

**DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW**

2017

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Editor

Office of the Legal Adviser
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Introduction

It is my pleasure to introduce the 2017 edition of the *Digest of United States Practice in International Law*. This volume reflects the work of the Office of the Legal Adviser during calendar year 2017, including the final weeks of the Obama Administration and the beginning of the Trump Administration. The State Department publishes the on-line *Digest* to make U.S. views on international law quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world. During most of this year, the Office was fortunate to be led by Principal Deputy Legal Adviser Richard Visek, and a number of excerpts from his remarks and presentations over the course of 2017 are included in this edition.

This volume features explanations of U.S. international legal views in 2017 delivered by representatives of the U.S. government. Secretary of State Rex Tillerson announced the conclusion that ISIS is responsible for genocide against Yezidis, Christians, and Shia Muslims in areas it controls or has controlled, as well as crimes against humanity and ethnic cleansing directed at these and other minority groups. Secretary Tillerson also spoke in 2017 on the crisis in Burma's Rakhine State, conveying the U.S. view that the situation in northern Rakhine state constitutes ethnic cleansing against Rohingya. U.S. Special Adviser Carlos Trujillo at the UN General Assembly's Sixth Committee expressed the U.S. commitment to accountability for atrocity crimes, and support for international, regional, hybrid, and domestic mechanisms that pursue this goal. And, Acting Legal Adviser Rich Visek also commemorated the closure of the International Criminal Tribunal for the former Yugoslavia. Mr. Visek spoke at the Assembly of States Parties of the International Criminal Court, reiterating the United States' long-standing and continuing objection to any ICC assertion of jurisdiction over nationals of States that are not parties to the Rome Statute, absent a UN Security Council referral or the consent of that State. Mr. Visek and Mark Simonoff, Minister Counselor for the U.S. Mission to the United Nations, expressed U.S. views on the work of the International Law Commission in 2017, including the topics of crimes against humanity, provisional application of treaties, general principles of law, evidence before international courts and tribunals, immunity of state officials, protection of the atmosphere, peremptory norms of general international law, succession of states in respect of state responsibility, and protection of the environment in relation to armed conflicts. The administration's views were also conveyed in Congressional communications, including several regarding the domestic and international legal bases for the campaign against al-Qa'ida and associated forces, including against the Islamic State of Iraq and Syria.

There were numerous developments in 2017 relating to U.S. international agreements, treaties and other arrangements. The President notified Congress of his intent to renegotiate the North American Free Trade Agreement ("NAFTA"). President Trump also announced the U.S. intent to withdraw from the Paris Agreement on climate change but to begin negotiations to reenter either the Paris Agreement or a new arrangement.

Additionally, the Administration pursued entry into new international obligations in a variety of areas. For example, Mr. Visek testified before the U.S. Senate on five treaties under consideration that had previously been transmitted: extradition treaties with Kosovo and Serbia; maritime boundary delimitation treaties with Kiribati and the Federated States of Micronesia; and the UN Convention on the Assignment of Receivables in International Trade. The United States entered into new arrangements, including Minute No. 323 to the 1944 Water Treaty with Mexico, outlining joint measures to address water shortages. Four agreements on preventing and combating serious crime entered into force in 2017, with Chile, Romania, New Zealand, and Cyprus. The United States signed new air transport agreements in 2017 with St. Vincent and the Grenadines and with the Kingdom of the Netherlands, in respect of Sint Maarten, and amended air transport agreements with Benin and Sri Lanka. The Minamata Convention on Mercury surpassed the requirement of 50 Parties for entry into force, and the Secretary of State signed the instrument of acceptance to join the 2012 amendments to the Gothenburg Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution. The United States deposited its instrument of ratification for three regional fisheries conventions. The Republic of Cabo Verde concluded a new Status of Forces Agreement (“SOFA”) with the United States. And, the United States ratified the protocol for Montenegro to join NATO.

