’s agreement’ between allies.”¹³

Germany’s demands for such an agreement, however, were of no avail. According to news reports,

The way German officials tell the story, they were promised those negotiations by Susan E. Rice, Mr. Obama’s national security adviser, and other American intelligence officials. But the American officials say there was never such a promise, and that German officials blanched when they heard what kind of responsibilities they would have for intelligence collection and cyberoperations around the world if they ever joined that elite club.

The discussions went nowhere, and the public collapse of the talks left Ms. Merkel’s top aides embittered.¹⁴

American officials denied the existence of no-spy agreements with any Five Eyes nations and refused to negotiate such an agreement with Germany. According to news reports, Rice worried that doing so “would set a precedent that every other major European ally, along with the Japanese, the South Koreans and others, would soon demand to replicate.”¹⁵ Moreover, in the end, Germany declined to pursue such an agreement:

By the American account of events, German officials decided to proceed with an agreement for enhanced intelligence sharing, a process that consumed the intelligence agencies in both countries, and was presided over by [President Obama’s National Security Adviser Susan E.] Rice and [her German counterpart Christoph] Heusgen. American officials said that in January, the Germans terminated those talks, saying that if an accord could not include a no-spy agreement—a political necessity for Ms. Merkel—it was not worth signing.

“We were ready to conclude an agreement about intelligence cooperation that reiterated key principles about our collection activities around the time of the president’s January speech” that put new limits on the N.S.A.’s activities, a senior administration official said.

¹¹ U.S. Dep’t of State Press Release No. 2012/391, Annual Meeting of the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons (Mar. 15, 2012), at <http://www.state.gov/secretary/20092013/clinton/rm/2012/03/185905.htm> (statement of Lieutenant General Jim Clapper, the director of national intelligence).

¹² JAMES COX, CANADA AND THE FIVE EYES INTELLIGENCE COMMUNITY 2, 6 (2012), available at <http://www.cdfai.org/PDF/Canada%20and%20the%20Five%20Eyes%20Intelligence%20Community.pdf>.

¹³ *Id.* at 5, 7.

¹⁴ Smale, Mazzetti & Sanger, *supra* note 3.

¹⁵ David E. Sanger, *U.S. and Germany Fail to Reach a Deal on Spying*, N.Y. TIMES, May 2, 2014, at A3.

“But it was the German government who told us they no longer wanted to proceed, not the other way around.”

“They pulled the plug,” another official said. “What the Germans want, and wanted, is that we would never do anything against their laws on their territory.” That is an agreement the United States “has with no country,” the official said.

Any monitoring from German soil—including from the United States Embassy—would constitute a violation of German law.¹⁶

In its public discussions of the Five Eyes community, the White House has continued to deny that the United States maintains a no-spy agreement with any nation. In a joint press conference with French President François Hollande, U.S. President Barack Obama told White House reporters that

the first place that we look to in terms of how do we make sure that our rules are compatible with our partnerships and our friendships and our alliances were countries like France that have been long-time allies of ours and some of our closest partners. It’s not actually correct to say that we have a “no-spy agreement” with Great Britain. That’s not actually what happens. We don’t have—there’s no country where we have a no-spy agreement. We have, like every other country, an intelligence capability, and then we have a range of partnerships with all kinds of countries.¹⁷

The Obama administration has likewise maintained the position that both law and policy need to keep up with changes in surveillance technology and that the United States is committed to reforms and further communications with its allies to address concerns about espionage. In a May 2014 joint press conference with Merkel, Obama told White House reporters:

I’ve also been convinced for a very long time that it is important for our legal structures and our policy structures to catch up with rapidly advancing technologies. And as a consequence, through a series of steps, what we’ve tried to do is reform what we do and have taken these issues very seriously. Domestically, we’ve tried to provide additional assurances to the American people that their privacy is protected. But what I’ve also done is taken the unprecedented step of ordering our intelligence communities to take the privacy interests of non-U.S. persons into account in everything that they do—something that has not been done before and most other countries in the world do not do. What I’ve said is, is that the privacy interests of non-U.S. citizens are deeply relevant and have to be taken into account, and we have to have policies and procedures to protect them, not just U.S. persons. And we are in the process of implementing a whole series of those steps.

We have shared with the Germans the things that we are doing. I will repeat what I’ve said before—that ordinary Germans are not subject to continual surveillance, are not subject to a whole range of bulk data gathering. I know that the perceptions I think among the public sometimes are that the United States has capacities similar to what you see on movies and in television. The truth of the matter is, is that our focus is principally and primarily on how do we make sure that terrorists, those who want to proliferate weapons, transnational criminals are not able to engage in the activities that they’re engaging in. And

¹⁶ *Id.*

¹⁷ White House Press Release, Press Conference by President Obama and President Hollande of France (Feb. 11, 2014), at <http://www.whitehouse.gov/photos-and-video/video/2014/02/11/president-obama-holds-press-conference-president-hollande-france#transcript>.

in that, we can only be successful if we're partnering with friends like Germany. We won't succeed if we're doing that on our own.

So what I've pledged to Chancellor Merkel has been in addition to the reforms that we've already taken, in addition to saying that we are going to apply privacy standards to how we deal with non-U.S. persons as well as U.S. persons, in addition to the work that we're doing to constrain the potential use of bulk data, we are committed to a U.S.-German cyber dialogue to close further the gaps that may exist in terms of how we operate, how German intelligence operates, to make sure that there is transparency and clarity about what we're doing and what our goals and our intentions are.¹⁸

The White House's response to the July espionage scandal, including the ouster of CIA Berlin station chief from Germany, has been publicly muted. The Obama administration acknowledged that the two countries have "agreed to set up a Structured Dialogue to address concerns of both sides and establish guiding principles as the basis for continued and future cooperation" to address "the full range of issues . . . including intelligence and security matters."¹⁹ Similarly, Obama has noted that he and Merkel will "remain in close communication on ways to improve cooperation going forward."²⁰ Subsequent news reports have indicated that the CIA has quietly scaled back spying on friendly Western European governments,²¹ and Director of National Intelligence James Clapper confirmed that the U.S. intelligence community has recently experienced a "'perfect storm' that's dogging and degrading [its] capabilities," partly as a result of the community's "conscious decisions to stop collecting on some specific targets."²²

INTERNATIONAL ORGANIZATIONS

United States Defends United Nations' Immunity in Haitian Cholera Case

The United States government has recently filed a statement of interest and a supplementary letter in the U.S. District Court for the Southern District of New York, endorsing the immunity of the United Nations and several UN officials to claims of liability based on the alleged introduction of cholera into Haiti by UN peacekeepers.¹ According to the Haitian Ministry

¹⁸ White House Press Release, Remarks by President Obama and German Chancellor Merkel in Joint Press Conference (May 2, 2014), at <http://www.whitehouse.gov/the-press-office/2014/05/02/remarks-president-obama-and-german-chancellor-merkel-joint-press-confere>.

¹⁹ White House Press Release, Readout of the Chief of Staff's Meetings in Berlin, Germany (July 22, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/22/readout-chief-staff-s-meetings-berlin-germany>.

²⁰ White House Press Release, Readout of the President's Call with Chancellor Merkel of Germany (July 15, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/15/readout-president-s-call-chancellor-merkel-germany>.

²¹ Ken Dilanian, *CIA Stops Spying on Friendly Nations in W. Europe*, ABC NEWS, Sept. 20, 2014, at <http://abcnews.go.com/Politics/wireStory/cia-stops-spying-friendly-nations-europe-25641881?singlePage=true>.

²² Office of the Director of National Intelligence, Remarks as Delivered by the Honorable James R. Clapper, Director of National Intelligence, at the AFCEA/INSA National Security and Intelligence Summit (Sept. 18, 2014), at <http://www.dni.gov/index.php/newsroom/speeches-and-interviews/202-speeches-interviews-2014/1115-remarks-as-delivered-by-the-honorable-james-r-clapper-director-of-national-intelligence-afcea-insa-national-security-and-intelligence-summit>.

¹ Statement of Interest of the United States filed March 7, 2014, *Georges v. United Nations*, No. 1:13-cv-07146 (S.D.N.Y. filed Oct. 10, 2013), available at <http://www.ijdh.org/wp-content/uploads/2011/11/Georges-v.-UN-13-Civ.-7146-SDNY-Statement-of-Interest.pdf>; Letter in Further Support of Statement of Interest filed July 7,

of Health, as of June 2014, more than 700,000 people have fallen ill with cholera, and more than 8,500 have died.²

The Security Council established the United Nations Stabilization Mission in Haiti (MINUSTAH) in 2004 following a period of repression and insurgent activity that triggered armed conflict there.³ MINUSTAH's original mandate was broad: it included assisting the transitional government in Haiti with restructuring the Haitian National Police, organizing and holding elections, and promoting and protecting human rights.⁴ MINUSTAH was still operating in Haiti when a devastating earthquake struck on January 12, 2010. Shortly thereafter, the Security Council increased MINUSTAH's overall force levels and expanded its mandate to include supporting post-earthquake recovery, reconstruction, and stability efforts.⁵

On October 22, 2010, ten months after the earthquake struck, Haiti's National Public Laboratory confirmed the first cholera case in the country in nearly a century.⁶ Laboratory testing by the U.S. Centers for Disease Control soon revealed that "the cholera strain linked to the current outbreak in Haiti was most similar to cholera strains found in South Asia."⁷ Suspicions grew that UN peacekeepers from Nepal at the Mirebalais camp on the Meye Tributary were the source of the outbreak.⁸

On January 6, 2011, UN Secretary-General Ban Ki-moon appointed an independent panel to investigate the source of the cholera outbreak.⁹ The panel presented its findings in a report to the secretary-general four months later.¹⁰ After undertaking "concurrent epidemiological, water and sanitation, and molecular analysis investigations,"¹¹ the panel did not explicitly identify MINUSTAH as the source of cholera. The panel did conclude, however, that "the evidence overwhelmingly supports the conclusion that the source of the Haiti cholera outbreak was due to contamination of the Meye Tributary of the Artibonite River with a pathogenic strain of current South Asian type *Vibrio cholerae* as a result of human activity."¹² The report

2014, *Georges v. United Nations*, No. 1:13-cv-07146 (S.D.N.Y. filed Oct. 10, 2013), available at <http://www.innerecitypress.com/us1unimmunity070714.pdf>.

² United Nations in Haiti, *Haiti Cholera Response* (June 2014), available at http://www.un.org/News/dh/infocus/haiti/Cholera_UN_Factsheet_June_2014.pdf.

³ SC Res. 1542 (Apr. 30, 2004); see also MICHAEL J. MATHESON, *COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR 156-57* (2006).

⁴ SC Res. 1542, *supra* note 3, para. 7.

⁵ SC Res. 1908, para. 1 (Jan. 19, 2010); SC Res. 1927 (June 4, 2010).

⁶ Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti 3 (May 2011), available at <http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf> [hereinafter UN Expert Report].

⁷ U.S. Centers for Disease Control and Prevention Press Release (Nov. 1, 2010), at <http://www.cdc.gov/media/pressrel/2010/r101101.html>.

