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Contemporary Practice of the United States Relating to International Law (114:2 Am J Int'l L)

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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY JEAN GALBRAITH*

In this section:

- Department of Justice Declines to Defend the Constitutionality of a Statute Criminalizing Female Genital Mutilation
- Secretary of State Describes Israeli Settlements in the West Bank as “Not Per Se Inconsistent with International Law”
- U.S. Trade Representative Holds Environmental Consultations with South Korea Regarding Illegal, Unreported, and Unregulated Fishing
- Congress Signals Concern About Human Rights Abuses in China
- Issuing Several Pardons, President Trump Intervenes in Proceedings of U.S. Troops Charged or Convicted of Acts Amounting to War Crimes
- U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani
- United States Creates the U.S. Space Command and the U.S. Space Force to Strengthen Military Capabilities in Space

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Department of Justice Declines to Defend the Constitutionality of a Statute Criminalizing Female Genital Mutilation

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On September 13, 2019, the Sixth Circuit dismissed the appeal of *United States v. Nagarwala*, a federal district court decision that had held unconstitutional the federal statute criminalizing the female genital mutilation (FGM) of minors. Jumana Nagarwala, an emergency room doctor, was one of eight defendants charged by the Department of Justice (DOJ) for performing or assisting in performing FGM on nine girls, at least some of whom were around age seven.¹ The federal district court judge in *Nagarwala* rejected arguments that Congress had the constitutional authority—under either its power to implement treaty obligations or its power to regulate interstate commerce—to enact the statute at issue. Although the DOJ appealed this decision, it changed its position while the case was on appeal and declined to defend the constitutionality of the statute. The Sixth Circuit’s dismissal of the appeal came at the request of the DOJ, which opposed an effort by the House of Representatives to intervene in the case in defense of the statute’s constitutionality.

In 1996, Congress passed several measures aimed at combatting FGM.² These measures included: (1) the criminalization of the practice of FGM on girls under the age of 18; (2) a directive to the Department of Health and Human Services to compile data on FGM and engage in educational outreach efforts to relevant communities; (3) a directive to the Immigration and Naturalization Service to provide information to new immigrants on the effects of FGM and on its criminalization; and (4) instructions to U.S. directors of international financial institutions to oppose certain types of loans to countries that had yet to take preventative measures against FGM.³ *Nagarwala* concerned the first of these provisions, which is codified at 18 U.S.C. § 116 (FGM Criminalization Statute).

¹ *United States v. Nagarwala*, 350 F. Supp. 3d 613, 616 (E.D. Mich. 2018) (noting that four of the girls were residents of Michigan, where the mutilation was performed, while five of the girls were brought from out of state); Criminal Compl. at 5, *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 2:17-cr-20274), ECF No. 1.

² During the time period when FGM legislation passed, there were an estimated 168,000 girls and women living in the United States with or at risk for FGM or female circumcision. Wanda K. Jones, Jack Smith, Burney Kieke, Jr. & Lynne Wilcox, Centers for Disease Control & Prevention, *Female Genital Mutilation/Female Circumcision*, 112 PUB. HEALTH REPORTS 368, 369, 372 (Sept.–Oct. 1997), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1381943/pdf/pubhealthrep00038-0014.pdf> [<https://perma.cc/ZQ52-GDSB>]. A more recent study estimated the number to have increased to 513,000 by 2012. Howard Goldberg, et al., Centers for Disease Control & Prevention, *Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at Risk, 2012*, 131 PUB. HEALTH REPORTS 1, 4, 7 (Mar.–Apr. 2016), available at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/fgmutilation.pdf> [<https://perma.cc/7JBR-DYZB>] (noting that over half of these persons had Egypt, Ethiopia, Somalia, or Nigeria as the country of origin for themselves or their parents).

³ See Pub. L. 104-208, at § 645, 110 Stat. 3009 (1996) (codified at 18 U.S.C. § 116) (criminalizing FGM); *id.*, § 644 (codified at 8 U.S.C. § 1374) (directing the provision of information to new immigrants); *id.*, § 579 (codified at 22 U.S.C. § 262k-2) (setting terms for financial loans); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 520(b), 110 Stat. 1321 (1996) (mandating the compilation of data); see also Khadijah F. Sharif, Comment, *Female Genital Mutilation: What Does the New Federal Law Really Mean?*, 24 FORDHAM URB. L.J. 409, 418–20 (1997) (discussing the various provisions).

The FGM Criminalization Statute provides that “whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.”⁴ The statute exempts certain operations necessary for the health of the minor (such as during childbirth), but makes clear that “no account shall be taken” of any beliefs “that the operation is required as a matter of custom or ritual.”⁵ As findings accompanying the statute, Congress observed that FGM “often results in the occurrence of physical and psychological health effects that harm the women involved” and that “the unique circumstances surrounding the practice of [FGM] place it beyond the ability of any single State or local jurisdiction to control.”⁶ Congress also found that it had the authority to criminalize FGM pursuant to specific provisions of the Constitution, pointing to its “affirmative power under section 8 of article I, the necessary and proper clause, section 5 of the fourteenth Amendment, as well as under the treaty clause.”⁷

Since its enactment, the FGM Criminalization Statute had remained mostly untested, as federal prosecutors apparently filed charges based on it only once before the charging of Nagarwala in 2017.⁸ Nagarwala’s case eventually expanded to include seven co-defendants: another doctor, two assistants, and four mothers who had arranged for the performance of FGM on their young daughters.⁹ While most of the federal charges stemmed from the FGM Criminalization Statute, Nagarwala was also charged with “conspiracy to travel with intent to engage in illicit sexual conduct,” and four defendants were also charged with conspiring to tamper with witnesses.¹⁰ The defendants moved to dismiss the charges that were based on the FGM Criminalization Statute on the ground that Congress lacked the constitutional authority to pass this statute.

In response, the DOJ defended the constitutionality of the FGM Criminalization Statute on two separate bases. The first was that Congress had the constitutional authority to pass the statute under the Necessary and Proper Clause, which, as interpreted by the Supreme Court in *Missouri v. Holland*, gives Congress the power to implement treaties through legislation.¹¹

⁴ 18 U.S.C. § 116(a). Pursuant to a later amendment, the statute also criminalizes foreign travel for the purpose of enabling FGM to be performed on a minor. See 18 U.S.C. § 116(d).

⁵ 18 U.S.C. § 116(b)–(c).

⁶ Pub. L. 104-208, at § 645(a).

⁷ *Id.*, § 645(a)(6). One of these grounds—the Fourteenth Amendment—was not raised in defense of the constitutionality of the statute by the DOJ at the district court level. Instead, in response to Nagarwala’s motion to dismiss, the DOJ relied only on Congress’s treaty-implementing power and commerce power. See generally Response to Def.’s Mot. to Dismiss Counts One Through Five, *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 2:17-cr-20274), ECF No. 336 [hereinafter DOJ Response in the District Court]. A footnote observed that “[t]he government defends the prosecution here on only the grounds enumerated in this brief. It does not, however, waive the right to assert other grounds in future cases, should the facts and circumstances so merit.” *Id.* at 15 n. 16.

⁸ Daniel Rice, *Female Genital Mutilation and the Treaty Power: What Congress Can Do*, JUST SECURITY (Oct. 29, 2019), at <https://www.justsecurity.org/66757/female-genital-mutilation-and-the-treaty-power-what-congress-can-do> (observing that “federal prosecutors [had] brought only one set of charges under the FGM prohibition” prior to the charging of Nagarwala and co-defendants in 2017). This number reflects only federal prosecutions. Some U.S. states also criminalize FGM and, in addition, the perpetration of FGM could be criminally prosecuted as child abuse or assault. See *infra* notes 54–55 and accompanying text.

⁹ See 350 F. Supp. 3d at 615–16.

¹⁰ See *id.* at 616.

¹¹ DOJ Response in the District Court, *supra* note 7, at 15–16; see also U.S. CONST. Art. I, § 8, cl. 18; *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

The government argued that the FGM Criminalization Statute advances the objectives of the International Covenant on Civil and Political Rights (ICCPR), including two of its specific provisions.¹² One of these was Article 3, under which the signatories “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”¹³ The other was Article 24, which provides that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”¹⁴ In arguing that the FGM Criminalization Statute was necessary and proper in light of these treaty provisions, the DOJ emphasized that “the U.N. body tasked with overseeing implementation of the ICCPR, the Human Rights Committee, has identified FGM as a gender-based impediment to women and girls’ equal enjoyment of rights provided in the Covenant.”¹⁵ As its second, separate defense of the statute’s constitutionality, the DOJ argued that Congress had the authority to pass this statute as part of its power to regulate commerce.¹⁶

Judge Bernard Friedman of the Eastern District of Michigan rejected both of the DOJ’s arguments. He held that “Congress had no authority to pass this statute under either the Necessary and Proper Clause or the Commerce Clause.”¹⁷

On the first issue, the district court concluded that “there is no [rational] relationship between the ICCPR and the FGM [Criminalization Statute]” and therefore that Congress’s treaty-implementing power did not provide Congress with authority to pass the statute.¹⁸ The court’s analysis focused exclusively on the text of the ICCPR, without addressing how it had been interpreted and applied by the Human Rights Committee.¹⁹ The court stated:

[T]here is no rational relationship between the FGM [Criminalization Statute] and Article 3 [of the ICCPR] This article seeks to ensure equal civil and political rights (e.g., the freedom of expression, the right to participate in elections, and protections for defendants in criminal proceedings) for men and women, while the FGM Criminalization Statute seeks to protect girls aged seventeen and younger from a particular form of physical abuse. There is simply no rational relationship between Article 3 and the FGM statute. The latter does not effectuate the purposes of the former in any way.

¹² DOJ Response in the District Court, *supra* note 7, at 18–21 (noting that the Senate advised and consented to the ICCPR in 1992). The DOJ did not rely on Article 7 of the ICCPR, which prohibits cruel or degrading treatment, as the United States had entered a reservation limiting the scope of that article. *See id.* at 19 n. 18.

