

move, it would have “preferred another decision” and wants to focus on confronting dissidents moving forward.<sup>34</sup> Vice President Marta Lucía Ramírez issued a statement assuring the public that the FARC would not be forgiven for its past crimes or terrorism.<sup>35</sup>

The delisting also drew criticism from some Republicans in Congress, most notably Florida lawmakers who have a sizeable number of Colombian Americans in their constituent base. Senators Marco Rubio (R-FL) and Rick Scott (R-FL) sent a letter to President Biden stating that the decision is “counterproductive” to the goal of a “peaceful and prosperous Colombia” and “emboldens and enables those FARC members who reject any and all attempts at peace.”<sup>36</sup> Rep. María Elvira Salazar (R-FL) called the delisting decision a “slap in the face for the Colombian people,”<sup>37</sup> and along with Rep. Dan Crenshaw (R-TX), she introduced a bill entitled the No Foreign Adversaries Residing in Our Communities Act (No FARC Act) to restrict admission of former FARC members into the United States.<sup>38</sup>

#### INTERNATIONAL ORGANIZATIONS

##### *United States Re-elected to UN Human Rights Council*

doi:10.1017/ajil.2022.11

On October 14, 2021, the United States was elected to the UN Human Rights Council (HRC), fulfilling a pledge President Joseph R. Biden Jr. made during the 2020 campaign,<sup>1</sup> and marking a reversal from the Trump administration’s withdrawal from the Council in 2018. While continuing to highlight concerns with the Council, including the membership of human rights violators and a substantive focus on Israel, the Biden administration has

<sup>34</sup> Steven Grattan, *What Next After Colombia’s FARC Removed from US “Terrorist” List?*, AL JAZEERA (Dec. 1, 2021), at <https://www.aljazeera.com/news/2021/12/1/what-next-after-colombia-farc-removed-from-us-terrorist-list>.

<sup>35</sup> “*El Terrorismo No Se Puede Perdonar*”: Marta Lucía Ramírez Sobre Exclusión de Farc de Lista de Terroristas, SEMANA (Nov. 30, 2021), at <https://www.semana.com/nacion/articulo/el-terrorismo-no-se-puede-perdonar-marta-lucia-ramirez-sobre-exclusion-de-farc-de-lista-de-terroristas/202149> (“Para nosotros es claro que las Farc, mientras funcionaron como organización, siempre fueron consideradas como un grupo terrorista. En la medida en que el acuerdo firmado con el expresidente Juan Manuel Santos, supuestamente dio por terminado ese grupo, pues la decisión del Departamento de Estado reconoce que ya no existen como grupo, aunque eso no significa que las actividades de todos y cada uno de ellos hayan sido delincuenciales y de terrorismo.”).

<sup>36</sup> Office of U.S. Senator Marco Rubio Press Release, Rubio and Scott to POTUS: We Strongly Disagree with Your Decision to Delist the FARC as a Foreign Terrorist Organization (Dec. 1, 2021), at <https://www.rubio.senate.gov/public/index.cfm/2021/12/rubio-and-scott-to-potus-we-strongly-disagree-with-your-decision-to-delist-the-farc-as-a-foreign-terrorist-organization> [<https://perma.cc/XG5A-YGU9>].

<sup>37</sup> Vanessa Vallejo, *Reps. Salazar and Crenshaw Against FARC Members: Push to Deny Them Visas*, EL AMERICAN (Dec. 9, 2021), at <https://elamerican.com/reps-salazar-and-crenshaw-against-farc-members-push-to-deny-them-visas>.

<sup>38</sup> *Id.*; No Foreign Adversaries Residing in our Communities Act, H.R. 6237, 117th Cong. (2021).

<sup>1</sup> Rick Gladstone, *U.S. Regains Seat at U.N. Human Rights Council, 3 Years After Quitting*, N.Y. TIMES (Oct. 14, 2021), at <https://www.nytimes.com/2021/10/14/world/un-us-human-rights-council.html>; U.S. Dep’t of State Press Release, Election of the United States to the UN Human Rights Council (HRC) (Oct. 14, 2021), at <https://www.state.gov/election-of-the-united-states-to-the-un-human-rights-council-hrc> [<https://perma.cc/29E4-Z4WJ>]; see also Katie Rogers, *Biden Administration Moves to Rejoin U.N. Human Rights Council* (Feb. 7, 2021), at <https://www.nytimes.com/2021/02/07/us/politics/human-rights-council-biden-administration.html>.

emphasized that the Council plays a role in protecting human rights and provides an important forum for discussion.