⁸ See, e.g., William Booth, *U.N. Troops Assaulted, Blamed for Outbreak*, WASH. POST, Nov. 16, 2010, at A9; see also UN Expert Report, *supra* note 6, at 8 (noting one possible hypothesis that "the source of the outbreak was an infected human who carried a pathogenic strain of *Vibrio cholerae* into Haiti from a cholera endemic region outside the country," that "the soldiers at the Mirebalais MINUSTAH camp were the direct source for the cholera outbreak," and that this hypothesis was "a commonly held belief in Haiti").

⁹ UN News Centre Press Release, *Haiti: Ban Appoints Four Top Medical Experts to Probe Source of Cholera Epidemic* (Jan. 6, 2011), at <http://www.un.org/apps/news/story.asp?NewsID=37216&Cr=haiti&Cr1#.U-eRsUi5ZrM>.

¹⁰ Secretary-General Press Statement, *Statement Attributable to the Spokesperson for the Secretary-General on the Independent Expert Panel's Report Regarding the Cholera Outbreak in Haiti* (May 4, 2011), at <http://www.un.org/sg/statements/?nid=5245>.

¹¹ UN Expert Report, *supra* note 6, at 3.

¹² *Id.* at 29 (emphasis omitted).

also found that “[t]he sanitation conditions at the Mirebalais MINUSTAH camp were not sufficient to prevent fecal contamination of the Meye Tributary System of the Artibonite River.”¹³

A UN spokesperson was quoted as saying that the report “does not present any conclusive scientific evidence linking the outbreak to the MINUSTAH peacekeepers or the Mirebalais camp.”¹⁴ The secretary-general issued a statement indicating that he intends to “convene a task force within the United Nations system, to study the findings and recommendations made by the Independent Panel of Experts to ensure prompt and appropriate follow-up.”¹⁵

In November 2011, the Boston-based Institute for Justice and Democracy in Haiti and the Haiti-based Bureau des Avocats Internationaux presented the secretary-general with a formal petition for relief on behalf of cholera victims in Haiti.¹⁶ The petition alleged that the United Nations was liable for “negligence, gross negligence, recklessness, and deliberate indifference for the health and lives of Haitian people”; that the United Nations “failed to respect Haitian civil, criminal, and constitutional law as mandated by the [status-of-forces agreement (SOFA)]”; that the United Nations “failed to comply with international environmental principles”; and that the United Nations and MINUSTAH “acted in violation of petitioners’ fundamental human rights.”¹⁷

The petition argued that both the SOFA between the United Nations and Haiti and the Convention on the Privileges and Immunities of the United Nations (General Convention) require the United Nations to settle the petitioners’ claims.¹⁸ Article VIII, section 29(a), of the General Convention obliges the United Nations to “make provisions for appropriate modes of settlement of . . . [d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.”¹⁹ Pursuant to the SOFA, “[t]hird-party claims for . . . personal injury, illness or death arising from or directly attributed to MINUSTAH, except for those arising from operational necessity, which cannot be settled through the internal procedures of the United Nations, shall be settled” by a standing claims commission.²⁰ That commission would be comprised of one member appointed by the UN secretary-general, one member appointed by the Haitian government, and a third member selected jointly.²¹

¹³ *Id.* at 3.

¹⁴ *UN Haiti Cholera Panel Avoids Blaming Peacekeepers*, REUTERS, May 5, 2011, at <http://www.reuters.com/article/2011/05/05/us-haiti-cholera-panel-idUSTRE74457Q20110505>; see also *id.* (quoting a spokesperson for the UN peacekeeping departments that “[a]nyone carrying the relevant strain of the disease in the area could have introduced the bacteria into the river”).

¹⁵ Secretary-General Press Statement, *supra* note 10; UN News Centre, UN to Set Up Taskforce in Wake of Report into Source or Haitian Cholera Outbreak (May 4, 2011), at <http://www.un.org/apps/news/story.asp?NewsID=38277&#.VA9dY0geVrM>.

¹⁶ Petition for Relief, *Over 5,000 Victims of Cholera v. United Nations (MINUSTAH Claims Unit, Haiti, Nov. 2011)*, available at <http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf> [hereinafter Petition for Relief].

¹⁷ *Id.* at 18, 21, 24.

¹⁸ *Id.* at 16, 25.

¹⁹ Convention on the Privileges and Immunities of the United Nations, Art. VIII, sec. 29(a), Feb. 13, 1946, 21 UST 1418, 1 UNTS 16.

²⁰ Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operations in Haiti, paras. 54, 55, July 9, 2004, 2271 UNTS 235 (2005), available at <https://treaties.un.org/doc/publication/UNTS/Volume%202271/v2271.pdf>.

²¹ *Id.*, para. 55.

After not responding for fifteen months, the United Nations denied the petition in February 2013.²² The UN undersecretary for legal affairs sent a letter to the petitioners' representatives stating:

With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946.²³

It is not clear whether this letter intends to suggest that the underlying claims are not of a "private law character" for purposes of Article VIII, section 29(a), of the General Convention. The General Convention does not explicitly carve out an exception for claims that would require a review of "political and policy matters," and UN practice does not appear to reflect the existence of any such exception.²⁴

In July 2013, the members of the panel appointed by the secretary-general independently released a new report.²⁵ It took into account research concluded after the submission of the initial report and reached a more definitive conclusion: "[T]he preponderance of the evidence and the weight of the circumstantial evidence does lead to the conclusion that personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti."²⁶

On October 9, 2013, the Institute for Justice and Democracy in Haiti filed suit on behalf of the surviving family members of cholera victims in the U.S. District Court for the Southern District of New York against the United Nations, MINUSTAH, and several UN officials.²⁷ Captioned *Georges v. United Nations*, the suit alleged negligent, reckless, and tortious conduct on the part of the United Nations in allowing Nepalese peacekeeping forces to enter Haiti without adequate medical screenings and in failing to maintain facilities onsite with sanitation measures that would have prevented the contamination of the Artibonite River.²⁸ The plaintiffs further sought a declaratory judgment that the United Nations was not immune from liability

²² Secretary-General Press Statement, Statement Attributable to the Spokesperson for the Secretary-General on Haiti (Feb. 21, 2013), at <http://www.un.org/sg/statements/index.asp?nid=6615>.

²³ Letter from Patricia O'Brien, UN Under-Secretary-General for Legal Affairs, to Brian Concannon, Attorney for the Haitian Cholera Victims (Feb. 21, 2013), available at <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf>; see also Letter from Patricia O'Brien, UN Under-Secretary-General for Legal Affairs, to Brian Concannon, Attorney for the Haitian Cholera Victims (July 5, 2013), available at <http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf>.

²⁴ Bruce Rashkow, *Remedies for Harm Caused by UN Peacekeepers*, AJIL UNBOUND (Apr. 2, 2014), at <http://www.asil.org/blogs/remedies-harm-caused-un-peacekeepers> ("Indeed, as the head of the UN legal office that routinely handled claims against the Organization for some ten years, I did not recall any previous instance where such a formulation was utilized in regard to such claims."); see also *id.* (noting that the United Nations used that formulation once in 2011 in response to claims for health damages suffered by third parties as a result of lead contamination in certain internally displaced persons camps in Kosovo).

²⁵ See Colum Lynch, *Cholera Outbreak in Haiti in 2010 Tied to U.N. Peacekeepers, Report Says*, WASH. POST, July 25, 2013, at http://www.washingtonpost.com/world/national-security/cholera-outbreak-in-haiti-tied-to-un-peacekeepers-report-says/2013/07/25/7732341e-f552-11e2-a2f1-a7acf9bd5d3a_story.html; Daniele Lantagne, G. Balakrish Nair, Claudio F. Lanata & Alejandro Cravioto, *The Cholera Outbreak in Haiti: Where and How Did it Begin?*, 379 CURRENT TOPICS IN MICROBIOLOGY & IMMUNOLOGY 145 (2014).

²⁶ Lantagne et al., *supra* note 25, at 162.

²⁷ Complaint, *Georges v. United Nations*, No. 1:13-cv-7146 (S.D.N.Y. filed Oct. 10, 2013), available at <http://www.ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf>.

²⁸ *Id.*, paras. 243–62.

for the deaths resulting from cholera and that, pursuant to the SOFA and as a condition of its presence in Haiti, it must abide by the agreed-upon claims process for any harm to private individuals.²⁹ In addition, the plaintiffs alleged that the United Nations' continuous denial of responsibility for the outbreak delayed an adequate and timely response to the epidemic.³⁰ In March 2014, two more lawsuits making similar claims were filed in the U.S. District Courts for the Southern and Eastern Districts of New York.³¹

On March 7, 2014, the United States submitted a statement of interest in *Georges v. United Nations* supporting the immunity of the United Nations, MINUSTAH, and relevant UN officials.³² The statement of interest explained that the United Nations, including MINUSTAH, enjoys absolute immunity:

The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment [sic] of its purposes." UN Charter, art. 105, § 1. The UN's General Convention, which the UN adopted shortly after the UN Charter, defines the UN's privileges and immunities, and specifically provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2.

. . . The United States understands the General Convention, Article II section 2, to mean what it unambiguously says: the UN enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity.

. . . .

MINUSTAH, as a subsidiary organ of the UN, enjoys this same absolute immunity. . . .

. . . .

In this case, there has been no express waiver. To the contrary, the UN has repeatedly asserted its immunity. On December 20, 2013, Miguel de Serpa Soares, the United Nations Legal Counsel, wrote to Samantha Power, Permanent Representative of the United States to the United Nations, stating: "I hereby respectfully wish to inform you that the United Nations has not waived and is expressly maintaining its immunity with respect to the claims in [the instant] Complaint." The UN has requested that the United States advise the Court of its immunity and that of its officials and take steps to ensure that these immunities are protected.

Accordingly, because the UN has not waived its immunity in this case, the UN, including MINUSTAH, enjoys absolute immunity from suit, and this action should be dismissed as against the UN for lack of subject matter jurisdiction.³³

²⁹ *Id.*, paras. 11–12.

³⁰ *Id.*, paras. 105–41, 163–77, 184–88.

³¹ Complaint, *Jean-Robert v. United Nations*, No. 1:14-cv-1545 (S.D.N.Y. filed Mar. 6, 2014); Complaint, *LaVenture v. United Nations*, No. 1:14-cv-1611 (E.D.N.Y. filed Mar. 11, 2014), available at <http://online.wsj.com/public/resources/documents/marielaventure.pdf>.

³² Statement of Interest, *supra* note 1.

³³ *Id.* at 3–6 (citations omitted).