The United States was very active in its relations with Cuba, concluding a bilateral Joint Statement on Migration that ended the so-called Wet Foot-Dry Foot policy for Cuban migrants; a bilateral treaty to delimit the maritime boundary in the eastern Gulf of Mexico; a bilateral search and rescue agreement; a bilateral agreement to prepare for and respond to oil spills and hazardous substance pollution in the Gulf of Mexico and the Straits of Florida; a bilateral Law Enforcement Memorandum of Understanding; and also convening the sixth meeting of the Bilateral Commission. Later in the year, the United States ordered the departure of non-emergency personnel assigned to the U.S. Embassy in Havana, Cuba, due to health-related attacks on embassy employees, and President Trump signed the National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba (“NSPM”). With respect to the Democratic People’s Republic of Korea (“DPRK”), the Secretary of State designated the DPRK as a State Sponsor of Terrorism in November. In its relations with Russia, the State Department announced that it would require the closure of specified facilities in New York, Washington, D.C., and San Francisco in response to Russia’s invocation of parity to reduce the size of the United States presence in Russia. Several provisions in the Countering America’s Adversaries through Sanctions Act of 2017 (“CAATSA”) relate to, and provide for mandatory sanctions in connection with, Russia. In December, the President issued Proclamation 9683, “Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United State Embassy to Israel to Jerusalem.” The United States condemned the government of Venezuela in several ways including Executive Order 13808, “Imposing Additional Sanctions With Respect to the Situation in Venezuela.” And, recognizing the progress made by the government of Sudan under the Five Track Engagement Plan, including the cessation of aerial bombings and military offensives in Darfur, the United States revoked certain longstanding economic sanctions on Sudan.

In the area of human rights, the United States appeared before the UN Committee on the Rights of the Child in Geneva in May to answer the Committee’s questions with respect to the 2016 U.S. periodic report on its implementation of the two Optional Protocols to the Convention on the Rights of the Child to which the United States is a party. The United States made two submissions to the Committee Against Torture on the Draft Revised General Comment on the implementation of Article 3 of the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, including a joint submission with the governments of the United Kingdom, Canada, and Denmark. The United States government issued its fifth annual report on implementation of the Magnitsky Act, cumulatively listing the 49 persons sanctioned for their involvement in gross violation of human rights or in the conspiracy that led to the death of Sergei Magnitsky. The first report under the Global Magnitsky Human Rights Accountability Act, authorizing the President to impose financial sanctions and visa restrictions on foreign persons in response to certain gross human rights violations and acts of corruption was released in June of 2017 and in December, the President issued E.O. 13818, to further implement the Global Magnitsky Act.

The U.S. government also participated in litigation and arbitration involving issues related to foreign policy and international law in 2017. The United States filed a brief in the Supreme Court of the United States in *Water Splash, Inc. v. Menon*, asserting that the Hague Service Convention authorizes service of process by mail—and, the Supreme Court agreed in its decision later in the year. The United States successfully opposed the petition for certiorari in *Morfin v. Tillerson*, concerning the reviewability of a consular officer’s decision to deny an immigrant visa to an alien believed to have been “an illicit trafficker in any controlled substance.” The Supreme Court held in *Morales-Santana* that the differing requirements for unwed mothers and fathers to transmit citizenship to their child violate the equal protection clause, but did not apply the shorter one-year period to fathers. The Supreme Court also held that the provisions of Executive Order 13780, “Protecting the Nation From Foreign Terrorist Entry Into the United States,” could be implemented to a large extent. The United States filed a brief in the U.S. Supreme Court in *Jesner v. Arab Bank*, asserting that a corporation can be a defendant in an action under the Alien Tort Statute. The U.S. brief in *Ali v. Warfaa* recommended that certiorari be denied because both the Fourth Circuit and the Executive Branch had concluded that Ali was not entitled to immunity. In *Hernandez v. Mesa*, a damages action for the death of a Mexican national in a shooting across the U.S. border with Mexico by a U.S. Border Patrol Agent, the U.S. brief was filed in the Supreme Court in January and the Supreme Court decided to remand for further proceedings in light of an opinion the Supreme Court had recently rendered on the availability of a tort remedies under *Bivens* (*Ziglar v. Abbasi*). The Supreme Court also decided *Venezuela v. Helmerich & Payne*, addressing the jurisdictional standard under the Foreign Sovereign Immunity Act (“FSIA”) in a case involving the expropriation exception to immunity. The U.S. briefs in *Bennett* and *Rubin* recommended the Court deny certiorari in *Bennett* but grant it in *Rubin* to determine whether §1610(g) of the FSIA creates a freestanding exception to attachment immunity. In the world of arbitration, in August, the United States filed its Response to Iran’s Brief and Evidence in Case A/11 before the Iran-U.S. Claims Tribunal. The United States also participated in an International Civil Aviation Organization dispute settlement proceeding with Brazil under Article 84 of the Chicago

Convention. The United States made non-disputing party submissions in dispute settlement proceedings in several cases in 2017 under NAFTA as well as the United States-Panama Trade Promotion Agreement, and the U.S.-Uruguay Bilateral Investment Treaty (“BIT”).

The *Digest* also discusses U.S. participation in international organizations, institutions, and initiatives. In the UN Security Council, the United States joined in ratcheting up sanctions on the DPRK in response to its nuclear activities, via Resolutions 2371, 2375 and 2397. The United States withdrew from the UN Educational, Scientific, and Cultural Organization (UNESCO) in 2017; it continued its active participation in the Organization of American States’ Inter-American Commission on Human Rights through written submissions and participation in a number of hearings. The United States acted both unilaterally and multilaterally to protect cultural heritage, imposing emergency import restrictions on certain archaeological and ethnological materials from Libya, joining in a G7 ministerial on culture, and joining in adopting UN Security Council Resolution 2347 on the destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict.