U.S. policy toward the HRC has shifted several times. When the UN General Assembly established the Human Rights Council in 2006,<sup>2</sup> the Bush administration voted against the Council's creation and did not run for a seat.<sup>3</sup> However, when the Obama administration took office, the United States sought and was elected to a seat in May 2009.<sup>4</sup> Throughout the Obama administration, the United States actively participated in the Council's work, particularly in advocacy for LGBTQ rights.<sup>5</sup> After President Trump took office, U.S. officials signaled skepticism about the Council, calling for keeping countries that engage in human rights abuses off the Council and for removing an agenda item focused on Israel.<sup>6</sup> On June 19, 2018—one day after the UN High Commissioner for Human Rights criticized the Trump administration's policy of forcibly separating undocumented families at the U.S. border—the United States announced its withdrawal from the Council.<sup>7</sup> As part of President Biden's efforts to reengage with international institutions from which the Trump administration had withdrawn, Secretary of State Antony Blinken announced in February 2021 that the United States would seek election to the Human Rights Council later in the year and in the meantime would engage with the Council as an observer, seeking to improve the Council from within.<sup>8</sup>

The Biden administration demonstrated its commitment to engagement with the Council over the summer of 2021. The UN High Commissioner for Human Rights filed with the Council a report, focusing in part on the United States, on "Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers."<sup>9</sup> The HRC responded by establishing a three-member body of experts on law enforcement and human rights with a "three-year mandate to investigate the root causes and effects of systemic racism in policing, including the legacies of slavery and colonialism, and to make recommendations for change."<sup>10</sup> The same day, Blinken issued a statement announcing:

<sup>2</sup> LUISA BLANCHFIELD & MICHAEL A. WEBER, CONG. RES. SERV., RL33608, THE UNITED NATIONS HUMAN RIGHTS COUNCIL: BACKGROUND AND POLICY ISSUES 1 (2021), available at <https://sgp.fas.org/crs/row/RL33608.pdf>.

<sup>3</sup> Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 745, 746 (2018).

<sup>4</sup> UN Gen. Assembly Press Release, United States Elected to Human Rights Council for First Time, with Belgium, Hungary, Kyrgyzstan, Norway as 18 Seats Filled in Single Round of Voting, UN Doc. GA/10826 (May 12, 2009), at <https://www.un.org/press/en/2009/ga10826.doc.htm>.

<sup>5</sup> See, e.g., White House Press Release, Fact Sheet: Obama Administration Leadership on International Human Rights (Dec. 4, 2013), at <https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/fact-sheet-obama-administration-leadership-international-human-rights> [<https://perma.cc/44VV-AMDF>]; White House Press Release, Fact Sheet: Promoting and Protecting the Human Rights of LGBT Persons (June 19, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/06/29/fact-sheet-promoting-and-protecting-human-rights-lgbt-persons> [<https://perma.cc/7V77-F7BJ>].

<sup>6</sup> Galbraith, *supra* note 3, at 746–47.

<sup>7</sup> *Id.* at 747–49.

<sup>8</sup> Kristen E. Eichensehr, Contemporary Practice of the United States, 115 AJIL 310, 326–27 (2021).

<sup>9</sup> Rep. of the UN High Comm'r for Hum. Rts., UN Doc. A/HRC/47/53 (June 1, 2021), at <https://undocs.org/en/A/HRC/47/53>; see also Rep. of the Hum. Rts. Council, UN Doc. A/HRC/47/CRP.1 (June 28, 2021), available at [https://www.ohchr.org/Documents/Issues/Racism/A\\_HRC\\_47\\_CRP\\_1.pdf](https://www.ohchr.org/Documents/Issues/Racism/A_HRC_47_CRP_1.pdf).

<sup>10</sup> Nick Cumming-Bruce, *U.N. to Form Panel to Investigate Systemic Racism in Policing*, N.Y. TIMES (July 13, 2021), at <https://www.nytimes.com/2021/07/13/world/united-nations-panel-human-rights-council-racism.html>;

The United States intends to issue a formal, standing invitation to all UN experts who report and advise on thematic human rights issues. As a first step, we have reached out to offer an official visit by the UN Special Rapporteur on contemporary forms of racism and the UN Special Rapporteur on minority issues. I also welcome the UN Human Rights Council's adoption today in Geneva of a resolution to address systemic racism against Africans and people of African descent in the context of law enforcement. I look forward to engaging with the new mechanism to advance racial justice and equity.