¹³ International Covenant on Civil and Political Rights, Art. 3, Oct. 5, 1977, 999 UNTS 171 [hereinafter ICCPR]; *see also* DOJ Response in the District Court, *supra* note 7, at 19.

¹⁴ ICCPR, *supra* note 13, Art. 24; *see also* DOJ Response in the District Court, *supra* note 7, at 19.

¹⁵ DOJ Response in the District Court, *supra* note 7, at 19–20; *see also id.* at 27–28 (once again discussing the Human Rights Committee’s treatment of FGM). General Comment 28 of the Human Rights Committee, for example, calls upon state parties to provide the Committee with information regarding “the practice of genital mutilation,” including “on measures to eliminate it.” Human Rights Committee, CCPR General Comment 28: Article 3 (Equality of Rights Between Men and Women), at 3, UN Doc. No. CCPR/C/21/rev.1/Add.10 (Mar. 29, 2000).

¹⁶ DOJ Response in the District Court, *supra* note 7, at 29–44; *see also* U.S. CONST. Art. I, § 8, cl. 3.

¹⁷ 350 F. Supp. 3d at 630. For a critique of the court’s reasoning, *see* Rice, *supra* note 8.

¹⁸ 350 F. Supp. 3d at 630.

¹⁹ *See id.* at 617–18.

The relationship between the FGM [Criminalization Statute] and Article 24 is arguably closer . . . [but still] tenuous. Article 24 is an anti-discrimination provision, which calls for the protection of minors without regard to their race, color, sex, or other characteristics. As laudable as the prohibition of a particular type of abuse of girls may be, it does not logically further the goal of protecting children on a nondiscriminatory basis.²⁰

As an alternative holding, the district court stated that “even assuming the treaty and the FGM [Criminalization Statute] are rationally related, federalism concerns deprive Congress of the power to enact this statute.”²¹ The court observed that, in advising and consenting to the ICCPR, the Senate had included an understanding indicating that federalism principles were relevant to the implementation of the ICCPR.²² The court quoted at length from the Supreme Court’s 2014 decision in *Bond v. United States*, which drew upon federalism principles in narrowly interpreting a criminal statute implementing the Chemical Weapons Convention.²³ After making these two references, the court concluded that “[l]ike the common law assault at issue in *Bond*, FGM is local criminal activity which, in keeping with longstanding tradition and our federal system of government, is for the states to regulate, not Congress.”²⁴

The district court separately held that Congress did not have the power under the Commerce Clause to enact the FGM Criminalization Statute.²⁵ The court determined that FGM could not be deemed an economic or commercial activity, concluding that the DOJ had failed to show an interstate market beyond the facts of the present case and that FGM could not be regulated as health care, notwithstanding its performance by medical professionals, because it “is a form of physical assault, not anything approaching a healthcare service.”²⁶ The court also noted the absence of a jurisdictional element in the statute requiring that the victims or providers of FGM “traveled in, or had any effect on, interstate commerce.”²⁷

The DOJ appealed the district court decision to the Sixth Circuit.²⁸ But on April 10, 2019, after receiving two extensions to file an opening brief on appeal, the DOJ reversed its stance in identical letters from the solicitor general to the House and Senate Judiciary Committees.²⁹

²⁰ *Id.*

²¹ *Id.*

²² *Id.* This understanding provided that the ICCPR “shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments” and that “to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the” ICCPR. 138 CONG. REC. S4834 (Apr. 2, 1992).

²³ 350 F. Supp. 3d at 619–20; *see also* *Bond v. United States*, 572 U.S. 844, 847–49 (2014) (concluding as a matter of statutory interpretation that the federal statute implementing the Chemical Weapons Convention did not criminalize a woman’s attempt to poison her husband’s lover).

²⁴ 350 F. Supp. 3d at 620 (quotation marks omitted).

²⁵ *Id.* at 627–30.

²⁶ *Id.* at 628.

²⁷ *Id.* at 629.

²⁸ *See* Notice of Appeal, at 1–2, *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (No. 2:17-cr-20274), ECF No. 378.

²⁹ Letter from Noel J. Francisco, Solicitor General, to Dianne Feinstein, Ranking Member of the Senate Committee on the Judiciary, at 2 (Apr. 10, 2019), at https://www.justice.gov/oip/foia-library/osg-530d-letters/4_10_2019/download [<https://perma.cc/4FU6-EQ2E>]; Letter from Noel J. Francisco, Solicitor General, to Jerrold Nadler, Chairman Member of the House Committee on the Judiciary, at 1–2 (Apr. 10, 2019), *available at* <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2019/04/530D-Letter-FGM-Statute.pdf>

The letters, as required by 28 U.S.C. § 530D (530D Letters),³⁰ acted as official notice to Congress that the DOJ would not defend the constitutionality of the FGM Criminalization Statute on appeal. The solicitor general stated that while FGM performed on minors is “an especially heinous practice . . . that should be universally condemned,” the DOJ had “reluctantly determined that . . . it lacks a reasonable defense of the [FGM Criminalization Statute], as currently worded.”³¹ In the solicitor general’s view, the FGM Criminalization Statute could not be defended as an exercise of Congress’s treaty-implementing power and, as written, lacked the nexus to commerce necessary for it to be defensible as an exercise of Congress’s commerce power. The solicitor general suggested that Congress could cure the constitutional issue with respect to the Commerce Clause by amending the FGM Criminalization Statute to include a nexus to interstate or foreign commerce as an element of the crime.³²

The solicitor general offered the following explanation for why the DOJ would not defend the FGM Criminalization Statute as an exercise of Congress’s treaty-implementing power:

[T]he [DOJ] has determined that it does not have an adequate argument that Section 116(a) is within Congress’s authority to enact legislation to implement the ICCPR, which does not address FGM. None of the ICCPR’s provisions reference FGM at all. Nor do they provide a basis for the federal government itself (rather than the individual States) to criminalize FGM of minors by private parties. This case is therefore not analogous to *Holland*, which involved a treaty that more directly addressed the parties’ obligation to protect certain migratory birds and to propose legislation to do so. Thus, even maintaining the full continuing validity of *Holland*, the [DOJ] does not believe it can defend Section 116(a) on this ground.³³

On April 30, 2019, the House of Representatives filed a motion to intervene in the *Nagarwala* appeal in order to defend the constitutionality of the FGM Criminalization Statute.³⁴ In an accompanying press release, Speaker of the House Nancy Pelosi explained that the “Trump Administration’s sudden refusal to advance legal arguments to defend a long-standing federal statute criminalizing this horrific act disrespects the health and futures of vulnerable women and girls.”³⁵ In its motion, the House observed that 28 U.S.C. § 530D(b)(2) requires the DOJ to notify Congress of a decision not to defend the

[<https://perma.cc/6ZJP-FXPZ>] [collectively hereinafter 530D Letters]; see also Mot. of the U.S. House of Representatives to Intervene, at 6, *United States v. Nagarwala* (6th Cir. filed Apr. 30, 2019) (No. 19-1015), ECF No. 24 [hereinafter Motion to Intervene] (noting the two extensions sought by the DOJ).

³⁰ This statute provides that “[t]he Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice . . . determines . . . to refrain (on the ground that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute.” 28 U.S.C. § 530D(a)(1)(B)(ii).

³¹ 530D Letters, *supra* note 29, at 1–2.

³² *Id.* at 2. The solicitor general did not discuss whether, in his view, Congress would have the constitutional authority to enact the FGM Criminalization Statute if the United States were to ratify other human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women or the Convention on the Rights of the Child. See generally *id.*

³³ *Id.* (citation omitted).

³⁴ Motion to Intervene, *supra* note 29.

³⁵ Nancy Pelosi, Speaker of the House Press Release, Pelosi Statement on Filing of House Intervention to Uphold Federal Statute Criminalizing Female Genital Mutilation (May 1, 2019), at <https://www.speaker.gov/newsroom/5119-3> [<https://perma.cc/HY2K-UDCG>].

constitutionality of a statute “within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding.”³⁶ The House pointed to several prior instances in which it had intervened in civil proceedings to defend a statute’s constitutionality and argued that the same standard should be applicable to appeals in criminal cases.³⁷ The House reasoned that its intervention would “ensur[e] that the FGM [Criminalization Statute] receives a vigorous constitutional defense” since the “Executive Branch and defendants agree—incorrectly—that the FGM [Criminalization Statute] is unconstitutional.”³⁸

In response, the DOJ both opposed the House’s intervention and moved to voluntarily dismiss the appeal.³⁹ The DOJ argued that the House had no authority to intervene in criminal proceedings, stating that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case” and “[n]o court has ever permitted the Legislature to . . . extend a federal criminal prosecution that the United States has determined no longer to pursue on appeal.”⁴⁰ The DOJ argued that the “proper role of the House in ensuring the viability of future prosecutions for [FGM] is its participation in the bicameralism and presentment process for enacting new laws.”⁴¹

On September 13, 2019, the Sixth Circuit granted the DOJ’s motion to voluntarily dismiss the appeal.⁴² The court did not address the House’s motion to intervene. Instead, it simply granted the motion to voluntarily dismiss the case, thus making the House’s pending motion moot.⁴³ The court noted that it “generally grant[s] motions to voluntarily dismiss unless it would be unjust or unfair to do so” and found “no reason to disregard our general rule” after “[h]aving considered the parties’ arguments.”⁴⁴

On the same day that the Sixth Circuit dismissed *Nagarwala*, the D.C. Circuit upheld a different congressional statute as a valid exercise of Congress’s treaty-implementing power.⁴⁵ *United States v. Park* concerned the constitutionality of a federal statute that criminalized the sexual abuse of children by U.S. citizens abroad.⁴⁶ Reversing the federal district court, the D.C. Circuit held that Congress had the authority to enact this statute in order to implement the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which the United States had ratified in 2002.⁴⁷ While the court acknowledged that the

³⁶ Motion to Intervene, *supra* note 29, at 6 (quoting 28 U.S.C. § 530D(b)(2)).

³⁷ *Id.* at 8–9.