Citing the UN Charter and the General Convention, the statement of interest also supported the immunity of UN Secretary-General Ban Ki-moon and Assistant Secretary-General Edmond Mulet.³⁴

The statement of interest also argued that because all defendants are immune, the plaintiffs' attempted service of process was ineffective:

Consistent with its absolute immunity, the UN, including MINUSTAH, is also immune from service of legal process. *See* General Convention, art. II, § 2 (the UN "shall enjoy immunity from every form of legal process"); Status of Forces Agreement, art. III, § 3 (stating that MINUSTAH "shall enjoy the privileges and immunities . . . provided for in the [General] Convention," which include immunity "from any form of legal process"). In addition, the General Convention specifically provides that the "premises of the United Nations shall be inviolable." *Id.*, art. II, § 3. Moreover, the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations ("Headquarters Agreement"), June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11 (entered into force Oct. 21, 1947), art. III, § 9(a), provides that "service of legal process . . . may take place within the headquarters district only with the consent of and under conditions approved by the [UN] Secretary-General." And pursuant to the Headquarters Agreement, "the Secretary-General of the United Nations has not prescribed any conditions under which service by mail or facsimile would be allowed." Accordingly, plaintiffs' attempts to serve the UN, including MINUSTAH, in New York, and their attempts to serve MINUSTAH in Haiti . . . were ineffective. Moreover, any attempt at an alternative method of service, including by publication, would likewise be ineffectual.

For similar reasons, plaintiffs' attempts to serve Secretary-General Ban and Assistant Secretary-General Mulet at UN Headquarters . . . were ineffective. *See* General Convention, art. II; Headquarters Agreement, art. III, § 9(a) . . . Moreover, the General Convention specifically provides that "[t]he person of a diplomatic agent shall be inviolable," and that the "private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission." General Convention, arts. 29, 30; *see also* Vienna Convention, art. 22 ("The premises of the mission shall be inviolable."). Accordingly, plaintiffs' attempts to serve Secretary-General Ban and Assistant Secretary-General Mulet by delivering mail to, or leaving process at, their residences . . . were ineffective. Plaintiffs have therefore failed to effect service on Secretary-General Ban and Assistant Secretary-General Mulet, in light of their diplomatic immunity, the inviolability of the UN headquarters district, and the inviolability of the premises of the UN.³⁵

In a follow-up letter filed in the federal district court on July 7, 2014, the United States rejected arguments advanced by the plaintiffs that the United Nations' immunity was contingent on providing an alternative mechanism to resolve the plaintiffs' claims:

Plaintiffs' position that the UN's immunity under Section 2 [of the General Convention] is conditional on its providing appropriate modes of settling disputes of a private law character under Section 29 [of the General Convention] is contrary to the plain language of the General Convention, which provides that the UN "shall enjoy absolute immunity from every form of legal process *except* insofar as in any particular case it has expressly

³⁴ *Id.* at 6–8 (citing legal immunity for UN officials "as are necessary for the independent exercise of their functions" under Article 105, section 2, of the UN Charter; for the secretary-general and all assistant secretaries-general, in line with the immunities accorded to diplomatic envoys, under Article V, section 19, of the UN Charter; and for UN officials acting in their official capacity under Article V, section 18(a), of the General Convention).

³⁵ *Id.* at 8–9 (citations and footnote omitted).

waived its immunity.” General Convention § 2 (emphasis added). The word “except” is followed by a category of one: express waiver. The UN’s obligation to provide for dispute resolution mechanisms for claims by third parties against it under Section 29(a) is not included in the category of the exceptions to immunity. Plaintiffs argue, in effect, that such an exception should exist, but the text of the General Convention makes clear that it does not.

....

Any purported inadequacies in the claims resolution process referred to in Section 29 of the General Convention, or even the absence of such a process, fails to establish that the UN has expressly waived its immunity from suit.³⁶

This follow-up letter further argued that the General Convention’s drafting history confirms this interpretation:

Plaintiffs assert that the UN’s “founders . . . understood the importance of limiting UN immunity such that the organization could . . . fulfill its responsibilities to innocent third parties harmed by UN operations . . .” In support, Plaintiffs cite to a sentence in the report of the Executive Committee of the Preparatory Commission, which states, “It should be a principle that no immunities and privileges, which are not really necessary, should be asked for.” The sentence relied upon by Plaintiffs does not state, or even suggest, that the UN’s immunity is contingent upon providing a mechanism for dispute resolution, nor does it suggest that the UN can implicitly waive its immunity. Moreover, the sentence refers to the immunities and privileges of “specialised agencies,” such as the International Monetary Fund and the International Bank for Reconstruction and Development, which operate independently of the UN.

Plaintiffs also rely on the statement by the UN’s Executive Committee of the Preparatory Commission to the effect that when the UN enters into contracts with private individuals and corporations, “it *should* include in the contract or arbitration disputes arising out of the contract, *if it is not prepared to go before the Courts.*” The use of the word “should” is hortatory and undermines plaintiffs’ position that the UN’s immunity is conditional on its providing a dispute resolution mechanism.

Nor do drafts of the General Convention state that providing access to alternative methods of dispute resolution is a “critical pre-condition to immunity,” . . . as Plaintiffs argue. Although, as Plaintiffs point out . . . , Article 9 of the first draft of the General Convention was entitled “Control of Privileges and Immunities of Officials[,]” that article contained no mention of any pre-condition to the UN’s immunity. Moreover, the language regarding “[c]ontrol” disappeared in subsequent drafts of the General Convention. What is constant throughout the drafts is that they provide for absolute immunity for the UN, subject only to express waiver. By the same token, the provisions for UN immunity and dispute settlement remained in separate sections of the draft convention, and without any link between them. Nor is there any suggestion in the drafting history that the UN’s immunity may be waived implicitly if the UN does not comply with another provision of the General Convention. To the contrary, the drafters made clear in the Convention that any waiver of the UN’s immunity must be “express.”

....

³⁶ Letter in Further Support of Statement of Interest, *supra* note 1, at 3–4.

The drafting history of the General Convention thus does not support Plaintiffs' position that the UN cannot enjoy immunity unless it provides for a dispute resolution mechanism. If anything, the drafting history reflects a bargain between the UN and its member states in which, in exchange for Section 2, which establishes the UN's absolute immunity, the UN, in Section 29, agreed to provide for dispute resolution mechanisms for third-party claims. But the drafting history does not reflect any intent to make the UN's immunity in any particular case legally contingent on the UN's providing a forum for, or satisfying the claims of, third parties in that case. In any event, however, the drafting history could not overcome the fact that the final text of the General Convention, as adopted by the General Assembly, and as ratified by the United States Senate, does not include any such condition.³⁷

On July 13, 2014, the day before arriving in Haiti, Secretary-General Ban Ki-moon acknowledged the United Nations' moral, but not legal, responsibility to assist Haiti in ending the cholera epidemic. "Regardless of what the legal implication may be," he stated, "I believe that the international community, including the United Nations, has a moral responsibility to help the Haitian people stem the further spread of the cholera epidemic."³⁸

As of the date of publication, the three cases remain pending.

INTERNATIONAL ECONOMIC LAW AND U.S. REGULATION OF FOREIGN ENTERPRISES

French Bank Pleads Guilty to Criminal Violations of U.S. Sanctions Laws

On June 30, 2014, the U.S. Department of Justice announced that BNP Paribas S.A., France's largest bank, had agreed to plead guilty to conspiring to violate U.S. economic sanctions laws against Cuba, Iran, and Sudan.¹ "Working with financial institutions based in these countries and others, between 2004 and 2012, BNP engaged in a complex and pervasive scheme to illegally move billions through the U.S. financial system on behalf of sanctioned entities," stated U.S. Attorney General Eric Holder.² The bank admitted to one felony count of conspiracy to violate U.S. sanctions laws.³ Under the terms of the plea deal, BNP Paribas agreed to forfeit nearly \$9 billion in proceeds traceable to the sanctions violations,⁴ the largest penalty ever obtained by the Department of Justice in a sanctions case.⁵ The U.S. District Court

³⁷ *Id.* at 7–9 (citations and footnote omitted).

³⁸ Jacqueline Charles, *United Nations Top Official Goes to Haiti to Promote Cholera Elimination, Elections*, MIAMI HERALD, July 13, 2014, at <http://www.miamiherald.com/2014/07/13/4234323/united-nations-top-official-goes.html>.

¹ U.S. Dep't of Justice Press Release, *BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions* (June 30, 2014), at <http://www.justice.gov/opa/pr/2014/June/14-ag-686.html>.

² U.S. Dep't of Justice Press Release, *Attorney General Holder Delivers Remarks at Press Conference Announcing Significant Law Enforcement Action* (June 30, 2014), at <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1406301.html> [hereinafter Holder Press Release].

³ Statement of Facts, para. 14, *United States v. BNP Paribas S.A.*, No. 1:14-Cr.-00460 (S.D.N.Y. July 9, 2014), available at <http://www.justice.gov/opa/documents/paribas/statement-of-facts.pdf>; U.S. Dep't of Justice Press Release, *supra* note 1.

⁴ Plea Agreement, *United States v. BNP Paribas S.A.*, No. 1:14-Cr.-00460 (S.D.N.Y. July 9, 2014), available at <http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf>.

⁵ U.S. Dep't of Justice Press Release, *Remarks by Assistant Attorney General Leslie R. Caldwell at BNP Paribas Press Conference* (June 30, 2014), at <http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-140630.html> [hereinafter Caldwell Press Release].

for the Southern District of New York accepted the plea agreement on July 9, 2014.⁶ The Department of Justice noted that the agreement marked “the first time a global bank has agreed to plead guilty to large-scale, systematic violations of U.S. economic sanctions.”⁷

Unlike some other U.S. sanctions, those at issue in the BNP Paribas settlement have not elicited protests that the United States is impermissibly exercising extraterritorial jurisdiction.⁸ As explained in more detail below, all of the illegal transactions appear to involve transactions in U.S. dollars that were completed or cleared by banks in the United States—in some cases through BNP Paribas’s own subsidiary.⁹

The majority of illegal payments were made on behalf of entities in Sudan. According to an agreed statement of facts, BNP Paribas conspired with Sudanese banks to process \$6 billion in financial transactions on behalf of sanctioned Sudanese parties over a five-year period beginning in 2002.¹⁰ Specifically, BNP Paribas aided Sudanese clients in clearing payments in U.S. dollars through U.S. financial institutions, which would normally refuse wire transfers from sanctioned countries.¹¹ Many of the violations occurred at the bank’s Swiss operations. BNP Paribas (Suisse) developed a two-step practice for transferring U.S.-denominated funds from Sudanese clients involving third party banks, or “satellite banks,” that served as intermediaries.¹² BNP Paribas (Suisse) would process Sudanese transactions by first transferring funds to the satellite banks’ BNP Paribas correspondent accounts, then facilitating payments in U.S. dollars to or through unwitting U.S. financial institutions in the name of the third-party bank, concealing Sudanese involvement.¹³ The bank further assisted its Sudanese clients by removing all references to Sudan in the messages that accompanied financial transactions with U.S. counterparties. Bank employees would internally mark the messages with notes such as “ATTENTION: US EMBARGO” to ensure that the information was concealed.¹⁴

BNP Paribas also helped Iranian clients avoid U.S. sanctions.¹⁵ BNP Paribas admitted to processing payments through the United States on behalf of an Iranian-controlled energy

⁶ Andrew R. Johnson, *BNP Paribas Pleads Guilty to Criminal Charge in Federal Court: French Bank Agreed in June to Plead Guilty in Sanctions Case*, WALL ST. J., July 9, 2014, at <http://online.wsj.com/articles/bnp-paribas-pleads-guilty-to-criminal-charge-in-federal-court-1404944484>; see also U.S. Dep’t of Justice Press Release, *supra* note 1.