Responsible nations must not shrink from scrutiny of their human rights record; rather, they should acknowledge it with the intent to improve.<sup>11</sup>

On October 14, the United States was reelected to the HRC for a term beginning January 1, 2022, receiving 168 votes in the UN General Assembly.<sup>12</sup> The Council's forty-seven seats are allocated by geographic region, and membership requires a majority vote by secret ballot in the UN General Assembly, with elected states serving a three-year term.<sup>13</sup> Along with the United States, the countries elected to the Council in the most recent election are Argentina, Benin, Cameroon, Eritrea, Finland, The Gambia, Honduras, India, Kazakhstan, Lithuania, Luxembourg, Malaysia, Montenegro, Paraguay, Qatar, Somalia, and the United Arab Emirates.<sup>14</sup> They will join twenty-nine existing members states, including China and Russia.<sup>15</sup>

After the election, Biden noted that he “look[s] forward to the United States once more being a constructive voice that works to help push the Human Rights Council to live up to its mandate and to protect the values we hold dear for all people.”<sup>16</sup> Blinken “thank[ed] the UN Member States for affording the United States the opportunity to serve again on the” Council, while noting both the Council's important role and ongoing U.S. concerns with the body:

The Council plays a meaningful role in protecting human rights and fundamental freedoms by documenting atrocities in order to hold wrongdoers accountable. It focuses attention on emergencies and unfolding human rights crises, ensuring that those who are voiceless have a place to be heard. The Council provides a forum where we can have open discussions about ways we and our partners can improve. At the same time,

*see also* Off. of the UN High Comm'r for Hum. Rts. Press Release, Human Rights Council Concludes Forty-Seventh Regular Session After Adopting 25 Resolutions and 2 Decisions (July 14, 2021), at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27310&LangID=E> [<https://perma.cc/7A76-KK96>].

<sup>11</sup> U.S. Dep't of State Press Release, U.S. Leadership on Human Rights and Ending Systemic Racism (July 13, 2021), at <https://www.state.gov/u-s-leadership-on-human-rights-and-ending-systemic-racism> [<https://perma.cc/FDR3-FGFP>].

<sup>12</sup> Tess McEvoy, *HRC: Results Show Need for Competition in Human Rights Council Elections*, INT'L SERV. HUM. RTS. (Oct. 14, 2021), at <https://ishr.ch/latest-updates/hrc-results-show-need-for-competition-in-human-rights-council-elections> [<https://perma.cc/LN9C-X9NP>].

<sup>13</sup> GA Res. 60/251, para. 7 (Apr. 3, 2006).

<sup>14</sup> United Nations, Election of the Human Rights Council (14, October 2021), at <https://www.un.org/en/ga/76/meetings/elections/hrc.shtml>.

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

<sup>16</sup> White House Press Release, Statement by President Joseph R. Biden, Jr. on the United States Election to the Human Rights Council (HRC) (Oct. 14, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/14/statement-by-president-joseph-r-biden-jr-on-the-united-states-election-to-the-human-rights-council-hrc> [<https://perma.cc/9B3K-7RCC>].

it also suffers from serious flaws, including disproportionate attention on Israel and the membership of several states with egregious human rights records. Together, we must push back against attempts to subvert the ideals upon which the Human Rights Council was founded, including that each person is endowed with human rights and that states are obliged to protect those rights.<sup>17</sup>

U.S. Ambassador to the United Nations Linda Thomas-Greenfield provided more details on the U.S. goals for the Council, explaining:

Our initial efforts as full members in the Council will focus on what we can accomplish in situations of dire need, such as in Afghanistan, Burma, China, Ethiopia, Syria, and Yemen. More broadly, we will promote respect for fundamental freedoms and women's rights, and oppose religious intolerance, racial and ethnic injustices, and violence and discrimination against members of minority groups, including LGBTQI+ persons and persons with disabilities. And we will oppose the Council's disproportionate attention on Israel, which includes the Council's only standing agenda item targeting a single country.

Finally, we will press against the election of countries with egregious human rights records and encourage those committed to promoting and protecting human rights both in their own countries and abroad to seek membership. We hold others to our own standard: while we may sometimes fall short of our own ideals, we must constantly strive to be as inclusive, rights respecting, and free as possible.<sup>18</sup>

The most recent election cycle prompted some criticism. Senate Foreign Relations Committee Ranking Member Sen. Jim Risch (R-ID) called the election "a sham," because every newly elected member ran unopposed, and he further noted that "[t]he United States should not be lending its legitimacy to a body that includes perpetrators of human rights abuses like China, Venezuela, and Cuba."<sup>19</sup> These criticisms echo complaints from non-governmental organizations. Human Rights Watch, for example, argued that "[a] noncompetitive United Nations election for Human Rights Council members virtually guarantees seats for candidate countries with abysmal rights records," and urged countries to deny states with problematic human rights records the requisite majority General Assembly vote required for HRC membership.<sup>20</sup>

The Biden administration nominated Michèle Taylor to serve as ambassador to HRC on October 21, 2021,<sup>21</sup> and the Senate confirmed her in a voice vote on February 17,

<sup>17</sup> U.S. Dep't of State Press Release, *supra* note 1.