³⁸ *Id.* at 13–14.

³⁹ Opposition of the United States to Motion of the U.S. House of Representatives to Intervene, *United States v. Nagarwala* (6th Cir. filed May 31, 2019) (No. 19-1015), ECF No. 41 [hereinafter Opposition to Motion to Intervene]; Mot. to Voluntarily Dismiss Appeal, *United States v. Nagarwala* (6th Cir. filed May 31, 2019) (No. 19-1015), ECF. No. 40.

⁴⁰ Opposition to Motion to Intervene, *supra* note 39, at 5.

⁴¹ *Id.*

⁴² *United States v. Nagarwala*, No. 19-1015, 2019 WL 7425389, at *1 (6th Cir. Sept. 13, 2019).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *United States v. Park*, 938 F.3d 354, 363–64 (D.C. Cir. 2019).

⁴⁶ *Id.* at 357–58 (considering the constitutionality of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, as codified at 18 U.S.C. § 2423). The DOJ “argue[d] on appeal that Congress’s treaty [implementing] power and the Foreign Commerce Clause support[ed]” the constitutionality of the statute as applied to the criminal prosecution at issue in the case. *Id.* at 362.

⁴⁷ *Id.* at 357, 360.

Optional Protocol only required the criminalization of child prostitution “for remuneration or any other form of consideration,” the court concluded that “the Optional Protocol’s goal of eliminating commercial child sexual exploitation, including global sex tourism, could be undercut if Congress failed to criminalize non-commercial child sex abuse by U.S. residents abroad.”⁴⁸ As one of its reasons, the court noted that while the “government may not simply point to any tangentially related treaty to defend a constitutionally suspect statute,” nevertheless Congress’s “power to give the treaty practical effect . . . is not confined to the Optional Protocol’s minimum requirements.”⁴⁹ The D.C. Circuit’s decision is one of several federal appellate decisions in recent years upholding the constitutionality of an exercise of Congress’s treaty-implementing power.⁵⁰

The statutes at issue in both *Nagarwala* and *Park* reflect a congressional commitment to deterring and punishing abuses committed against children. In the wake of the DOJ’s decision not to defend the FGM Criminalization Statute, the House passed an unopposed non-binding resolution denouncing the practice of FGM and calling on the international community and the Department of State and United States Agency for International Development to accelerate efforts to eliminate it.⁵¹ Members of Congress have also introduced various bills to fund efforts to combat FGM and to amend the FGM Criminalization Statute so that it includes a more explicit nexus to commerce.⁵²

The district court decision in *Nagarwala* and the DOJ’s subsequent decision not to defend the statute may animate efforts for more state law protection against FGM.⁵³ Roughly half of the states currently have laws specifically criminalizing FGM, at least with respect to minors, and the perpetration of FGM could also fall within the elements of more broadly phrased

⁴⁸ *Id.* at 368. The court separately held that Congress had the authority to criminalize the production of child pornography in order to implement the Optional Protocol, concluding that the statute’s “criminalization of non-commercial child pornography production plainly implements the treaty and is constitutional” because “the Optional Protocol, by its terms, reaches both commercial and non-commercial production of child pornography.” *Id.* at 366.

⁴⁹ *Id.* at 369.

⁵⁰ See *United States v. Mikhel*, 889 F.3d 1003, 1023–24 (9th Cir. 2018) (upholding the constitutionality of the Hostage Taking Act as implementing the International Convention Against the Taking of Hostages); *United States v. Noel*, 893 F.3d 1294, 1305 (11th Cir. 2018) (same); see also *United States v. Ryan*, ___ F. Supp. 3d ___, 2019 WL 7556053, at *14 (W.D. Wis. Dec. 20, 2019) (finding that Congress had the constitutional authority to criminalize the possession of polonium-210 in order to implement the International Convention for the Suppression of Acts of Nuclear Terrorism).

⁵¹ H.R. Res. 106, 116th Cong. (2019), at <https://www.congress.gov/bill/116th-congress/house-resolution/106>.

⁵² H.R. 3583, 116th Cong. (2019), at <https://www.congress.gov/bill/116th-congress/house-bill/3583> (proposing that the FGM Criminalization Statute be amended as suggested in the 530D Letters); S. 2017, 116th Cong. (2019), at <https://www.congress.gov/bill/116th-congress/senate-bill/2017?s=1&r=5> (same); H.R. 960, 116th Cong. (2019), at <https://www.congress.gov/bill/116th-congress/house-bill/960> (proposing increased grants to aid FGM victims and calling for data collection on FGM criminal occurrences); H.R. 959, 116th Congress (2019), at <https://www.congress.gov/bill/116th-congress/house-bill/959/text> (proposing the criminalization of FGM when individuals transport minors across state lines); H.Amdt.341 to H.R. 2740, Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020, 116th Cong. (2019), at <https://www.congress.gov/amendment/116th-congress/house-amendment/341?s=a&r=46> (proposing funding for combatting FGM).

⁵³ E.g., Hollie McKay, *Minnesota Lawmaker’s Push for Tougher Female Genital Mutilation Law Faces Opposition*, FOX NEWS (Feb. 19, 2019) at <https://www.foxnews.com/politics/the-push-to-prosecute-parents-for-fgm-in-minnesota-proves-a-struggle-for-republican-lawmaker> (noting a push for stronger FGM state statutes in Minnesota, where some of the *Nagarwala* victims resided); see also Shellie Sylvestri, *Female Genital Mutilation Bill Introduced in KY*, WAVE 3 NEWS (Jan. 13, 2020), at <https://www.wave3.com/2020/01/14/female-genital-mutilation-bill-introduced-ky> (noting the introduction of a bill in the Kentucky legislature).

crimes.⁵⁴ There is considerable variation among these state laws, including whether they criminalize travel outside the state for the performance of FGM and what sentences they impose for FGM.⁵⁵ Unless Congress amends the FGM Criminalization Statute or the DOJ reverses its position that the statute is unconstitutional, there is no federal alternative to these state laws for the prosecution of FGM as a crime. But other federal criminal laws may be brought to bear against the perpetrators of FGM. In the Eastern District of Michigan, the DOJ continues to pursue charges against Jumana Nagarwala for the crime of conspiracy to travel with intent to engage in illicit sexual conduct.⁵⁶

Secretary of State Describes Israeli Settlements in the West Bank as “Not Per Se Inconsistent with International Law”

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On November 18, 2019, Secretary of State Mike Pompeo stated that the “establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law.”¹ This announcement contrasts with the approach taken by the State Department late in the Obama administration. Although embraced by Israel, the position announced by Pompeo was criticized by Palestinians, Security Council members and other states, who maintain that Israeli settlements in the West Bank violate international law. In January of 2020, the Trump administration released its proposed peace plan for the Israelis and Palestinians, which met with approval from Israeli leaders and rejection from Palestinian leaders.

Israeli citizens began moving to the West Bank after Israel captured the territory in the Six-Day War in 1967, and U.S. perspectives about the legality of the settlements have varied over the course of different administrations. The Carter administration declared the settlements to be illegal in a State Department letter, concluding that “[w]hile Israel may undertake, in the occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation . . . the civilian settlements in those territories is inconsistent with international law.”² In 1981, President Reagan told reporters that he disagreed with his predecessor’s position and did not consider the settlements to be illegal.³ President

⁵⁴ See Limor Ezioni, *Contemporary Aspects of Female Genital Mutilation Prohibitions in the United States*, 28 AM. U. J. GENDER SOC. POL’Y & L. 39, 49–61 (2019) (surveying state laws); see also *id.* at 61 (concluding that “about half of the states have not enacted an anti-FGM bill”).

⁵⁵ See *id.* at 49–61 (discussing the variation in state laws).

⁵⁶ See 18 U.S.C. § 2423(b); Gov.’s Response to Def.’s Mot. to Dismiss Count Seven (R.373), *United States v. Nagarwala* (E.D. Mich filed January 31, 2020) (No. 17-20274), ECF. No. 422.

¹ U.S. State Dep’t Press Release, Secretary Michael R. Pompeo Remarks to the Press (Nov. 18, 2019), at <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press> [<https://perma.cc/5L3G-GMER>] [hereinafter Pompeo Remarks].

² Letter from State Department Legal Adviser Concerning Legality of Israeli Settlements in the Occupied Territories, Apr. 21, 1978, 17 ILM 777.

³ *Excerpts from Interview with President Reagan Conducted by Five Reporters*, N.Y. TIMES (Feb. 3, 1981), at <https://www.nytimes.com/1981/02/03/world/excerpts-from-interview-with-president-reagan-conducted-by-five-reporters.html>.

George H.W. Bush called the settlements “counterproductive to peace,”⁴ but his administration did not describe them as illegal.⁵ The Clinton and George W. Bush administrations raised various criticisms related to settlements, but did not expressly declare them to be illegal.⁶

In a 2009 speech, President Obama stated that the “United States does not accept the legitimacy of continued Israeli settlements” without speaking directly to their legality.⁷ At the end of his administration, however, the United States declined to veto Security Council Resolution 2334, which “[r]eaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967 . . . has no legal validity and constitutes a flagrant violation under international law”⁸ In remarks explaining the decision to abstain, Secretary of State John Kerry stated that the settlements, in combination with other actions, “destroy hopes for peace on both sides and increasingly cement[] an irreversible one-state reality.”⁹ He observed that in “1978, the State Department Legal Adviser advised the Congress on his conclusion that Israel’s government, the Israeli Government’s program of establishing civilian settlements in the occupied territory is inconsistent with international law, and we see no change since then to affect that fundamental conclusion.”¹⁰

Since taking office in 2017, President Trump has made other changes to previous administrations’ policies relating to Israel. In December 2017, Trump recognized Jerusalem as Israel’s capital and moved the U.S. embassy to Jerusalem a few months later.¹¹ In response, Palestine initiated a lawsuit in the International Court of Justice arguing that the relocation of the U.S. embassy to Jerusalem violates the Vienna Convention on Diplomatic Relations.¹² Then, in March 2019, the Trump administration recognized Israeli sovereignty over the Golan Heights, another disputed territory that Israel captured during the Six-Day

⁴ President George H.W. Bush, Remarks at a St. Patrick’s Day Ceremony and an Exchange with Reporters, 1 PUB. PAPERS 467 (March 17, 1992).