⁷ U.S. Dep’t of Justice Press Release, *supra* note 1.

⁸ Cf., e.g., Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AJIL 419, 428–33 (1996) (arguing that the Helms-Burton Act is incompatible with international law limits on extraterritorial jurisdiction).

⁹ See, e.g., Meredith Rathbone, Peter Jeydel & Amy Lentz, *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws*, 44 GEO. J. INT’L L. 1055, 1110–11 (2013) (describing “moving money through the U.S. financial system” as being “engaged in activity within the territory of the United States”); Michael Gruson, *The U.S. Jurisdiction over Transfers of U.S. Dollars Between Foreigners and over Ownership of U.S. Dollar Accounts in Foreign Banks*, 2004 COLUM. BUS. L. REV. 721, 724–25.

¹⁰ Statement of Facts, *supra* note 3, para. 17. Specifically, the government accused BNP Paribas of conspiring to violate Executive Orders 13,067 and 13,412, as well as their associated regulations. *Id.*, para. 5.

¹¹ *Id.*, paras. 17, 24.

¹² *Id.*, paras. 18, 23.

¹³ See Office of Foreign Assets Control (OFAC) Settlement Agreement, para. 9, *United States v. BNP Paribas*, S.A., No. 1:14-Cr-00460 (S.D.N.Y. July 9, 2014), available at http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140630_bnp_settlement.pdf. According to the OFAC settlement, BNP Paribas “conveyed the benefit of the services of the unwitting U.S. bank recipients to Sudan and directly or indirectly exported financial services from the United States to Sudan.” *Id.*

¹⁴ Statement of Facts, *supra* note 3, paras. 18, 22.

¹⁵ Information, para. 2, *United States v. BNP Paribas*, S.A., No. 1:14-Cr-00460 (S.D.N.Y. July 9, 2014), available at <http://www.justice.gov/opa/documents/paribas/information.pdf> (listing violated sanctions).

business.¹⁶ BNP Paribas continued to process transactions of at least \$586 million on behalf of the sanctioned Iranian business between 2011 and 2012, even after the bank was notified of the problem by U.S. authorities and European business partners.¹⁷ Separately, the bank also processed \$100 million in payments related to an Iranian oil company in 2009, despite red flags raised by its internal compliance officers.¹⁸

BNP Paribas also violated U.S. sanctions against Cuba.¹⁹ The long-standing trade embargo against Cuba, dating to the 1960s, is enforced primarily through regulations promulgated pursuant to the Trading with the Enemy Act of 1917.²⁰ Regulations issued by the U.S. Department of the Treasury specifically prohibit banking institutions subject to U.S. jurisdiction from facilitating financial transactions with Cuba.²¹ Despite the U.S. trade embargo against Cuba, BNP Paribas processed at least \$1.7 billion in transactions with sanctioned counterparties in Cuba between 2000 and 2010 through financial institutions located in the United States.²² The bank's Paris office managed unlicensed credit facilities that helped clear U.S. dollars to provide financing for Cuban investments or transactions with Cuban companies.²³ Much like the bank's Sudanese business, the Cuban transactions were concealed through the use of multiple accounts and the omission of references to Cuba in wire transfer messages.²⁴

The UN Security Council has adopted resolutions regarding both Sudan and Iran that require UN member states to ensure that no funds, financial assets, or economic resources are made available by their nationals or by any persons within their territories to or for the benefit of certain persons and entities designated by the Security Council or its committees.²⁵ BNP Paribas appears not to have violated any U.S. sanctions laws that implement Security Council resolutions, however. According to press reports, Christian Noyer, the French central bank governor, stated that all of the transactions at issue were consistent with French and European Union laws and regulations—presumably including those that implement Security Council

¹⁶ Statement of Facts, *supra* note 3, para. 43.

¹⁷ *Id.*, paras. 46, 47.

¹⁸ *Id.*, para. 48.

¹⁹ Information, *supra* note 15, para. 3 (detailing the government's specific charges).

²⁰ Trading with the Enemy Act of 1917, 40 Stat. 411 (1917) (codified at 50 U.S.C. app. §§1–44); *see also* Cuban Assets Control Regulations, 31 C.F.R. §515 (2013); Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (1992) (codified at 22 U.S.C. §§6001–10).

²¹ 31 C.F.R. §515.201(a)(1), (c) (prohibiting “[a]ll transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States” and “any transaction for the purpose or has the effect of evading or avoiding” such sanctions).

²² Statement of Facts, *supra* note 3, para. 49; OFAC Settlement Agreement, *supra* note 13, paras. 3, 21; *see also* 31 C.F.R. §515.201.

²³ Statement of Facts, *supra* note 3, para. 52.

²⁴ *Id.*, paras. 53–54.

²⁵ SC Res. 1591, para. 3(e) (Mar. 29, 2005) (deciding that states “shall freeze all funds, financial assets and economic resources” of designated persons involved in the Sudan conflict); SC Res. 1737, para. 12 (Dec. 23, 2006) (deciding that states “shall freeze the funds, other financial assets and economic resources” of designated persons related to Iran's nuclear program); SC Res. 1747, para. 4 (Mar. 24, 2007) (expanding sanctions to additional persons related to Iran's nuclear program); SC Res. 1803, para. 7 (Mar. 3, 2008) (further expanding sanctions to additional persons related to Iran's nuclear program); SC Res. 1929, para. 11 (June 9, 2010) (further expanding sanctions to additional persons related to Iran's nuclear program).

sanctions regimes.²⁶ U.S. sanctions on both countries are more extensive than those required by the Security Council, and there are no Security Council sanctions on Cuba.

U.S. officials emphasized that this case was a landmark enforcement action in the U.S. sanctions program.²⁷ Announcing the settlement, U.S. Attorney General Eric Holder stated that BNP Paribas's illicit activities had "significantly undermined longstanding U.S. economic sanctions, in many cases to the detriment of America's national security interests."²⁸ His deputy, James M. Cole, said that the "lesson to be learned from this case is that violating U.S. law carries serious consequences" for companies, whether "a U.S. based firm or a foreign chartered one."²⁹ Specifically addressing BNP Paribas's lack of cooperation with investigating authorities, Cole expressed optimism that "other corporations and financial firms who find themselves in a similar situation will take a lesson from this."³⁰ There was also speculation that criminal charges could lead to the revocation of BNP Paribas's charter, which would have serious implications for the bank's U.S. business.³¹ However, the relevant regulator, the New York Department of Financial Services, ultimately agreed not to revoke the charter, settling for, inter alia, a \$2.24 billion penalty and the suspension of U.S. dollar-clearing services for all of 2015.³² At least a dozen employees were also forced out of the company, including a co-chief operating officer. No individuals have yet been charged with criminal offenses.³³

The investigation and its ultimate resolution created tension in Europe, where French officials complained that France's largest bank was facing censure in the United States despite complying with French and EU laws.³⁴ French President François Hollande wrote to U.S. President Barack Obama in April, while criminal charges and fines were still being negotiated,

²⁶ William Horobin & David Gauthier-Villars, *Top French Banker Defends BNP Paribas: Noyer Says Lender Didn't Break French, European Rules on Transactions at Heart of U.S. Probes*, WALL ST. J., May 23, 2014, at <http://online.wsj.com/news/articles/SB10001424052702303749904579579403841990922>; *Pour la Banque de France, BNP Paribas a respecté les règles françaises et européennes*, LE MONDE, May 23, 2014, at http://www.lemonde.fr/economie/article/2014/05/23/pour-la-banque-de-france-bnp-paribas-a-respecte-les-regles-francaises-et-europeennes_4424498_3234.html [hereinafter LE MONDE].

²⁷ Caldwell Press Release, *supra* note 5 (noting that the "nature and scope of [BNP Paribas's] criminal conduct far exceeded that in any previous criminal sanctions case").

²⁸ Holder Press Release, *supra* note 2.

²⁹ U.S. Dep't of Justice Press Release, Remarks by Deputy Attorney General Cole at Press Conference Announcing Significant Law Enforcement Action (June 30, 2014), at <http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140630.html>.

³⁰ *Id.*

³¹ Jessica Silver-Greenberg & Ben Protess, *BNP Paribas Pinned Its Hopes on a Memo, but in Vain*, N.Y. TIMES, June 4, 2014, at B1; Ben Protess & Jessica Silver-Greenberg, *Two Giant Banks, Seen as Immune, Become Targets*, N.Y. TIMES, Apr. 30, 2014, at A1.

³² N.Y. Dep't of Fin. Servs. Press Release, Cuomo Administration Announces BNP Paribas to Pay \$8.9 Billion, Including \$2.24 Billion to NYDFS, Terminate Senior Executives, Restrict U.S. Dollar Clearing Operations for Violations of Law (June 30, 2014), at <http://www.dfs.ny.gov/about/press2014/pr1406301.htm>. This state penalty is credited against the \$8.9 billion settlement with the U.S. Department of Justice. In other words, payment of the \$2.24 billion fine is in partial satisfaction of the \$8.9 billion total, not in addition to it. *Id.*

³³ Ben Protess, *Banks Urged to Denounce Wrongdoers*, N.Y. TIMES, Sept. 18, 2014, at B8; David Jolly, *BNP Paribas Executive Leaves as Trade Investigation Grows*, N.Y. TIMES, June 13, 2014, at B5; Devlin Barrett, David Enrich & Christopher M. Matthews, *Justice Dept. Seeks More Than \$10 Billion Penalty from BNP Paribas*, WALL ST. J., May 29, 2014, at <http://online.wsj.com/articles/justice-dept-seeks-more-than-10-billion-penalty-from-bnp-paribas-1401386918>.