<sup>18</sup> U.S. Mission to the UN Press Release, Statement by Ambassador Linda Thomas-Greenfield on the Election of the United States to the Human Rights Council (Oct. 14, 2021), at <https://usun.usmission.gov/statement-by-ambassador-linda-thomas-greenfield%E2%80%AFon-the-election-of-the-united-states-to-the-human-rights-council> [<https://perma.cc/KY4Q-TPY2>].

<sup>19</sup> U.S. Senate Comm. on Foreign Rel. Press Release, Risch: Rejoining the UNHRC Is a Disgrace (Oct. 14, 2021), at <https://www.foreign.senate.gov/press/ranking/release/risch-rejoining-the-unhrc-is-a-disgrace> [<https://perma.cc/E48G-GDBH>].

<sup>20</sup> Human Rts. Watch, *UN: Noncompetitive Rights Council Election Aids Abusers* (Oct. 12, 2021), at <https://www.hrw.org/news/2021/10/12/un-noncompetitive-rights-council-election-aids-abusers>.

<sup>21</sup> White House Press Release, President Biden Announces Key Nominations (Oct. 21, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/21/president-biden-announces-key-nominations-7> [<https://perma.cc/T2S2-YV3E>].

2022,<sup>22</sup> just before the opening of the HRC’s forty-ninth session, scheduled from February 20 to April 1.<sup>23</sup> In remarks to the Council on March 1, Blinken condemned Russia’s invasion of Ukraine and praised the Council’s “decision to hold an urgent debate on the crisis,” while also highlighting other areas “where the Council’s attention is needed,” including Belarus, China, and Afghanistan.<sup>24</sup> Blinken further pledged that the United States will focus on strengthening economic, social, and cultural rights as well as civil and political rights, work to “counter anti-Israel bias,” and “keep fighting for the human rights of LGBTQI+ people; people with disabilities; members of racial, ethnic, and religious minorities; women and girls; and all marginalized populations and people in vulnerable situations.”<sup>25</sup>

#### INTERNATIONAL ECONOMIC LAW

##### *United States Makes Efforts to Curb Misuse of Surveillance Technology*

doi:10.1017/ajil.2022.13

In November 2021, following numerous reports of misuse, the Biden administration placed surveillance technology companies—including the Israeli firm NSO Group—on the Commerce Department’s Entity List,<sup>1</sup> a designation that “prohibits export from the United States to NSO of any type of hardware or software, severing the company from a vital source of technology.”<sup>2</sup> So-called “spyware,” such as the NSO Group’s Pegasus software, is used to hack into mobile devices, “secretly harvest[ing] all of the data on a phone and deploy[ing] the microphone and camera.”<sup>3</sup> Although surveillance technology companies assert that they sell software to governments for use in criminal and terrorism investigations, investigative reporting has revealed numerous instances of misuse of surveillance technology to spy on journalists, lawyers, and activists, among others. WhatsApp and Apple have sued NSO Group in U.S. federal court for exploiting their platforms to spy on users, and through measures like the Entity List, the Biden administration is attempting to curb the misuse of surveillance technology. Congress has also taken steps to restrict the use of spyware, including

<sup>22</sup> PN1296 - Nomination of Michele Taylor for Department of State, 117th Congress (2021–2022), PN1296, 117th Cong. (2022), at <https://www.congress.gov/nomination/117th-congress/1296>.

<sup>23</sup> Human Rights Council, Agenda and Annotations, UN Doc. A/HRC/49/1 (Jan. 17, 2022), at <https://undocs.org/A/HRC/49/1>.

<sup>24</sup> U.S. Dep’t of State Press Release, Remarks at the UN Human Rights Council 49th Session (Mar. 1, 2022), at <https://www.state.gov/remarks-at-the-un-human-rights-council-49th-session> [<https://perma.cc/656C-V5FG>].

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

<sup>1</sup> U.S. Dep’t of Commerce Press Release, Commerce Adds NSO Group and Other Foreign Companies to Entity List for Malicious Cyber Activities (Nov. 3, 2021), at <https://www.commerce.gov/news/press-releases/2021/11/commerce-adds-nso-group-and-other-foreign-companies-entity-list> [<https://perma.cc/SC22-D2XM>].

<sup>2</sup> Drew Harwell, Ellen Nakashima & Craig Timberg, *Biden Administration Blacklists NSO Group Over Pegasus Spyware*, WASH. POST (Nov. 3, 2021), at <https://www.washingtonpost.com/technology/2021/11/03/pegasus-nso-entity-list-spyware/>.

<sup>3</sup> Julie Bloch, Sukti Dhital, Rashmika Nedungadi & Nikki Reisch, *CTRL+HALT+Defeat: State-Sponsored Surveillance and the Suppression of Dissent*, JUST SECURITY (May 15, 2019), at <https://www.justsecurity.org/64095/ctrlhaltdefeat-state-sponsored-surveillance-and-the-suppression-of-dissent>.