⁵ AMERICAN FOREIGN POLICY CURRENT DOCUMENTS 1991, at 570 (Paul Claussen & Evan M. Duncan eds., 1994) (Secretary of State James Baker: “The settlement activity is something that the United States has opposed for a long time. Our particular opposition today to settlement activity is that it constitutes an obstacle to peace. In the past, the position of the United States has been that it was, in fact, illegal.” Q: “But that’s not this administration?” Secretary Baker: “That is not our policy, No.”).

⁶ See President William J. Clinton, News Conference with European Union Leaders of Dec. 16, 1996, 32 WEEKLY COMP. PRES. DOCS. 2520 (Dec. 23, 1996) (responding “absolutely” when asked if the settlements were an “obstacle to peace”); President George W. Bush, Interview with Nahum Barnea and Shimon Shiffer of Yedioth Ahronoth of Jan. 2, 2008, 44 WEEKLY COMP. PRES. DOCS. 5 (Jan. 14, 2008) (distinguishing between “authorized” and “unauthorized” settlements and expressing the expectation that Israel would “get rid of unauthorized settlements”).

⁷ White House Press Release, Remarks by President Obama at Cairo University (June 4, 2009), at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09> [<https://perma.cc/8CUX-ZDW2>].

⁸ SC Res. 2334, para. 1 (Dec. 23, 2016).

⁹ U.S. Dep’t of State Press Release, John Kerry, Remarks on Middle East Peace (Dec. 28, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/12/266119.htm> [<https://perma.cc/JVX6-FSDY>].

¹⁰ *Id.*; see also Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 111 AJIL 477 (2017) (providing further discussion of the U.S. abstention).

¹¹ Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 306, 307 (2018).

¹² ICJ Press Release, The State of Palestine Institutes Proceedings Against the United States of America (Sept. 28, 2018), available at <https://www.icj-cij.org/files/case-related/176/176-20180928-PRE-01-00-EN.pdf> [<https://perma.cc/AM2C-438L>]. Palestine claims that the Vienna Convention requires embassies to be located in the territory of the host state, and disputes that Jerusalem is part of Israel’s territory. *Id.* The case remains pending. *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America): Latest Developments*, INT’L CT. OF JUST., at <https://www.icj-cij.org/en/case/176>.

War.¹³ Pompeo said that the U.S. decision does not set a precedent allowing territory to be taken from another country by force, describing the occupation of the Golan Heights as a “unique situation” because “the Israelis ended up with the Golan Heights as the result of having been attacked. . . . They were at risk of their very nation being overrun . . . and they defended themselves, and they retained that terrain to continue to defend themselves from the murderous regimes in Syria.”¹⁴

At a press conference on November 18, 2019, Pompeo stated that “the Trump administration is reversing the Obama administration approach towards Israeli settlements.”¹⁵ He elaborated:

The establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law.

I want to emphasize several important considerations.

First, look, we recognize that—as Israeli courts have—the legal conclusions relating to individual settlements must depend on an assessment of specific facts and circumstances on the ground. Therefore, the United States Government is expressing no view on the legal status of any individual settlement.

The Israeli legal system affords an opportunity to challenge settlement activity and assess humanitarian considerations connected to it. Israeli courts have confirmed the legality of certain settlement activities and has concluded that others cannot be legally sustained.

Second, we are not addressing or prejudging the ultimate status of the West Bank. This is for the Israelis and the Palestinians to negotiate. International law does not compel a particular outcome, nor create any legal obstacle to a negotiated resolution.

Third, the conclusion that we will no longer recognize Israeli settlements as per se inconsistent with international law is based on the unique facts, history, and circumstances presented by the establishment of civilian settlements in the West Bank. Our decision today does not prejudice or decide legal conclusions regarding situations in any other parts of the world.

And finally—finally—calling the establishment of civilian settlements inconsistent with international law hasn’t worked. It hasn’t advanced the cause of peace.

The hard truth is there will never be a judicial resolution to the conflict, and arguments about who is right and wrong as a matter of international law will not bring peace. This is a complex political problem that can only be solved by negotiations between the Israelis and the Palestinians.¹⁶

¹³ Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 613, 613 (2019).

¹⁴ *State Department Fiscal Year 2020 Budget Request*, C-SPAN, at 49:00–51:00 (Apr. 9, 2019), at <https://www.c-span.org/video/?459622-1/secretary-state-pompeo-testifies-fiscal-year-2020-budget-request&start=2953>; see Galbraith, *supra* note 13, at 617.

¹⁵ Pompeo Remarks, *supra* note 1.

¹⁶ *Id.*

Israeli Prime Minister Benjamin Netanyahu celebrated this announcement, saying that it “reflects an historical truth—that the Jewish people are not foreign colonialists in Judea and Samaria.”¹⁷ Palestinian leaders, in contrast, were angered. Palestinian negotiator Saeb Erekat criticized the Trump administration for “threatening the international system with its unceasing attempts to replace international law with the ‘law of the jungle.’”¹⁸ Palestinians in the West Bank responded to the announcement with a “day of rage,” protesting throughout the West Bank.¹⁹

In his remarks, Pompeo did not explain the U.S. reasoning with respect to international law. The Fourth Geneva Convention (Convention) applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them” and “all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”²⁰ Article 49 of the Convention provides that “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”²¹ The widely prevailing view is that—either directly, as reflective of customary international law, or both—the Convention applies to the occupation of the West Bank, and that Israeli settlements violate the Convention’s prohibition on civilian population transfers.²²

Many nations responded to Pompeo’s announcement by reaffirming concerns about Israeli activity in the West Bank or by reiterating the conclusion that all Israeli settlements in the West Bank are illegal. On the day after Pompeo’s announcement, the Third Committee of the General Assembly advanced a resolution on “The right of the Palestinian people to self-

¹⁷ Isr. Ministry of Foreign Affairs Press Release, Statement from the Prime Minister’s Office (Nov. 18, 2019), at <https://mfa.gov.il/MFA/PressRoom/2019/Pages/Statement-from-the-Prime-Minister-s-Office-18-November-2019.aspx>. At the time the announcement was made, Netanyahu was facing a close election, and the U.S. announcement was seen as politically beneficial to him. Lara Jakes & David M. Halbfinger, *In Shift, U.S. Says Israeli Settlements in West Bank Do Not Violate International Law*, N.Y. TIMES (Nov. 18, 2019), at <https://www.nytimes.com/2019/11/18/world/middleeast/trump-israel-west-bank-settlements.html>. Pompeo denied that the timing of the announcement was connected to politics. Pompeo Remarks, *supra* note 1.

¹⁸ State of Palestine Negotiations Affairs Dep’t. Press Release, Dr. Saeb Erekat on Mike Pompeo Statement on Israeli Settlements (Nov. 18, 2019), at <https://www.nad.ps/en/media-room/press-releases/dr-saeb-erekat-mike-pompeo-statement-israeli-settlements> [<https://perma.cc/57RB-PXVS>].

¹⁹ Mohammed Daraghme, *Palestinians Protest Settlement Decision in “Day of Rage,”* ASSOC. PRESS (Nov. 26, 2019), at <https://apnews.com/f2049665002045869da66b237c3673c1>.

²⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 2, Aug. 12, 1949, 6 UST 3316.

²¹ *Id.* Art. 49.

²² Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AJIL 44, 69 (1990) (observing that this understanding “has been very widely held internationally” and that “a remarkable degree of unanimity prevails on this matter”). The International Court of Justice, the General Assembly, and the Security Council have all supported this conclusion. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 ICJ Rep. 136, (July 9), at <https://unispal.un.org/UNISPAL.NSF/0/B59ECB7F4C73BDBC85256EEB004F6D20>; GA Res. 70/89, para. 2 (Dec. 15, 2015); SC Res. 2334, *supra* note 8; SC Res. 465, para. 5 (Mar. 1, 1980). For a recent description of arguments made by Israel and some others to the contrary, see generally Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AJIL 357 (2017) (describing these arguments while concluding that, consistent with a position the author took in 1967 as the legal adviser to the Israeli Ministry of Foreign Affairs, the West Bank settlements violate the Fourth Geneva Convention).

determination,” which calls for “an end to the Israeli occupation that began in 1967,” by a vote of 164 to five with nine abstentions.²³ The votes in favor included Canada, which had voted “no” or abstained on similar resolutions for the past fourteen years.²⁴ At a Security Council meeting two days after Pompeo’s statement, most members of the Security Council called the settlements illegal and many criticized the United States for issuing a unilateral declaration of international law that contravenes the UN’s position.²⁵ UN Special Coordinator for the Middle East Peace Process Nickolay Mladenov called Israeli settlements “a flagrant violation of international law” and an obstacle to a peaceful solution at the meeting.²⁶ The United Kingdom issued a statement reiterating its position that the settlements are illegal and urging Israel to “halt its counterproductive settlement expansion.”²⁷ In December 2019, Fatou Bensouda, the prosecutor of the International Criminal Court, stated, in submitting a request for a jurisdictional ruling to the Court, that “Palestine’s viability as a State (and the exercise of the Palestinian people’s right to self-determination) has been obstructed by the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East Jerusalem, in violation of international law.”²⁸

The Trump administration’s West Bank policy gained renewed international attention in late January of 2020, when Trump announced his Middle East peace plan. On the issue of West Bank settlements, the plan would “incorporate the vast majority of Israeli settlements into contiguous Israeli territory,” while calling on Israel to refrain during negotiations from building any new settlements or expanding existing settlements outside of the territory proposed for incorporation.²⁹ The plan endorses a two-state solution, but makes the recognition of a Palestinian state contingent on Palestinian leaders “recognizing Israel as the Jewish state, rejecting terrorism in all its forms, allowing for special arrangements that address Israel’s and the region’s vital security needs, building effective institutions and choosing pragmatic solutions.”³⁰ The capital of the Palestinian state would be East Jerusalem, while Jerusalem would be the undivided capital of Israel.³¹

²³ UN GA, Social, Humanitarian & Cultural Issues (Third Committee): Status of Action on Draft Proposals, at <https://www.un.org/en/ga/third/74/proposalstatus.shtml>. The resolution passed in the General Assembly a month later. GA Res. 74/139 (Dec. 18, 2019), at <https://undocs.org/en/A/RES/74/139>.