³⁴ Martin Arnold & Hugh Carnegie, *BNP and US Cross the T's and Dot the I's*, FIN. TIMES, June 23, 2014, at <http://www.ft.com/intl/cms/s/0/e01505d6-face-11e3-a9cd-00144feab7de.html>; LE MONDE, *supra* note 26.

seeking to ensure that any penalty imposed would not be “unfair and disproportionate.”³⁵ Although Obama stated that he would not interfere in the investigation, Hollande continued to press him, telling reporters that the investigation “has an impact on the French economy—it has an impact on the European economy.”³⁶ When figures as high as \$10 billion were reported, French Foreign Minister Laurent Fabius decried the amount as “unreasonable,” and French banking regulators met with their U.S. counterparts to counsel against suspension of dollar-clearing privileges.³⁷ When the ultimate figure of nearly \$9 billion was announced, French Minister of Finance Michel Sapin said that it was “[i]n line with the demands of French authorities,” noting that the bank “will continue to be able to finance economic activity in satisfactory conditions.”³⁸ Nonetheless, BNP Paribas posted a record loss of €4.32 billion at the end of the quarter, having set aside €5.75 billion to cover the fine.³⁹ In addition, the banking regulator in Switzerland, the Swiss Financial Market Supervisory Authority (FINMA), increased the bank’s capital requirements and imposed a two-year ban on business with any person subject to U.S. and EU sanctions, effectively applying U.S. sanctions in Switzerland.⁴⁰

Although the BNP Paribas settlement was the first to involve admissions of criminal conduct, it was only one in a series of steps taken by U.S. authorities to police foreign financial institutions. For example, the British bank Standard Chartered settled U.S. and state investigations into transactions with Iranian banks and corporations for \$667 million, entering into a deferred prosecution agreement with the U.S. Department of Justice in December 2012.⁴¹ That month, HSBC, another British bank, agreed to a \$1.92 billion settlement with U.S. authorities over allegations that it had also engaged in prohibited Iranian transactions, in addition to laundering money for Mexican drug cartels.⁴² Even as the BNP Paribas settlement was announced, U.S. authorities were in talks with German banks Commerzbank and Deutsche Bank to settle investigations into Iranian and Sudanese transactions, while investigations into French banks Crédit Agricole and Société Générale were still underway.⁴³

³⁵ Noémie Bisserbe, *Hollande Backs BNP Paribas in Letter to Obama*, WALL ST. J., June 4, 2014, at <http://online.wsj.com/articles/hollande-backs-bnp-paribas-in-letter-to-obama-1401885257>.

³⁶ Lori Hinnant, *Obama Deflects French Appeal in Massive Bank Fine*, ASSOCIATED PRESS, June 5, 2014, at <http://bigstory.ap.org/article/hollande-wants-discuss-bnp-bank-fine-obama>.

³⁷ William Horobin & Noémie Bisserbe, *France Pushes Back Against Possible U.S. \$10 Billion Fine on BNP Paribas: U.S. Alleges French Bank Breached Sanctions*, WALL ST. J., June 3, 2014, at <http://online.wsj.com/articles/frances-fabius-says-possible-10-billion-bnp-fine-unreasonable-1401783540>.

³⁸ William Horobin, *France Claims Victory in BNP Paribas Case*, WALL ST. J., July 1, 2014, at <http://online.wsj.com/articles/france-claims-victory-in-bnp-paribas-case-1404211120>.

³⁹ Mark Scott, *Sanction Costs*, N.Y. TIMES, Aug. 1, 2014, at B6; Noémie Bisserbe, *BNP Paribas Reports Record \$5.79 Billion Quarterly Loss*, WALL ST. J., July 31, 2014, at <http://online.wsj.com/articles/bnp-paribas-reports-record-5-79-billion-quarterly-loss-1406783037>.

⁴⁰ FINMA Press Release, *Inadequate Risk Management of US Sanctions: FINMA Closes Proceedings Against BNP Paribas (Suisse)* (July 1, 2014), at <https://www.finma.ch/e/aktuell/pages/mm-abschluss-verfahren-bnp-paribas-suisse-20140701.aspx>.

⁴¹ Mark Scott, *Standard Chartered Chairman Retracts Comments on Sanctions Settlement with U.S.*, N.Y. TIMES, Mar. 21, 2013, at <http://dealbook.nytimes.com/2013/03/21/standard-chartered-chairman-retracts-comments-on-sanctions-settlement>; see also Jessica Silver-Greenberg, *Standard Chartered Agrees to Settle Iran Money Transfer Claims*, N.Y. TIMES, Dec. 10, 2012, at <http://dealbook.nytimes.com/2012/12/10/standard-chartered-agrees-to-settle-iran-money-transfer-claims>.

⁴² Ben Protess & Jessica Silver-Greenberg, *Bank Said to Avoid Charges over Laundering*, N.Y. TIMES, Dec. 11, 2012, at A1.

⁴³ Jessica Silver-Greenberg & Ben Protess, *Scrutiny for Banks Is Shifting to Germany*, N.Y. TIMES, July 8, 2014, at B1.

These investigations of European banks by U.S. authorities for transactions that are legal in their home countries have generated criticism across Europe.⁴⁴ Detractors have charged that U.S. authorities are leveraging the unique position of the dollar as a global currency—effectively necessitating that all major banks conduct business through the United States—to police the conduct of financial institutions globally in pursuit of its foreign policy goals.⁴⁵ To avoid U.S. regulation, the governor of the French central bank suggested that Europe should start diversifying the currencies used in international trade.⁴⁶

D.C. Circuit Strikes down Administrative Order Requiring Divestment by Foreign-Owned Corporation

In *Ralls Corp. v. Committee on Foreign Investment in the United States*, the U.S. Court of Appeals for the D.C. Circuit held that a presidential order requiring a foreign-owned corporation to divest itself of all interests in a recently purchased U.S. wind farm group violated the Due Process Clause.¹ The court’s decision turned on the government’s failure to provide the foreign-owned corporation with an opportunity to either review or rebut unclassified evidence on which the president’s decision was based.²

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee created by the Defense Production Act of 1950.³ It is tasked with reviewing and approving “any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”⁴ The secretary of the Treasury serves as chairperson of CFIUS; other committee members include the heads of the Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy.⁵

CFIUS review “is initiated in one of two ways. First, any party to a covered transaction may initiate review, either before or after the transaction is completed, by submitting a written

⁴⁴ Brian Parkin & Birgit Jennen, *Merkel Ally Criticizes U.S. Sanctions-Busting Bank Fines*, BLOOMBERG, July 11, 2014, at <http://www.bloomberg.com/news/2014-07-11/merkel-ally-criticizes-u-s-sanctions-busting-bank-fines.html>; Ben Marlow, *Banks Under the Thumb of America, the Global Cop*, TELEGRAPH, July 6, 2014, at <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/10948081/Banks-under-the-thumb-of-America-the-global-cop.html>; *BNP Paribas in the Dock: No Way to Treat a Criminal*, ECONOMIST, July 5, 2014, at 12, available at <http://www.economist.com/node/21606279>; Jill Treanor, *US Regulators Have Britain’s ‘Wild West’ Bank Culture in Their Sights*, GUARDIAN, Aug. 7, 2012, at <http://www.theguardian.com/business/2012/aug/07/standard-chartered-joins-british-banks-in-us-sights>.

⁴⁵ See, e.g., Michael Stothard, *France Hits Out at Dollar Dominance in International Transactions*, FIN. TIMES, July 6, 2014, at <http://www.ft.com/intl/cms/s/0/883e7912-0513-11e4-b098-00144feab7de.html>; Neil Irwin, *In BNP Case, an Example of How Mighty the Dollar Is*, N.Y. TIMES, July 2, 2014, at B4.

⁴⁶ Mark Deen, *France’s Noyer Says BNP May Prompt Shift Away from Dollar*, BLOOMBERG, June 11, 2014, at <http://www.bloomberg.com/news/2014-06-11/ecb-s-noyer-says-bnp-may-prompt-shift-away-from-dollar.html>.

¹ *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296, 302 (D.C. Cir. 2014).

² *Id.*

³ *Id.* at 301.

⁴ 50 U.S.C. app. §2170(a)(3) (2012) (defining “covered transaction”).

⁵ U.S. Dep’t of the Treasury, The Committee on Foreign Investment in the United States (CFIUS) (Dec. 20, 2012), at <http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx>. In addition, CFIUS was created “pursuant to section 721 of the Defense Production Act (DPA) of 1950 [the Exon-Florio Amendment], as amended by the Foreign Investment and National Security Act of 2007 (FINSAs) (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800.” *Id.*

notice to the CFIUS chairman. Alternatively, CFIUS may initiate review *sua sponte*.⁶ CFIUS must then determine if “the transaction threatens to impair the national security of the United States and that threat has not been mitigated.”⁷ The statute defines *national security* as “those issues relating to ‘homeland security,’ including its application to critical infrastructure.”⁸ In addition,

If CFIUS finds that a covered transaction presents national security risks and that other provisions of law do not provide adequate authority to address the risks, then CFIUS may enter into an agreement with, or impose conditions on, parties to mitigate such risks or may refer the case to the President for action.⁹

The president “has fifteen days to ‘take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.’”¹⁰

In March 2012, Ralls Corporation—an American corporation owned by two Chinese nationals—purchased four American companies that were developing wind farms in Oregon.¹¹ On June 28, 2012, Ralls submitted notice to CFIUS informing it of the acquisition and arguing that the transaction did not pose a security threat.¹²

In response, CFIUS commenced an initial thirty-day review process as mandated by federal law¹³ during which it determined that the transaction did pose a threat to national security—apparently in part because, the Department of the Treasury later observed, the wind farm sites “are all within or in the vicinity of restricted air space at Naval Weapons Systems Training Facility Boardman in Oregon.”¹⁴ CFIUS therefore issued a temporary mitigation order, which required Ralls to “(1) cease all construction and operations at the Butter Creek project sites, (2) ‘remove all stockpiled or stored items from the [project sites] no later than July 30, 2012, and . . . not deposit, stockpile, or store any new items at the [project sites]’ and (3) cease all access to the project sites.”¹⁵

⁶ *Ralls Corp.*, 758 F.3d at 302 (citations and footnote omitted).

⁷ *Id.* at 303 (citing 50 U.S.C. app. §2170(b)(2)(A), (B)).

⁸ 50 U.S.C. app. §2170(a)(5). The statutory factors that CFIUS must consider in making this determination include the potential effects of the transaction on domestic production needed for national defense projects, the capacity of domestic industries to meet national defense requirements, and the impact on U.S. critical infrastructure. For a complete list of factors, see 50 U.S.C. app. §2170(f)(1)–(11).

⁹ U.S. Dep’t of the Treasury, *supra* note 5 (process overview).

¹⁰ *Ralls Corp.*, 758 F.3d at 303 (quoting 50 U.S.C. app. §2170(d)(1)).

¹¹ *Id.* at 304.

¹² *Id.* at 305.

¹³ 50 U.S.C. app. §2170(b)(1) (requiring an initial thirty-day investigation “to determine the effects of the transaction on the national security of the United States” and to decide whether “the covered transaction is [in fact] a foreign government-controlled transaction”).

¹⁴ Statement from the Treasury Department on the President’s Decision Regarding Ralls Corporation (Sept. 28, 2012), at <http://www.treasury.gov/press-center/press-releases/Pages/tg1724.aspx>; see also *Ralls Corp.*, 758 F.3d at 305 (“Neither the July Order nor the CFIUS Order disclosed the nature of the national security threat the transaction posed or the evidence on which CFIUS relied in issuing the orders.”); *id.* at 325 (“[A]s counsel for the [government] conceded at oral argument, other foreign-owned windfarms using foreign-made wind turbines operate without governmental interference near the same restricted airspace as the Butter Creek projects. We can thus infer therefrom that mere proximity of [the wind farms purchased by Ralls] to the restricted air space is not the only factor that precipitated the CFIUS Order.”).

¹⁵ *Ralls Corp.*, 758 F.3d at 305.