It is my hope that this collection will contribute to the codification and development of international law, and in particular that it will show that the United States continues to play a leading role in promoting, protecting, and respecting international law around the world.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2017 volume, attorneys whose voluntary contributions to the *Digest* were particularly significant include Henry Azar, James Bischoff, Julianna Bentes, Paul Dean, Steve Fabry, Brian Finucane, Monica Jacobsen, Michael Jacobsohn, Meredith Johnston, Emily Kimball, Jeffrey Kovar, Oliver Lewis, Lorie Nierenberg, Megan O’Neill, Cassie Peters, Shana Rogers, Tim Schnabel, Gabriel Swiney, Charles Trumbull, Thomas Weatherall, Niels von Deuten, and Vanessa Yorke. Sean Elliott at the Foreign Claims Settlement Commission also provided valuable input. I express very special thanks to Joan Sherer, the Department’s Senior Law Librarian, and to Jerry Drake and Rickita Smith for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

Jennifer Newstead
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Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2017 is published exclusively on-line on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the timely release of this year's *Digest*.

The 2017 volume follows the general organization and approach of past volumes. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Introductions (in Calibri font) prepared by the editor are distinguishable from excerpts (in Times Roman font), which come from the original sources. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs. Bracketed insertions indicate editorial clarification or correction to the original text.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through May 2018) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2018 where they relate to the discussion of developments in 2017.

Updates on most other 2018 developments are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross-references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet citation in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, at www.state.gov/s/l/c8183.htm, where links to the documents are organized by the chapter in which they are referenced.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at <http://www.un.org/en/documents/ods/>. For UN-related information generally, the UN's home page at www.un.org also remains a valuable source. Resolutions of the UN Human Rights Council can be retrieved most readily by using the search function on the Human Rights Council's website, at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Documents.aspx>. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

The U.S. Government Printing Office (“GPO”) provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at <https://www.govinfo.gov>, is GPO’s online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President’s transmittal of treaties to the Senate for advice and consent, with related materials), available at <https://www.govinfo.gov/app/collection/CDOC>, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at <https://www.govinfo.gov/app/collection/CRPT>. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at <http://www.state.gov/s/l/treaty> and the Library of Congress provides extensive treaty and other legislative resources at <https://www.congress.gov>.

The U.S. government’s official web portal is <https://www.usa.gov>, with links to government agencies and other sites; the State Department’s home page is <http://www.state.gov>.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

- U.S. Court of Appeals for the District of Columbia Circuit:
<https://www.cadc.uscourts.gov/bin/opinions/allopinions.asp>;
- U.S. Court of Appeals for the First Circuit:
<http://www.ca1.uscourts.gov/opinions/>;
- U.S. Court of Appeals for the Second Circuit:
<http://www.ca2.uscourts.gov/decisions.html>;
- U.S. Court of Appeals for the Third Circuit:
<http://www.ca3.uscourts.gov/search-opinions>;
- U.S. Court of Appeals for the Fourth Circuit:
<http://www.ca4.uscourts.gov/opinions/search-opinions>;
- U.S. Court of Appeals for the Fifth Circuit:
<http://www.ca5.uscourts.gov/electronic-case-filing/case-information/current-opinions>;
- U.S. Court of Appeals for the Sixth Circuit:
<http://www.ca4.uscourts.gov/opinions/search-opinions>;
- U.S. Court of Appeals for the Seventh Circuit:
<http://media.ca7.uscourts.gov/opinion.html>;
- U.S. Court of Appeals for the Eighth Circuit:
<http://www.ca8.uscourts.gov/all-opinions>;
- U.S. Court of Appeals for the Ninth Circuit:
www.ca9.uscourts.gov/opinions/ (opinions) and
www.ca9.uscourts.gov/memoranda/ (memoranda and orders—unpublished dispositions);

U.S. Court of Appeals for the Tenth Circuit:
<http://www.ca10.uscourts.gov/clerk/opinions/daily>;
U.S. Court of Appeals for the Eleventh Circuit:
<http://www.ca11.uscourts.gov/published-opinions>;
U.S. Court of Appeals for the Federal Circuit:
<http://www.cafc.uscourts.gov/opinions-orders/0/all>.

The official U.S. Supreme Court website is maintained at www.supremecourtus.gov. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at <https://www.justice.gov/osg>. Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records (“PACER”) service. Other links to individual federal court websites are available at <http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links>.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

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