²⁴ Evan Dyer, *Canada Reverses UN Stance on Palestinians in Break with U.S. Over Settlements*, CBC NEWS (Nov. 19, 2019), at <https://www.cbc.ca/news/politics/un-palestinian-vote-canada-israel-us-1.5365637>.

²⁵ UN Meetings Coverage, *Israeli-Palestinian Escalation in Gaza Shows Urgent Need for Political Process on Middle East Peace Process, Special Coordinator Tells Security Council* (Nov. 20, 2019), at <https://www.un.org/press/en/2019/sc14026.doc.htm> [<https://perma.cc/FV73-7Y39>].

²⁶ *Israeli Settlements Remain “Flagrant Violation” of International Law, UN Envoy Tells Security Council*, UN NEWS (Nov. 20, 2019), at <https://news.un.org/en/story/2019/11/1051781>.

²⁷ UK Foreign & Commonwealth Office Press Release, *Israeli Settlements: November 2019: UK Statement* (Nov. 21, 2019), at <https://www.gov.uk/government/news/israeli-settlements-uk-statement> [<https://perma.cc/7Y8R-9RSK>].

²⁸ Office of the Prosecutor, *Situation in the State of Palestine*, ICC-01/18, para. 146 (Jan. 22, 2020).

²⁹ White House Press Release, *Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People* (January 2020), at 12, 38 available at <https://www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf>.

³⁰ *Id.* at 4.

³¹ *Id.* at 17.

Netanyahu praised the plan as “a great plan for Israel” and “a great plan for peace.”³² Meanwhile, Palestinian leaders rejected the plan as “nonsense.”³³ Erekat said that the plan “specifies the elements of apartheid,”³⁴ and Palestinian President Abbas said “[w]e say 1,000 no’s” to the proposal.³⁵ Some other countries in the region, including the United Arab Emirates,³⁶ Saudi Arabia,³⁷ and Egypt³⁸ expressed appreciation for Trump’s efforts to develop a comprehensive peace plan and expressed hope that it would launch negotiations between Israel and Palestine. UK Foreign Secretary Dominic Raab also called the plan “a serious proposal, reflecting extensive time and effort,” but noted that “[o]nly the leaders of Israel and the Palestinian territories can determine whether these proposals can meet the needs and aspirations of the people they represent.”³⁹ Other countries strongly criticized the plan. Turkey described the plan as “an annexation plan aiming to destroy the two-state solution and seize the Palestinian territories” and said that “[t]here will be not be any peace in the Middle East without ending Israel’s occupation policies.”⁴⁰ German Foreign Minister Heiko Maas expressed concern about the plan’s compliance with international law, saying that it raises questions concerning “how the proposal related to internationally agreed parameters and legal positions.”⁴¹

³² White House Press Release, Remarks by President Trump and Prime Minister Netanyahu of the State of Israel in Joint Statements (Jan. 28, 2020), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-prime-minister-netanyahu-state-israel-joint-statements> [<https://perma.cc/7XGK-GY8J>]. After Trump stated during the unveiling of his peace plan that “the United States will recognize sovereignty over the territory that my vision provides to be part of the State of Israel,” *id.*, Netanyahu announced that Israel would annex parts of the West Bank. David M. Halbfinger & Isabel Kershner, *Trump Plan’s First Result: Israel Will Claim Sovereignty Over Part of West Bank*, N.Y. TIMES (Jan. 28, 2020), at <https://www.nytimes.com/2020/01/28/world/middleeast/israel-west-bank-annex-sovereignty.html>. The Trump administration then reportedly asked Netanyahu to postpone the annexation. Isabel Kershner, *Israel Puts Brakes on West Bank Annexation Plan*, N.Y. TIMES (Feb. 2, 2020), at <https://www.nytimes.com/2020/02/02/world/middleeast/israel-west-bank-annexation.html>.

³³ Aron Heller & Matthew Lee, *Trump Peace Plan Delights Israelis, Enrages Palestinians*, ASSOC. PRESS (Jan. 28, 2020), at <https://apnews.com/f7d36b9023309ce4b1e423b02abf52c6>.

³⁴ Mark Stone, *Trump’s Peace Plan Has “Elements of Apartheid,” Palestinian Official Says*, SKY NEWS (Jan. 28, 2020), at <https://news.sky.com/story/trumps-peace-plan-has-elements-of-apartheid-palestinian-official-says-11920958>.

³⁵ Heller & Lee, *supra* note 33.

³⁶ UAE Press Release, Ambassador Yousef Al Otaiba Statement on Peace Plan (Jan. 28, 2020), at <https://www.uae-embassy.org/news-media/ambassador-yousef-al-otaiba-statement-peace-plan> [<https://perma.cc/FJ28-PNYN>].

³⁷ Saudi Arabia Ministry of Foreign Affairs Press Release, Statement from the Ministry of Foreign Affairs of the Kingdom of Saudi Arabia (Jan. 28, 2020), at <https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2027848#2027848> [<https://perma.cc/6DHG-XSMB>].

³⁸ Egypt Ministry of Foreign Affairs Press Release, Press Statement (Jan. 28, 2020), at <https://www.mfa.gov.eg/English/MediaCenter/News/Pages/You-are-making.aspx> [<https://perma.cc/M6L8-GJFQ>].

³⁹ UK Foreign & Commonwealth Office Press Release, Release of US Proposals for Middle East Peace: Foreign Secretary’s Statement (Jan. 28, 2020), at <https://www.gov.uk/government/news/foreign-secretary-statement-on-release-of-us-proposals-for-middle-east-peace> [<https://perma.cc/P45A-7TAD>].

⁴⁰ Turk. Ministry of Foreign Affairs Press Release, Press Release Regarding the Plan Released by US Administration on the Israeli-Palestinian Conflict (Jan. 28, 2020), at http://www.mfa.gov.tr/no_28_-abd-nin-irail-filistin-ihtilafina-yonelik-yayimladigi-plan-hk.en.mfa [<https://perma.cc/J37Q-2747>].

⁴¹ Ger. Federal Foreign Office Press Release, Foreign Minister Maas on US Proposal for Middle East Peace Process (Jan. 28, 2020), at <https://www.auswaertiges-amt.de/en/newsroom/news/-/2296906> [<https://perma.cc/GQ7G-BKHJ>].

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

U.S. Trade Representative Holds Environmental Consultations with South Korea Regarding Illegal, Unreported, and Unregulated Fishing
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The United States requested environmental consultations with South Korea under the United States-Korea Free Trade Agreement (KORUS) in September 2019. This request occurred on the same day as the release of a report to Congress raising concerns about South Korea's response to illegal, unreported, and unregulated fishing. Following the consultations, South Korea amended its law regulating the Korean fisheries industry in order to make more enforcement mechanisms available.

On September 19, 2019, the U.S. National Marine Fisheries Service released its biennial report to Congress on fisheries management, which identified South Korea and two other nations as failing to adequately regulate illegal, unreported, and unregulated fishing.¹ The report noted that the treaty monitoring body for the Convention on the Conservation of Antarctic Marine Living Resources had determined that, in 2017, two South Korean fishing vessels had impermissibly set "longline gear within 24 hours of a notified fishery closure."² South Korea had ordered the boats to leave and suspended one boat's license for two months, but it did not impose fines or seize the illegal catch.³ This was because its Distant Water Fisheries Development Act provided only for criminal penalties, which it chose not to pursue in response to the 2017 incident.⁴ The 2019 report to Congress noted that during prior consultations with both the treaty monitoring body and U.S. negotiators, South Korea had "recognized the need for administrative enforcement authority to address cases . . . that are inappropriate for criminal prosecution, as well as for enabling the government to deprive the violators of the economic benefit of their violations."⁵ South Korea represented that it would soon be amending its Distant Water Fisheries Development Act to incorporate such changes.⁶

Although the 2019 report recognized that South Korea was already on its way to reforming its laws, the Office of the U.S. Trade Representative (USTR) requested consultations with South Korea on this subject on the same day that the report was released.⁷ The USTR invoked

¹ Nat'l Oceanic & Atmospheric Admin., Improving International Fisheries Management: 2019 Report to Congress 27–30 (2019), at <https://www.fisheries.noaa.gov/foreign/international-affairs/identification-iuu-fishing-activities> [<https://perma.cc/RTN5-LQEM>] [hereinafter 2019 NOAA Report] (also identifying Ecuador and Mexico); see also NOAA Press Release, NOAA Fisheries Releases Report to Congress Identifying Three Nations for Reported IUU Fishing Activities (Sept. 19, 2019), at <https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-releases-report-congress-identifying-three-nations-reported-iuu-fishing> [<https://perma.cc/W578-DB6B>]. This biennial report to Congress is required under the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006. Pub. L. No. 109-479, § 403, 120 Stat. 3575, 3626-27 (2007).