Five days later, CFIUS launched the second phase of its statutory investigation,¹⁶ during which it issued amended interim mitigation measures prohibiting Ralls from selling any of the project companies or their assets “without first removing all items (including concrete foundations) from the Butter Creek project sites, notifying CFIUS of the sale and giving CFIUS ten business days to object to the sale.”¹⁷ By its terms, the CFIUS order “remained in effect ‘until CFIUS concludes action or the President takes action under section 721 [to suspend or prohibit any covered transaction]’ or until express ‘revocation by CFIUS or the President.’”¹⁸ On September 13, 2012, CFIUS concluded its investigation and submitted its report and recommendations to the president, requesting his decision.¹⁹ President Barack Obama agreed that the transaction posed a threat to national security. He issued a presidential order requiring Ralls to “divest itself of all its interests in the [project], their assets and their operations,” and he revoked the CFIUS mitigation orders.²⁰

Prior to the presidential order, Ralls challenged the CFIUS order in federal district court under the Administrative Procedure Act and the Due Process Clause.²¹ Upon issuance of the presidential order, Ralls amended its complaint to challenge the presidential order and to include Obama as a defendant.²² The district court held that the presidential order mooted the original CFIUS determinations and dismissed claims against CFIUS on that basis.²³ The court then granted the government’s motion to dismiss Ralls’s challenge to the presidential order, holding that Ralls had no constitutionally protected property interest because it had “‘voluntarily acquired those state property rights subject to the known risk of a presidential veto.’”²⁴ The district court further held that, in any event, Ralls had been given due process when “CFIUS informed Ralls in June 2012 that the transaction had to be reviewed and gave Ralls the opportunity to submit evidence in its favor in its notice filing and during follow-up conversations with—and a presentation to—CFIUS officials.”²⁵

The D.C. Circuit reversed. It began by affirming the judicial reviewability of the due process claims pertaining to the CFIUS and presidential orders. The government argued that the court lacked jurisdiction because the Defense Production Act of 1950 explicitly states that the president’s decision on such matters “shall not be subject to judicial review.”²⁶ The court rejected this argument on the ground that “a statutory bar to judicial review precludes review of constitutional claims only if there is ‘clear and convincing’ evidence that the Congress so

¹⁶ *Id.* (citing 50 U.S.C. app. §2170(b)(2)). If the first phase of a CFIUS investigation demonstrates (inter alia) that a covered transaction either threatens national security or is a foreign government-controlled transaction, the statute requires CFIUS to “immediately conduct an investigation of the effects of a covered transaction on the national security of the United States, and take any necessary actions in connection with the transaction to protect the national security of the United States.” *Id.* (quoting 50 U.S.C. app. §2170(b)(2)).

¹⁷ *Id.*

¹⁸ *Id.* (quoting joint appendix).

¹⁹ *Id.*

²⁰ *Id.* at 306.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 307.

²⁴ *Id.* (quoting *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 987 F.Supp.2d 18, 27 (D.D.C. 2013)).

²⁵ *Id.*

²⁶ *Id.* at 307–08 (quoting 50 U.S.C. app. §2170(e)).

intended.”²⁷ Because the Supreme Court requires “the clearest evocation of congressional intent to proscribe judicial review of constitutional claims,”²⁸ the D.C. Circuit found the absence of any specific reference to stripping judicial review of *constitutional violations* to mean that the due process claim is reviewable.²⁹

The D.C. Circuit then rejected the government’s contention that the presidential order “raises a non-justiciable political question” involving a controversy that “revolve[s] around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”³⁰ The court further ruled that—while the President’s determination that the acquisition posed a national security threat could not be reviewed on substantive grounds—judicial review of the *process* by which that determination was made “does not encroach on the prerogative of the political branches, does not require the exercise of non-judicial discretion and is susceptible to judicially manageable standards.”³¹

From there, the court proceeded to address the merits of the case. It affirmed the district court’s ruling that Ralls’s purchase of the wind farms under state law created a property interest.³² But it rejected the lower court’s conclusion that the purchase was not constitutionally protected because it had been made “subject to the known risk of a presidential veto” and without seeking prior approval.³³ In the D.C. Circuit’s view, a party’s failure to seek administrative preapproval does not waive its right to challenge an agency determination “when the regulatory scheme expressly contemplates that a party to a covered transaction may request approval—if the party decides to submit a voluntary notice at all—either before *or after* the transaction is completed.”³⁴

Applying the *Mathews v. Eldridge* balancing test for procedural due process, the court then held that even in the national-security context, due process requires that the person affected by an executive decision be given notice of the decision and an opportunity to access and rebut the unclassified supporting evidence on which the decision was based.³⁵ Because Ralls was given neither notice nor an opportunity to rebut the unclassified evidence that its wind farm acquisition posed a national security threat, the D.C. Circuit held that Ralls’s Fifth Amendment due process rights had been violated.³⁶

Finally, the court addressed the issue of whether the presidential order rendered the CFIUS order moot as a matter of constitutional justiciability. In the district court, “[b]oth parties appear[ed] to acknowledge that Ralls’s CFIUS Order claims were mooted when the Presidential Order revoked the CFIUS Order and deprived it of any effect.”³⁷ However, Ralls argued the D.C. Circuit should review the claims under the “capable of repetition yet evading review”

²⁷ *Id.* at 308.

²⁸ *Id.* (quoting *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981)).

²⁹ *Id.* at 311.

³⁰ *Id.* at 312 (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (en banc)).

³¹ *Id.* at 314.

³² *Id.* at 315.

³³ *Id.* at 316 (quoting *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 987 F.Supp.2d 18, 27 (D.D.C. 2013)).

³⁴ *Id.* at 317.

³⁵ *Id.* at 318 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

³⁶ *Id.* at 319–20.

³⁷ *Id.* at 321.

exception to mootness.³⁸ The exception requires that “(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party will be subjected to the same action again.”³⁹ The court concluded that the CFIUS order was “too short-lived to obtain Supreme Court review and therefore evades review.”⁴⁰ Additionally, the court ruled that the CFIUS order was capable of repetition because Ralls voiced plans to buy additional wind farms across the United States, and there is “some likelihood’ CFIUS will again respond similarly in the future.”⁴¹

Ultimately the court remanded the case to the district court “with instructions that Ralls be provided the requisite process set forth herein, which should include access to the unclassified evidence on which the President relied and an opportunity to respond thereto.”⁴² The D.C. Circuit further noted that “because the CFIUS Order claims were dismissed on a jurisdictional ground, and given the scant merit briefing, we leave it to the district court to address the merits of Ralls’s remaining claims in the first instance.”⁴³

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

United States Adopts New Land Mine Policy

On June 27, 2014, the United States announced a change to its policy on the use of anti-personnel land mines,¹ bringing the country into closer alignment with a global treaty that prohibits the use and production of such weapons.² The announcement came five years after the Obama administration initially announced plans to review its land mine policy.³

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Treaty) prohibits signatories from using, possessing, or otherwise acquiring land mines.⁴ In the wake of the treaty’s adoption almost fifteen years ago, the use and production of land mines has almost completely ceased.⁵ Countries once contaminated by land mines have removed them, and almost forty-seven million land mines have been destroyed.⁶

³⁸ *Id.*

³⁹ *Id.* (quoting *Clarke v. United States*, 915 F.2d 699, 704 (D.C. Cir. 1990) (en banc)).

⁴⁰ *Id.* at 323.

⁴¹ *Id.* at 325 (quoting *Doe v. Sullivan*, 938 F.2d 1370, 1378–79 (D.C. Cir. 1991)).

⁴² *Id.*

⁴³ *Id.*

¹ See White House Press Statement, Fact Sheet: Changes to U.S. Anti-Personnel Landmine Policy (Sept. 23, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/23/fact-sheet-changes-us-anti-personnel-landmine-policy>.

² Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 UNTS 35597 (2002), 36 ILM 1507 (1997) [hereinafter Ottawa Treaty]. For more background on United States practice with respect to the Ottawa Treaty, see John Crook, *Contemporary Practice of the United States*, 104 AJIL 299 (2010) & 104 AJIL 524 (2010).

³ Rick Gladstone, *U.S. Chided for Delays over Treaty on Weapons*, N.Y. TIMES, June 26, 2014, at A6.

⁴ Ottawa Treaty, *supra* note 2.

⁵ Rick Gladstone, *Treaty Is Making Land Mines Weapon of Past, Group Says*, N.Y. TIMES, June 23, 2014, at A5.

⁶ *Id.*

The United States was one of the first states to call for such a treaty and has spent over \$2 billion in recent years to help other countries remove land mines and assist victims. And yet, the United States has so far refused to accede to the Ottawa Treaty.⁷ Under President Bill Clinton, the United States initiated discussions of a land mine ban at the Conference on Disarmament in January of 1997 that led to the Ottawa Treaty.⁸ Instead of signing the treaty immediately, the Clinton administration pledged to join it by 2006 if the U.S. Department of Defense could develop an adequate substitute weapon.⁹ The George W. Bush administration, however, officially abandoned that objective in 2004.¹⁰ Even though the United States has not produced land mines since 1997, the chairman of the Joint Chiefs of Staff recently affirmed that land mines are “an important tool in the arsenal of the United States.”¹¹

In June 2014, at the Third Review Conference for the Ottawa Treaty, held in Maputo, Mozambique, the United States officially announced a change to its land mine policy. In a statement released to the conference participants, Douglas Griffiths, the U.S. ambassador to Mozambique, stated:

The United States will not produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention in the future, including [replacing] such munitions as they expire in the coming years. Meanwhile, we are diligently pursuing other solutions that would be compliant with the Convention and that would ultimately allow us to accede to the Convention. We are also conducting a high fidelity modeling and simulation effort to ascertain how to mitigate the risks associated with the loss of anti-personnel landmines. Other aspects of our landmine policy remain under consideration, and we will share outcomes from that process as we are in a position to do so.

As always, the United States applauds the significant accomplishments to date by States Parties to the Ottawa Convention in addressing the humanitarian impact of anti-personnel landmines. We remain committed to a continuing partnership with States Parties and non-governmental organizations in this effort.¹²

In connection with the announcement, the U.S. Department of Defense disclosed that the United States has “an active stockpile of just over 3 million anti-personnel mines in the inventory.”¹³ The U.S. Department of State reiterated, however, that with the exception of a “single munition in Afghanistan in 2002,” the United States has not used land mines in more than two

⁷ *Id.*

⁸ U.S. Dep’t of State Fact Sheet, United States Announces Next Steps on Anti-Personnel Landmines (Jan. 17, 1997), at http://1997-2001.state.gov/www/global/arms/pm/hdp/fs_970117_landmine.html.

⁹ Steven Lee Myers, *Clinton Agrees to Land-Mine Ban, but Not Yet*, N.Y. TIMES, May 22, 1998, at <http://www.nytimes.com/1998/05/22/world/clinton-agrees-to-land-mine-ban-but-not-yet.html>; see also U.S. Dep’t of State Press Statement, U.S. Landmine Policy (Sept. 23, 2014), at <http://www.state.gov/t/pm/wra/c11735.htm>.