² 2019 NOAA Report, *supra* note 1, at 30.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Office of the U.S. Trade Representative Press Release, USTR to Request First-Ever Environment Consultations Under the U.S.-Korea Free Trade Agreement (KORUS) in Effort to Combat Illegal Fishing

the environmental chapter of KORUS, which requires that “a party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under the multilateral environmental agreements listed in Annex 20-A,” including the Convention on the Conservation of Antarctic Marine Living Resources.⁸ U.S. officials then met with South Korean counterparts in Seoul on October 17, 2019, and, within a few weeks of this meeting, South Korea amended its Distant Water Fisheries Development Act to encompass administrative remedies.⁹

U.S. Trade Representative Robert Lighthizer asserted that “the Trump Administration’s strong commitment to using tools such as environmental monitoring and enforcement provisions under our trade agreements can produce real results that help protect and conserve our ocean resources.”¹⁰ These “first ever environment consultations” under KORUS came less than a year after the USTR had pursued environmental consultations under the U.S. free trade agreement with Peru.¹¹ In 2019, there were thirteen U.S. free trade agreements that featured environment chapters, including the not-yet-in-force United States-Mexico-Canada Agreement (USMCA).¹² In December of 2019, the Trump administration conceded to more robust enforcement mechanisms for the USMCA’s environmental provisions in order to ensure its approval in the House of Representatives.¹³

(Sept. 19, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/september/ustr-request-first-ever> [<https://perma.cc/KLX3-DT9V>].

⁸ U.S.-Kor. Free Trade Agreement, Art. 20.2, Annex 20-A at (1)(a), June 30, 2007, 125 Stat. 428, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file852_12719.pdf [<https://perma.cc/YA7G-L8GU>]; see also *id.* Art. 20.9(1) (providing that “a Party may request consultations with the other Party regarding any matter arising under this Chapter”).

⁹ See Office of the U.S. Trade Representative Press Release, USTR Welcomes Passage of Amendments to Korea’s Distant Water Fisheries Development Act Following First Ever Environment Consultations Under the United States-Korea Free Trade Agreement (Nov. 1, 2019), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/november/ustr-welcomes-passage-amendments> [<https://perma.cc/5Y62-AVK6>].

¹⁰ *Id.*

¹¹ *Id.*; Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 640, 640–41 (2019) (discussing the consultations with Peru). The USTR has also met in recent years with counterparts in Singapore to discuss compliance with the environmental chapter of the U.S.-Singapore Free Trade Agreement. Office of the U.S. Trade Representative Press Release, Joint Statement on the United States-Singapore Free Trade Agreement Environment Chapter Meeting (Oct. 5, 2017), at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/joint-statement-united-states-1> [<https://perma.cc/25JN-USRY>].

¹² See Office of Env’tl. Quality & Transboundary Issues, *Current Trade Agreements with Environmental Chapters*, U.S. DEP’T OF STATE (Feb. 11, 2019), at <https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/current-trade-agreements-with-environmental-chapters> [<https://perma.cc/6MGW-FVRE>].

¹³ See Jean Galbraith, Contemporary Practice of the United States, 114 AJIL 137, 141 (2020) (discussing the Trump administration’s actions in securing congressional approval for the USMCA); see also Protocol of Amendment to the Agreement Between the United States of America, the United Mexican States, and Canada, Dec. 10, 2019, available at <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf> [<https://perma.cc/5W6S-GHVL>] (containing the changes made in December 2019).

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Congress Signals Concern About Human Rights Abuses in China

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In late November of 2019, Congress passed the Hong Kong Human Rights and Democracy Act of 2019 (HKHRDA) with overwhelming bipartisan backing. Although its substantive provisions were modest in scope, this bill sent a strong indication of congressional support for protesters in Hong Kong. Despite having some reservations about this bill, President Trump signed it and a companion bill into law on November 27. The following month, Congress signaled attention to another human rights situation in China—the treatment of Uighurs in Xinjiang—by including a provision in the National Defense Authorization Act for Fiscal Year 2020 that requires an executive-branch report on this issue.

In June 2019, large-scale protests broke out in Hong Kong in response to a proposed bill that would have allowed defendants accused of certain crimes to be extradited to mainland China.¹ Following clashes with the police and the Hong Kong government, these protests expanded into demands for greater political reforms.² The protests continued over the following months, though dwindling by early 2020.³

In November 2019, Congress signaled support for the protesters through the passage of the HKHRDA. The section of the act setting forth policy objectives expressed strong support for the people of Hong Kong with respect to autonomy, human rights, and “democratic aspirations.”⁴ This section enumerated nine policy objectives, including the following:

It is the policy of the United States

...

(2) to support the high degree of autonomy and fundamental rights and freedoms of the people of Hong Kong, as enumerated by –

(A) the joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, done at Beijing December 19, 1984 . . . ;

(B) The International Covenant on Civil and Political Rights, done at New York December 19, 1966; and

(C) The Universal Declaration of Human Rights, done at Paris December 10, 1948.⁵

¹ Mike Ives, *What Is Hong Kong’s Extradition Bill?*, N.Y. TIMES (June 10, 2019), at <https://www.nytimes.com/2019/06/10/world/asia/hong-kong-extradition-bill.html>.

² Jin Wu, K.K. Rebecca Lai & Alan Yuhas, *Six Months of Hong Kong Protests. How Did We Get Here?*, N.Y. TIMES (Nov. 18, 2019), at https://www.nytimes.com/interactive/2019/world/asia/hong-kong-protests-arc.html?action=click&pgtype=Article&state=default&module=style-hong-kong&variant=show®ion=TOP_BANNER&context=Menu.

³ Chui-Wei Yap & Joyu Wang, *Hong Kong Protesters Refocus Ire on City’s Handling of Coronavirus Crisis*, WALL ST. J. (Jan. 31, 2020), at <https://www.wsj.com/articles/hong-kong-protesters-refocus-ire-on-citys-handling-of-coronavirus-crisis-11580475635> (noting that “fears about the [newly emerging coronavirus] have deterred large-scale gatherings”).

⁴ Hong Kong Human Rights and Democracy Act of 2019, at § 3, Pub. L. 116-76, 133 Stat. 1161 (2019) [hereinafter HKHRDA].

⁵ *Id.*

The act contained various provisions aimed at supporting the protesters in Hong Kong. Perhaps most importantly, the act requires annual recertification of Hong Kong's special status under the United States-Hong Kong Policy Act of 1992.⁶ Under this prior act, Hong Kong retains the same status vis-à-vis the United States as it did before its incorporation into China, meaning that it retains independent agreements with the United States on a number of fronts such as visa protections, trade, and the ability to freely trade the dollar.⁷ This special status has significant economic advantages for Hong Kong (and therefore presumably for China as well). Hong Kong's special status can be suspended, however, if "the President determines that Hong Kong is not sufficiently autonomous to justify treatment . . . different from that accorded the People's Republic of China."⁸ The HKHRDA amends the 1992 act by requiring the secretary of state to certify annually to Congress whether this special status remains justified.⁹ In doing so, the secretary of state is to consider the extent to which Hong Kong's government upholds human rights and the rule of law.¹⁰ As one commentator has observed, the HKHRDA "sets up an annual ritual . . . [which] will be noticed in China and Hong Kong and will thus keep Hong Kong high on the agenda of U.S.-China relations well into the next presidential administration."¹¹

The HKHRDA also includes two substantive provisions aimed at supporting the protesters. First, it specifies that Hong Kong students remain eligible for U.S. visas notwithstanding prior "politically-motivated" arrests.¹² Second, the act requires the president to report on persons who are responsible for serious human rights violations in Hong Kong and to impose sanctions on these persons.¹³ While prior law likely already provided the executive branch with authority in these two areas, the HKHRDA sends a clear congressional message that the executive branch should support the protesters through its visa decisions and its use of individualized sanctions.¹⁴

Alongside the HKHRDA, Congress also passed an act "[t]o prohibit the commercial export of covered munitions items to the Hong Kong Police Force."¹⁵ The act forbids the export of items such as tear gas, pepper spray, and rubber bullets.¹⁶ The president may waive these restrictions under certain conditions, and the act sunsets after one year.¹⁷

⁶ *Id.*, § 4(a).

⁷ United States-Hong Kong Policy Act of 1992, Pub. L. 102-383, 106 Stat. 1448 (1992).

⁸ *Id.*, § 202(a).

⁹ HKHRDA, *supra* note 4, § 4(a) (also providing that the secretary of state can waive the certification requirement under certain conditions).

¹⁰ *Id.*

¹¹ Julian Ku, *The Hong Kong Human Rights and Democracy Act Is Redundant, but Still Worthwhile*, LAWFARE (Nov. 25, 2019), at <https://www.lawfareblog.com/hong-kong-human-rights-and-democracy-act-redundant-still-worthwhile>.

¹² HKHRDA *supra* note 4, § 4(b).

¹³ *Id.*, § 7 (further providing that the president can waive these sanctions upon certification "that such a waiver is in the national interests of the United States").

¹⁴ Ku, *supra* note 11 (concluding that while "the HKHRDA is largely symbolic and redundant as a legal matter," the "political force of a message from a rarely united Congress during this era of impeachment is hard to overstate").

¹⁵ Pub. L. 116-77, 133 Stat. 1173 (2019).

¹⁶ *Id.*, § 2(a).

¹⁷ *Id.*, §§ 2(b), 3.

Both bills passed with virtually no opposition in Congress,¹⁸ notwithstanding the backdrop of comprehensive trade negotiations between the United States and China. In October of 2019, the United States had announced a preliminary “phase one” trade deal, but negotiations to finalize this deal were still ongoing at the time both bills passed in November of 2019.¹⁹ After the HKHRDA had passed both houses of Congress, President Trump was asked if he would veto it as requested by China, and he replied: “we have to stand with Hong Kong but I’m also standing with President Xi. He’s a friend of mine . . . we also are in the process of making the largest trade deal in history.”²⁰

Nonetheless, on November 27, Trump signed both acts into law. He stated:

I signed these bills out of respect for President Xi, China, and the people of Hong Kong. They are being enacted in the hope that Leaders and Representatives of China and Hong Kong will be able to amicably settle their differences leading to long term peace and prosperity for all.²¹

In response, China’s Foreign Ministry commissioner to Hong Kong stated that the bill was a “violation of China’s internal affairs.”²² China announced that it would suspend access to Hong Kong for the U.S. military and would take action against several U.S. nonprofit organizations operating in Hong Kong.²³ But following Trump’s decision to sign the bills, the Chinese Commerce Ministry did not link these bills to the trade negotiations.²⁴ The “phase one” trade deal was formally signed on January 15, 2020.²⁵

¹⁸ Patricia Zengerle & Richard Cowan, *U.S. House Passes Hong Kong Rights Bills, Trump Expected to Sign*, REUTERS (Nov. 20, 2019), at <https://www.reuters.com/article/us-hongkong-protests-usa/us-house-passes-hong-kong-human-rights-bills-idUSKBN1XU2CJ> (noting only one recorded vote in opposition to either bill).