¹⁰ U.S. Dep’t of State Fact Sheet, Frequently Asked Questions on the New United States Landmine Policy (Feb. 27, 2004), at http://fas.org/asmp/campaigns/landmines/FactSheet_FAQ_NewUSLandminePolicy_2-27-04.htm.

¹¹ Defense Department Fiscal Year 2015 Budget Request, Hearing Before the H. Armed Servs. Comm., 113th Cong. (Mar. 6, 2014), available at <http://www.c-span.org/video/?318133-1/hearing-fy2015-defense-budget> (broadcasted testimony of Gen. Martin Dempsey, chairman of the Joint Chiefs of Staff (1:07:18)).

¹² Statement of Ambassador Douglas Griffiths, United States Embassy Maputo, Mozambique, to the Third Review Conference to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (June 27, 2014), available at http://www.maputoreviewconference.org/fileadmin/APMBC-RC3/friday/13_HIGH_LEVEL_SEGMENT_-_United_States.pdf.

¹³ U.S. Dep’t of Defense News Transcript, Department of Defense Press Briefing by Rear Adm. Kirby in the Pentagon Briefing Room (June 27, 2014), at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5455>.

decades.¹⁴ Democratic Senator Patrick Leahy, a long-standing advocate of banning anti-personnel land mines, called the policy change “incremental, but it is significant, because it finally makes official policy what has been informal fact for a decade and a half.”¹⁵ On the other side of the aisle, Republican Representative Buck McKeon—who chairs the House Armed Services Committee—criticized the president’s new policy on land mines for “[o]nce again . . . making an end-run around Congress and demonstrat[ing] [the president’s] willingness to place politics above the advice of our military leaders.”¹⁶

In September 2014 the Department of State announced an additional change in the United States’ land mine policy that moves the country closer to compliance with the Ottawa Treaty. The United States pledged not to use land mines outside of the Korean Peninsula, where “our actions are governed by the unique situation there,” and stated that “we will diligently undertake to destroy stockpiles of . . . landmines that are not required for the defense of the Republic of Korea.”¹⁷ Because Article 19 of the Ottawa Treaty categorically bans reservations,¹⁸ the new U.S. land mine policy does not yet appear to put the United States in a position to accede to this treaty.

USE OF FORCE AND ARMS CONTROL

United States Claims That Russia Has Violated the INF Treaty

On July 29, 2014, the U.S. Department of State issued its annual report to Congress regarding compliance by the United States and other states with arms control, nonproliferation, and disarmament agreements and commitments.¹ In addition to reporting treaty violations by Iran, North Korea, and Syria,² the report indicated that the United States had determined that the Russian Federation has not complied with its obligations under the Intermediate-Range Nuclear Forces Treaty (INF Treaty).³ Specifically, the Department of State reported that the

¹⁴ U.S. Dep’t of State Daily Press Briefing No. 114 (June 27, 2014), at <http://www.state.gov/t/pa/prs/dpb/2014/06/228539.htm#MISCELLANEOUS>.

¹⁵ Sen. Patrick Leahy Press Release, Reaction of Senator Patrick Leahy to the White House Announcement of Changes to U.S. Landmine Policy (June 27, 2014), at <http://www.leahy.senate.gov/press/reaction-of-senator-patrick-leahy-to-the-white-house-announcement-of-changes-to-us-landmine-policy>.

¹⁶ H. Armed Servs. Comm. Press Release, McKeon Statement on President Obama’s Land Mine Announcement (June 27, 2014), at http://armedservices.house.gov/index.cfm/press-releases?ContentRecord_id=6D8559E8-F04E-437E-9D0E-90BE372E529E (“General Dempsey has long declared the responsible land mines we use are an ‘important tool in the arsenal of the Armed Forces of the United States.’”).

¹⁷ U.S. Dep’t of State Press Statement, U.S. Landmine Policy (Sept. 23, 2014), at <http://www.state.gov/t/pa/prs/ps/2014/09/231995.htm>.

¹⁸ Ottawa Treaty, *supra* note 2, Art. 19.

¹ U.S. DEP’T OF STATE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS 1 (July 2014), available at <http://www.state.gov/documents/organization/230108.pdf> [hereinafter INF REPORT] (“This Report assesses U.S. adherence to obligations undertaken in arms control, nonproliferation, and disarmament agreements and related commitments, including Confidence- and Security-Building Measures (CSBMs) in 2013, as well as the adherence in 2013 of other nations to obligations undertaken in arms control, nonproliferation, and disarmament agreements and related commitments, including CSBMs and the Missile Technology Control Regime, to which the United States is a participating state.”). Publication of the report is required by statute. See 22 U.S.C. §2593a (2012).

² INF REPORT, *supra* note 1, at 14–17.

³ *Id.* at 8–10; White House Daily Press Statement, Press Briefing by Press Secretary Josh Earnest (July 29, 2014), at <http://www.whitehouse.gov/the-press-office/2014/07/29/press-briefing-press-secretary-josh-earnest-072914>.

Russian Federation had violated its obligations under the INF Treaty “not to possess, produce, or flight-test a ground-launched cruise missile (GLCM) with a range capability of 500 km to 5,500 km, or to possess or produce launchers of such missiles.”⁴ According to the report, the United States repeatedly raised these concerns with Russia in 2013 and seeks to resolve these issues diplomatically.⁵

Signed by President Ronald Reagan and Soviet Premier Mikhail Gorbachev on December 8, 1987, the INF Treaty was intended to eliminate intermediate-range and shorter-range missiles.⁶ The treaty defines *intermediate-range missile* as “a [ground-launched ballistic missile (GLBM)] or GLCM having a range capability in excess of 1000 kilometers but not in excess of 5500 kilometers.”⁷ The treaty further defines *shorter-range missile* as “a GLBM or a GLCM having a range capability equal to or in excess of 500 kilometers but not in excess of 1000 kilometers.”⁸ Widely acknowledged as a significant step in nuclear arms control, the treaty markedly reduced the level of military and political conflict between the United States and the Soviet Union during the Cold War.⁹ Indeed, the treaty’s exacting verification regime was designed to completely eliminate all declared INF systems within three years of the treaty’s entry into force and to ensure compliance with the total ban on the possession and use of these missiles.¹⁰

The July 2014 compliance report—which consists solely of unclassified information—does not identify any particular details regarding Russia’s alleged violations of the treaty.¹¹ The

Several months earlier, news reports had indicated that Russia had been testing a new ground-launched cruise missile as early as 2008. Michael R. Gordon, *U.S. Says Russia Tested Missile, Despite Treaty*, N.Y. TIMES, Jan. 30, 2014, at A1. In January 2014, the United States informed NATO allies about the missile tests but did not at that time formally declare that Russia had violated the INF Treaty. *Id.* When asked about the apparent gap between the identification of the violation and the submission of the formal report, a U.S. Department of State spokesperson said that “decisions need to be made in these cases based on whether these issues constitute noncompliance after a careful fact-based process, which includes diplomatic work, and through an interagency consideration process. That’s been ongoing.” U.S. Dep’t of State Daily Press Briefing No. 132 (July 29, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/07/1229907.htm>.

⁴ INF REPORT, *supra* note 1, at 8; *see also id.* at 9 (“A GLCM is defined as a ground-launched cruise missile that is a weapon delivery vehicle.”).

⁵ *Id.* at 10.

⁶ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, 27 ILM 90 (1988), available at <http://www.state.gov/www/global/arms/treaties/inf1.html#treaty> [hereinafter INF Treaty]; *see also* Marian Nash Leich, *Contemporary Practice of the United States*, 82 AJIL 341 (1988).

⁷ INF Treaty, *supra* note 6, Art. 2, para. 5.

⁸ *Id.*, Art. 2, para. 6.

⁹ *See, e.g.*, U.S. Dep’t of State, Remarks at the Annual Deterrence Symposium (Aug. 14, 2014), at <http://www.state.gov/t/us/2014/230636.htm> (remarks by Rose Gottemoeller, Undersecretary for Arms Control and International Security); Yuri Gavrilov, *Its “Tomahawk” Is Closer to the Body Than the United States to Answer Uncomfortable Questions About the Russian Missiles and Medium-Range*, ROSSIYSKAYA GAZETA, Aug. 14, 2014, at <http://www.rg.ru/2014/08/14/antonov.html> (interview with Anatoly Antonov); Steven Pifer, Op-Ed., *What Should Obama Do About Russia and the INF Treaty? Channel Reagan.*, L.A. TIMES, July 30, 2014, at <http://www.latimes.com/opinion/op-ed/la-oe-pifer-russia-missile-test-20140731-story.html>.

¹⁰ INF Treaty, *supra* note 6.

¹¹ *See* INF REPORT, *supra* note 1, at 1 (“In comparison to classified versions of the Report, this unclassified version may contain less detailed information, fewer compliance assessments, and findings phrased to safeguard sensitive or special reporting while at the same time fulfilling the Report’s statutory requirement.”). *But see* *USA Invites Russia to Discuss Elimination of Ballistic Missiles*, PRAVDA.RU, Aug. 21, 2014, at http://english.pravda.ru/news/world/21-08-2014/128337-usa_russia_missiles-0/#.U_egevdXk8 (“[T]he USA is likely to be concerned about experimental tests of ground missile complex RS-26 ‘Frontier’ (‘Rubezh’) dubbed as ‘the killer of missile defense,’ as well as tactical cruise missile R-500, used for Iskander K complexes.”); Hans M. Kristensen, *Russia Declared in Violation of INF Treaty: New Cruise Missile May Be Deploying*, FED’N AM. SCIENTISTS, July 30, 2014, at <http://>

Compliance Analysis section of the report, however, enumerates several provisions of the treaty with which Russia has failed to comply, most notably the Article I prohibition on the possession of intermediate-range and shorter-range missiles.¹² The Compliance Analysis section also claims that Russia has violated paragraph 1 of Article IV (providing that “the Parties shall not possess intermediate-range missiles and launchers of such missiles, or support structures and equipment of the categories listed in the Memorandum of Understanding associated with such missiles and launchers”); paragraph 1 of Article VI (providing that “no Party shall produce or flight-test any intermediate-range missiles or produce any stages or launchers of such missiles, or produce, flight-test, or launch any shorter-range missiles or produce any stages or launchers of such missiles”); paragraph 1 of Article VII (providing that “if a cruise missile has been flight-tested or deployed for weapon-delivery, all missiles of that type shall be considered to be weapon-delivery vehicles”); paragraph 2 of Article VII (providing that “if a GLCM is an intermediate-range missile, all GLCMs of that type shall be considered to be intermediate-range missiles”); paragraph 4 of Article VII (providing that “the range capability of a GLCM not listed in Article III of this Treaty shall be considered to be the maximum distance which can be covered by the missile in its standard design mode flying until fuel exhaustion, determined by projecting its flight path onto the earth’s sphere from the point of launch to the point of impact”); and paragraph 11 of Article VII (providing that “a cruise missile which is not a missile to be used in a ground-based mode shall not be considered to be a GLCM if it is test-launched at a test site from a fixed land-based launcher which is used solely for test purposes and which is distinguishable from GLCM launchers”).¹³ The United States has not publicly revealed the intelligence information or analysis that led to these allegations.¹⁴ But the Obama administration found the Russian Federation’s response to earlier discussions of these noncompliance issues to be “wholly unsatisfactory.”¹⁵