¹⁹ Jean Galbraith, *Contemporary Practice of the United States*, 114 AJIL 137, 138 (2020) (describing the timing of the trade negotiations).

²⁰ *Trump Calls in to “Fox & Friends” Amid Impeachment Probe, Upcoming FISA Report*, REAL CLEAR POLITICS, at 45:08 (Nov. 22, 2019), at https://www.realclearpolitics.com/video/2019/11/22/trump_calls_in_to_fox_friend-s_amid_impeachment_probe_upcoming_fisa_report.html.

²¹ Donald J. Trump, *Statement on Signing Legislation Regarding United States Policy Towards Hong Kong*, 2019 DAILY COMP. PRES. DOC. 837 (Nov. 27, 2019). Given the strong support for the HKHRDA in Congress, a veto—if cast—might have been overridden. Trump issued an additional signing statement with respect to the HKHRDA in which he stated that “[c]ertain provisions of the Act would interfere with the exercise of the President’s constitutional authority to state the foreign policy of the United States” and that his “[a]dministration will treat each of the provisions of the Act consistently with the President’s constitutional authorities with respect to foreign relations.” Donald J. Trump, *Statement on Signing the Hong Kong Human Rights and Democracy Act of 2019*, 2019 DAILY COMP. PRES. DOC. 832 (Nov. 27, 2019).

²² Owen Churchill & Teddy Ng, *US’ Hong Kong Democracy Act Slanders China to a Level Close to Madness, Foreign Minister Wang Yi Says*, SOUTH CHINA MORNING POST (Nov. 21, 2019), at <https://www.scmp.com/news/china/diplomacy/article/3038789/us-hong-kong-democracy-act-slanders-china-level-close-madness>.

²³ Gerry Shih, *China Announces Sanctions Against U.S.-Based Nonprofit Groups in Response to Congress’s Hong Kong Legislation*, WASH. POST (Dec. 2, 2019), at https://www.washingtonpost.com/world/asia-pacific/china-announces-sanctions-against-us-based-nonprofits-in-response-to-congress-hong-kong-legislation/2019/12/02/9f414616-14e0-11ea-80d6-d0ca7007273f_story.html.

²⁴ Keith Bradsher, Javier Hernández & Alexandra Stevenson, *China Condemns U.S. Over Hong Kong. That Won’t Stop Trade Talks*, N.Y. TIMES (Nov. 28, 2019), at <https://www.nytimes.com/2019/11/28/business/china-hong-kong-trump-trade.html>.

²⁵ White House Press Release, *President Donald J. Trump is Signing a Landmark Phase One Trade Agreement with China* (Jan. 15, 2020), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signing-landmark-phase-one-trade-agreement-china> [<https://perma.cc/HV3J-5XTF>].

The U.S. government has also signaled concern about human rights violations in the Chinese region of Xinjiang, where Chinese authorities have reportedly orchestrated the detention, indoctrination, and forced labor of over a million Uighurs and other ethnic and religious minorities.²⁶ On October 7, 2019, the Commerce Department's Bureau of Industry and Security limited the export of sensitive items to twenty-eight Chinese-associated governmental and commercial organizations "that have been implicated in human rights violations and abuses in China's campaign targeting Uighurs. . . ."²⁷ The following day, the State Department issued visa restrictions on certain "Chinese government and Communist Party officials who are believed to be responsible for. . . the detention or abuse of Uighurs. . . ."²⁸ In December of 2019, Congress included a provision in the National Defense Authorization Act for Fiscal Year 2020 that required the intelligence agencies to prepare "a report on activity by the People's Republic of China to repress ethnic Muslim minorities in the Xinjiang region of China."²⁹ The report is due in May 2020.³⁰

INTERNATIONAL CRIMINAL LAW

Issuing Several Pardons, President Trump Intervenes in Proceedings of U.S. Troops Charged or Convicted of Acts Amounting to War Crimes

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On November 15, 2019, President Trump pardoned or otherwise removed punishments for three members of the military—Lieutenant Clint Lorange, Major Mathew Golsteyn, and Chief Petty Officer Edward Gallagher—who had been found to commit, or had allegedly committed, criminal acts abroad that amounted to war crimes. These actions follow Trump's May 2019 pardon of First Lieutenant Michael Behenna, who had been found guilty of murdering a detainee in Iraq. These intrusions into military proceedings were an unusual use of the president's pardon power and have raised concerns about the U.S. commitment to international humanitarian law.

²⁶ See Austin Ramzy & Chris Buckley, *Leaked China Files Show Internment Camps Are Ruled by Secrecy and Spying*, N.Y. TIMES (Nov. 24, 2019), at <https://www.nytimes.com/2019/11/24/world/asia/leak-chinas-internment-camps.html?searchResultPosition=4>; Eva Dou & Philip Wen, "Admit Your Mistakes, Repent": China's Shifts Campaign to Control Xinjiang's Muslims, WALL ST. J. (Feb. 6, 2020), at <https://www.wsj.com/articles/china-shifts-to-new-phase-in-campaign-to-control-xinjiangs-muslims-11580985000>.

²⁷ U.S. Dep't. of Commerce Press Release, U.S. Department of Commerce Adds 28 Chinese Organizations to Its Entity List (Oct. 7, 2019), at <https://www.commerce.gov/news/press-releases/2019/10/us-department-commerce-adds-28-chinese-organizations-its-entity-list> [<https://perma.cc/T75K-LJDE>].

²⁸ U.S. Dep't. of State Press Release, U.S. Department of State Imposes Visa Restrictions on Chinese Officials for Repression in Xinjiang (Oct. 8, 2019), at <https://www.state.gov/u-s-department-of-state-imposes-visa-restrictions-on-chinese-officials-for-repression-in-xinjiang> [<https://perma.cc/HVD7-2378>].

²⁹ National Defense Authorization Act for Fiscal Year 2020, § 5512, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

³⁰ See *id.* (requiring the report with 150 days of the act's passage). In December of 2019, the House of Representatives passed, by a 407–1 vote, a bill that would authorize or require the imposition of various sanctions and export controls related to China's treatment of the Uighurs. Uyghur Human Rights Policy Act of 2019, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/178/all-actions?overview=closed&q=%22roll-call-vote%22:%22all%22&KWICView=false> [<https://perma.cc/2KH8-9VQ3>]. This bill is now pending in the Senate. *Id.*

The underlying crimes of the officer who received the first pardon, Behenna, occurred in Iraq in 2008. Behenna killed an Iraqi man whom he had brought to a remote culvert, ordered stripped naked, and begun interrogating at gunpoint.¹ He defended the killing as an act of self-defense, claiming that the man had reached for Behenna's gun after throwing a piece of concrete at him.² Members of a court-martial rejected Behenna's self-defense claim, however, and he was convicted of unpremeditated murder and assault.³ After serving approximately five years in prison, Behenna was released on parole in 2014.⁴

Lorance was also convicted of murder, in his case for the killing of villagers in Afghanistan.⁵ Lorance had ordered his platoon to fire on unarmed villagers while in Afghanistan in July 2012, and two men died as a result.⁶ Following these deaths, Lorance falsely stated that he was not able to complete a proper Battle Damage Assessment on the men because other villagers had already taken away their bodies.⁷ A member of Lorance's platoon subsequently reported him to the military authorities.⁸ Lorance was convicted in a court-martial of second-degree murder and sentenced to a nineteen-year period of confinement.⁹

Golsteyn, although charged with premeditated murder after allegedly committing a war crime in Afghanistan, never stood trial to face these charges. An Army investigation into Golsteyn's conduct found that Golsteyn and his fellow troops had detained a bomb-maker they suspected to be responsible for a recent explosion at a military base in Afghanistan that killed two Marines.¹⁰ After the man was questioned, Golsteyn and another U.S. troop had killed him and burned his body.¹¹ The Army investigated this killing, but only disciplined Golsteyn by revoking his previously awarded Silver Star and transferring him out of the Special Forces.¹² The military reopened the investigation after Golsteyn publicly admitted to

¹ *United States v. Behenna*, 71 M.J. 228, 230-31 (C.A.A.F. 2012).

² *Id.* at 231.

³ *Id.* at 229; *see also* Uniform Code of Military Justice (UCMJ), Arts. 118, 128, 10 U.S.C. §§ 918, 928 (2012). Behenna was charged specifically with unpremeditated murder and assault, rather than for violations of the law of war through a UCMJ general court-martial or for violations of the War Crimes Act of 1996 through a federal district court prosecution. Nonetheless, the underlying allegations giving rise to these charges described behavior that amounted to a war crime. *See* 18 U.S.C. § 2441 (2012) (defining war crimes as including grave breaches of the Geneva Conventions and, for noninternational armed conflicts, grave breaches of common Article 3). This applies as well to the charges filed against Lorance, Golsteyn, and Gallagher.

⁴ White House Press Release, Statement From the Press Secretary Regarding Executive Clemency for Michael Behenna (May 6, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-clemency-michael-behenna> [<https://perma.cc/JE9Q-M5HC>] [hereinafter Behenna Press Release].

⁵ *United States v. Lorance*, No. ARMY 20130679, 2017 WL 2819756, at *1–2 (A. Ct. Crim. App. June 27, 2017). Lorance was additionally convicted of attempted murder, wrongfully communicating a threat, reckless endangerment, soliciting a false statement, and obstructing justice. *Id.*; *see also* UCMJ, Arts. 80, 118, 134, 10 U.S.C. §§ 880, 918, 934 (2012).

⁶ *United States v. Lorance*, *supra* note 5, at *2.

⁷ *Id.* at *3. In fact, Lorance told villagers to take away the bodies after two soldiers, who were not trained to complete Battle Damage Assessments, "conducted a cursory inspection of the victims." *Id.* at *2–3.