In addition to releasing the compliance report, President Barack Obama sent a letter to President Vladimir Putin addressing the violations in further detail.¹⁶ The White House subsequently confirmed that Russia’s noncompliance with the treaty is “a serious concern that we have raised with the Russians on a number of occasions through our standard diplomatic channels.”¹⁷ In turn, the White House has emphasized that it is “committed to the viability of the

fas.org/blogs/security/2014/07/russia-inf (noting that unconfirmed news media reports suggest that “Russia’s violation possibly concerns the Iskander-K weapon system, a modification of the Iskander launcher intended to carry two cruise missiles instead of two SS-26 Iskander-M ballistic missiles”); Alexey Eremenko, *Experts I.D. Russian Missile That U.S. Claims Breached Treaty*, MOSCOW TIMES, July 30, 2014, at <http://www.themoscowtimes.com/news/article/experts-i-d-russian-missile-that-u-s-claims-breached-treaty/504323.html> (stating that “deployment of Russia’s state-of-the-art R-500, a powerful missile that boasts a range of more than 2,000 kilometers, may be seen as a violation of the 1987 Intermediate-Range Nuclear Forces Treaty”). Reports have indicated that the R-500 cruise missile was first test-launched at Kapustin Yar in May 2007, and President Vladimir Putin allegedly “confirmed that ‘a new cruise missile test’ had been carried out.” Kristensen, *supra*. Reports further show great variation in the range estimates for the R-500, from 310 miles (500 km) to 1,243 miles (2,000 km), which may explain the significant length of time that the United States took to find a violation. *Id.*

¹² INF REPORT, *supra* note 1, at 9.

¹³ *Id.* at 9–10.

¹⁴ White House Daily Press Statement, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*; Michael R. Gordon, *Russians’ Test Called Breach of Missile Pact*, N.Y. TIMES, July 29, 2014, at A1; Felicia Schwartz, *U.S. Accuses Russia of Violating Arms Treaty*, WALL ST. J., July 28, 2014, at <http://online.wsj.com/articles/u-s-accuses-russia-of-violating-arms-treaty-1406601736>.

¹⁷ White House Daily Press Statement, *supra* note 3.

INF Treaty,” which remains “in the broad national security interest of every party that has agreed to that treaty,” including the United States, Russia, and eleven other successor states of the former Soviet Union.¹⁸ The U.S. Department of State has announced that “our goal is to convince Russia to return to compliance and to preserve the viability of this relationship and the efforts that have been underway for decades now.”¹⁹

On July 30, 2014, the Russian Ministry of Foreign Affairs responded to the American accusations that Russia had violated the INF Treaty.²⁰ The Ministry stated that the United States’ allegations were “unsupported” and without “any evidence.”²¹ The Ministry further noted that the problems regarding the implementation of the treaty were “not new” and “well-known to both parties.”²² Moreover, the Ministry indicated that the United States has itself jeopardized compliance with the treaty:

[W]e have a lot of claims to the United States in the context of the Treaty. These are tests of target-missiles of missile defence, which have similar characteristics to intermediate-range missiles, production of armed drones by the Americans, which evidently are covered by the definition of ground-launched cruise missiles in the Treaty. The topic of Mk-41 launch systems, which the United States intend to deploy in Poland and Romania within the framework of the implementation of their “stage-by-stage adaptive approach” to the deployment of a global missile defence, has been quite topical lately. These launch systems can launch intermediate-range cruise missiles, but their ground-launched version can be perceived as a direct violation of the INF Treaty.

We raised these concerns with the United States many times. Washington does not want to listen to us. In this issue, as well as other debatable ones, they only listen to themselves. However, we do not lose hope and hope to receive explanations from the United States regarding the nature of the questions asked by Russia, as well as a confirmation of their readiness to work jointly to ensure . . . the Treaty regime and to increase its viability.²³

On August 1, 2014, the Russian Foreign Ministry followed up with a new statement on the compliance report, focusing in particular on the lack of factual support in the United States’ allegations.²⁴ Positing that the United States’ charges of noncompliance constituted yet

¹⁸ *Id.*

¹⁹ U.S. Dep’t of State Daily Press Briefing No. 132, *supra* note 3.

²⁰ Ministry of Foreign Affairs of the Russian Federation, Comment by the Russian Ministry of Foreign Affairs Regarding the American Accusations That Russia Violates the INF Treaty (July 30, 2014), at http://www.mid.ru/bdcomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/a46210afcf9bbf3d44257d27005c8fc5!OpenDocument.

²¹ *Id.*

²² *Id.*

²³ *Id.* On July 31, 2014, General Valery Gerasimov, chief of the Russian General Staff, spoke with General Martin Dempsey, United States chairman of the Joint Chiefs of Staff, and “reaffirmed Russia’s adherence to strict implementation of the INF Treaty.” *Russian Military Reaffirms Strict Adherence to INF Treaty*, RIA NOVOSTI, July 31, 2014, at http://en.ria.ru/military_news/20140731/191540107/Russian-Military-Reaffirms-Strict-Adherence-to-INF-Treaty.html.

²⁴ Ministry of Foreign Affairs of the Russian Federation, Comments by the Russian Ministry of Foreign Affairs on the Report of the U.S. Department of State on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments (Aug. 1, 2014), at http://mid.ru/brp_4.nsf/0/D2D396AE143B098144257D2A0054C7FD (“Notably, the U.S. side, in its usual manner, provides no specific facts but rather replaced them, for some obscure reason, with a synopsis of the Treaty articles. Comments of the U.S. officials who refer to some ‘classified intelligence data’ also fail to clarify the essence of the U.S. claims. The value and the reliability of such references is largely compromised by the infamous story of the mythical ‘Iraqi weapons of mass destruction,’ which was publicly inflated by the Americans and then burst with a scandal.”).

“[a]nother attempt to discredit Russia [that] looks biased and outrageous,” the Russian Ministry declared that the “claims are hardly substantiated and are based on strange conclusions and conjectures, i.e. they are not meant for expert analysis.”²⁵ The Russian statement again raised doubts about the United States’ compliance with the Treaty:

We have told the U.S. representatives many times and say again that we have serious concerns about the use of targets with characteristics similar to those of intermediate and short-range missiles during missile defense tests. . . .

Washington, certainly, is aware of all these problems, but stubbornly refuses to discuss them substantially. This raises grave doubts about the sincerity of the U.S. official statements claiming its commitment to the goals and objectives of the INF Treaty, as well as its readiness for a real joint work with Russia to ensure adherence to the Treaty regime and increase its viability. The impression is that the purpose of artificial charges against Russia is to deflect attention from the listed US violations by creating some sort of a “smoke screen.”

. . . .

To sum it all up, the U.S. report may be considered as a list of far-fetched accusations of others with no attempts to reflect on their own actions.²⁶

The Russian Foreign Ministry responded similarly to a statement from the secretary general of NATO directing Russia to comply with the INF Treaty. Having been briefed by the United States on Russia’s alleged violation, the NATO secretary general issued a statement on July 30, 2014, that “Russia should work constructively to resolve this critical Treaty issue and preserve the viability of the INF Treaty by returning to full compliance in a verifiable manner.”²⁷ The Russian Foreign Ministry subsequently issued an official comment indicating that it was “quite surprised” at the secretary general’s statements and directing him to address other members of NATO instead of Russia itself regarding compliance concerns.²⁸ The comment reaffirmed Russia’s stance that “the main problems with its implementation occurred many times because of the United States,” specifically on account of the United States’ “launches of target-missiles of missile defense, armed drones, and Mk-41 systems, which can launch intermediate-range cruise missiles.”²⁹

On September 11, 2014, a U.S. delegation led by Undersecretary Rose Gottemoeller met with Russian Foreign Ministry officials to discuss issues regarding Russia’s alleged noncompliance with the INF Treaty.³⁰ The parties reconfirmed the significance of the treaty and their commitment to

²⁵ *Id.*

²⁶ *Id.*

²⁷ NATO, Statement by the Secretary General on the INF Treaty (July 30, 2014), at http://www.nato.int/cps/en/natolive/news_111823.htm?selectedLocale=en. The NATO secretary general further emphasized that the treaty “remains a key element of Euro-Atlantic security—one that benefits our mutual security and must be preserved.” *Id.*

²⁸ Ministry of Foreign Affairs of the Russian Federation, Comment by the Information and Press Department of the Russian Ministry of Foreign Affairs Regarding the Statement by the NATO Secretary General, Anders Fogh Rasmussen, on the INF Treaty (July 31, 2014), at http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/a852702835afcdc144257d27005d8898!OpenDocument.

²⁹ *Id.*

³⁰ U.S. Dep’t of State Daily Press Briefing (Sept. 9, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/09/231399.htm>; U.S. Dep’t of State Media Note, U.S.-Russia INF Treaty Compliance Meeting in Moscow (Sept. 11, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/09/231490.htm>; see also Michael R. Gordon, *U.S. Delegation Is*

its preservation.³¹ The concerns of the United States, however, “were not assuaged in this meeting.”³² Similarly, the Russian Foreign Ministry reported that “no satisfactory answers were given to Russia’s questions,”³³ and a Russian arms control official asserted that the United States was responsible for “improper fulfillment of the treaty in the least.”³⁴ Despite these continuing concerns, both sides reported that they “had a useful exchange of views”³⁵ and “agreed to continue dialogue to remove differences in a number of formats.”³⁶

to Visit Moscow to Review Claims of a Missile Violation, N.Y. TIMES, Sept. 8, 2014, at http://www.nytimes.com/2014/09/09/world/europe/us-delegation-is-to-visit-moscow-to-review-claims-of-a-missile-violation.html?_r=0.

³¹ U.S. Dep’t of State Media Note, U.S.-Russia INF Treaty Compliance Meeting in Moscow (Sept. 11, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/09/231490.htm>.

³² *Id.*

³³ Ministry of Foreign Affairs of the Russian Federation, Russian-US Consultations on the INF Treaty (Sept. 11, 2014), at http://www.mid.ru/bdomb/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/b26587b455160f3344257d51003656cd!OpenDocument [hereinafter Russian Foreign Ministry Comment].

³⁴ *Moscow Not Satisfied with U.S. Responses to Russia’s Concerns over Washington Observing INF Treaty, They Remain in Effect; Russia Recognizes No Violations After Itself—Russian Foreign Ministry*, INTERFAX NEWS, Sept. 11, 2014, at <http://www.interfax.com/news.asp?y=2014&m=9&d=11&pg=5>.

³⁵ U.S. Dep’t of State Media Note, *supra* note 31.

³⁶ Russian Foreign Ministry Comment, *supra* note 33; see also *Diplomat: Russia, US May Continue INF Treaty Talks, but Format Not Agreed Yet*, RIA NOVOSTI, Sept. 16, 2014, at <http://en.ria.ru/politics/20140916/192984730/Diplomat-Russia-US-May-Continue-INF-Treaty-Talks-But-Format-Not.html>.