⁸ *Id.* at *3.

⁹ *Id.* at *1, 3.

¹⁰ Dan Lamothe, *See Document Excerpts in the Army's War-Crimes Case Against a Green Beret War Hero*, WASH. POST (May 19, 2015), at <https://www.washingtonpost.com/news/checkpoint/wp/2015/05/19/see-document-excerpts-in-the-armys-war-crimes-case-against-a-green-beret-war-hero>.

¹¹ *Id.*

¹² Dan Lamothe, *Trump's Focus on an Army Murder Case Highlights a Divided Nation Still at War*, WASH. POST (Dec. 22, 2018), at https://www.washingtonpost.com/world/national-security/trumps-focus-on-an-army-murder-case-highlights-a-divided-nation-still-at-war/2018/12/21/b862b724-0465-11e9-b5df-5d3874f1ac36_story.html.

the killing of the suspected bomb-maker in a 2016 Fox News interview.¹³ Golsteyn was subsequently charged with murder, and was scheduled to be tried by court-martial in February 2020.¹⁴

Gallagher was charged with first-degree murder of an ISIS captive, for posing for a picture with the dead body of the captive, and with attempted murder for shooting at several unarmed civilians in Iraq.¹⁵ In July 2019, the members of the court-martial acquitted him of the first-degree murder and attempted murder charges while convicting him for taking a “trophy photo” with the dead captive’s body.¹⁶ Due to the time that Gallagher spent in confinement prior to his trial, he did not receive any further incarceration; however, the Navy followed the members’ recommendation and demoted Gallagher by one rank.¹⁷

Trump’s first pardon with respect to these four men went to Behenna, who received it on May 6, 2019.¹⁸ That day, the White House released a statement explaining that “Mr. Behenna [was] entirely deserving of this Grant of Executive Clemency” because he was “a model prisoner” and his case “attracted broad support from the military, Oklahoma elected officials, and the public.”¹⁹ Just over half a year later, on November 15, 2019, Trump signed pardons for both Lorance and Golsteyn and ordered the reversal of Gallagher’s demotion in rank.²⁰ The related press announcement asserted the following justification:

The President, as Commander-in-Chief, is ultimately responsible for ensuring that the law is enforced and when appropriate, that mercy is granted. For more than two hundred

¹³ Dan Lamothe, *Matt Golsteyn Planned to Join the CIA and Go to Iraq. Now He Faces a Murder Charge*, WASH. POST (Feb. 9, 2019), at https://www.washingtonpost.com/world/national-security/they-do-not-obey-their-own-rules-soldier-facing-murder-case-says-he-must-defend-himself-against-the-army/2019/02/09/a4cdb5b2-2baf-11e9-97b3-ae59fbae7960_story.html; *How We Fight: Part 3*, FOX NEWS, at 1:57–3:11 (Nov. 4, 2016), at <https://video.foxnews.com/v/5197270526001#sp=show-clips>.

¹⁴ See USASOC Public Affairs Press Release, Article 32 Hearing to be Held for Accused Soldier (Jan. 16, 2019), at https://www.army.mil/article/216229/article_32_hearing_to_be_held_for_accused_soldier [<https://perma.cc/QRP5-2DX2>] (announcing that “the Special Court-Martial Convening Authority decided that Maj. Mathew Golsteyn will proceed to an Article 32 Preliminary Hearing, . . . an initial step towards determining whether Major Mathew Golsteyn violated Article 118 of the [UCMJ], Premeditated Murder”); USASOC Public Affairs Press Release, Maj. Mathew Golsteyn Trial Date Delayed Until February 19th (Nov. 14, 2019), at https://www.army.mil/article/229836/maj_mathew_golsteyn_trial_date_delayed_until_february_19th [<https://perma.cc/4DXY-753U>] (noting that Golsteyn’s trial was rescheduled to February 19, 2020).

¹⁵ Fellow Navy SEALs testified that Gallagher stabbed the ISIS captive “repeatedly in the neck” with a hunting knife. Dave Philipps, *Navy SEAL Chief Accused of War Crimes Is Found Not Guilty of Murder*, N.Y. TIMES (July 2, 2019), at <https://www.nytimes.com/2019/07/02/us/navy-seal-trial-verdict.html>. Gallagher then sent a photo of him posing with the dead ISIS fighter to his friends in the United States, stating: “Good story behind this, got him with my hunting knife.” *Id.* Gallagher was also charged, but acquitted, with obstruction of justice because of an allegation that he had threatened to kill the SEALs in his platoon if they reported his conduct. *Id.*

¹⁶ *Id.* The acquittal was likely due to a fellow SEAL’s testimony taking responsibility for the killing of the ISIS fighter. *Id.* Because this testimony contradicted earlier statements the SEAL—Special Operator First Class Corey Scott—had made to the Navy, the Navy may charge Scott with perjury. *Id.*

¹⁷ Dave Philipps, *Navy Reduces Punishment for SEAL in War Crimes Case*, N.Y. TIMES (Oct. 29, 2019), at <https://www.nytimes.com/2019/10/29/us/navy-seal-gallagher-clemency.html?searchResultPosition=6>.

¹⁸ Behenna Press Release, *supra* note 4.

¹⁹ *Id.*

²⁰ U.S. Dep’t of Justice, Pardons Granted by President Donald Trump, Executive Grant of Clemency of Mathew Golsteyn (Nov. 15, 2019), at <https://www.justice.gov/pardon/pardons-granted-president-donald-trump>; U.S. Dep’t of Justice, Pardons Granted by President Donald Trump, Executive Grant of Clemency of Clint A. Lorance (Nov. 15, 2019), at <https://www.justice.gov/pardon/pardons-granted-president-donald-trump>; see also White House Press Release, Statement from the Press Secretary (Nov. 15, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-97> [<https://perma.cc/FF9D-KM96>] [hereinafter Golsteyn, Lorance, and Gallagher Press Release].

years, presidents have used their authority to offer second chances to deserving individuals, including those in uniform who have served our country. These actions are in keeping with this long history. As the President has stated, “when our soldiers have to fight for our country, I want to give them the confidence to fight.”²¹

Trump did not give any explanation for why he was pardoning Golsteyn before Golsteyn had even been convicted of a crime.²² Following the November 15, 2019 announcement, the Navy sought to discipline Gallagher by removing his trident pin—a badge of honor worn by Navy SEALs.²³ Trump overruled this decision as well, tweeting: “The Navy will NOT be taking away Warfighter and Navy Seal Eddie Gallagher’s Trident Pin. This case was handled very badly from the beginning. Get back to business!”²⁴

Trump’s power to pardon resides in Article II, Section 2 of the U.S. Constitution: “The President . . . shall have power to grant reprieves and pardons for Offenses against the United States, except in Cases of Impeachment.”²⁵ This provision for pardons of “Offenses against the United States” is understood to reach all crimes prosecuted by the United States, even those occurring against noncitizens on foreign soil.²⁶ Trump is not the first president to intervene in a case in which the underlying conduct amounts to war crimes. President Nixon allowed Lieutenant William Calley to stay under house arrest rather than in military confinement during his appeal of his conviction for killing civilians in My Lai village during the Vietnam War.²⁷ But in giving full pardons to military personnel convicted of acts amounting to war crimes, Trump’s use of his pardon power was highly unusual.²⁸ Even more extraordinary was Trump’s pardon of Golsteyn, who was still in the midst of his judicial proceedings.²⁹

²¹ Golsteyn, Lorange, and Gallagher Press Release, *supra* note 20.

²² See generally *id.*

²³ Dave Philipps, *Trump Reverses Navy Decision to Oust Edward Gallagher From SEALs*, N.Y. TIMES (Nov. 21, 2019), at <https://www.nytimes.com/2019/11/21/us/trump-seals-eddie-gallagher.html?action=click&module=RelatedLinks&pgtype=Article>.

²⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2019, 8:30 AM), at <https://twitter.com/realdonaldtrump/status/1197507542726909952> [<https://perma.cc/5MX5-7UHV>].

²⁵ U.S. CONST., Art. II, § 2.

²⁶ See Dan Maurer, *Should There Be a War Crime Pardon Exception*, LAWFARE (Dec. 3, 2019), at <https://www.lawfareblog.com/should-there-be-war-crime-pardon-exception> (“Ultimately, the difficulty of pardoning war crimes lies in that most people do not consider it a difficult question at all—the president clearly has plenary, unilateral discretion to grant a pardon.”); Chris Jenks, *Sticking It to Yourself: Preemptive Pardons for Battlefield Crimes Undercut Military Justice and Military Effectiveness*, JUST SECURITY (May. 20, 2019), at <https://www.justsecurity.org/64185/sticking-it-to-yourself-preemptive-pardons-for-battlefield-crimes-undercut-military-justice-and-military-effectiveness> (commenting that “the President possesses the authority to pardon” individuals who had allegedly committed war crimes, including Gallagher and Golsteyn).

²⁷ 7 WEEKLY COMP. PRES. DOCS. 577, 592 (Apr. 5, 1971) (also announcing the “President’s decision that before any final sentence is carried out in the case of Lieutenant Calley, the President will personally review the case and finally decide it”).

²⁸ Donald J. Guter, John D. Hutson & Rachel VanLandingham, *The American Way of War Includes Fidelity to Law: Preemptive Pardons Break that Code*, JUST SECURITY (May. 24, 2019), at <https://www.justsecurity.org/64260/the-american-way-of-war-includes-fidelity-to-law-preemptive-pardons-break-that-code>; see also Maurer, *supra* note 26 (“Though Trump’s acts of judicial mercy on service members may not be wholly original, they have made him the first president to pardon soldiers—in this case, officers—already convicted of having committed offenses that violate the international law of war.”).

²⁹ Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 15, 2019), at <https://www.nytimes.com/2019/11/15/us/trump-pardons.html> (quoting a retired military judge commenting on Golsteyn’s pardon: “I’m not sure it’s ever been done”); see also Guter, Hutson & VanLandingham, *supra* note 28

There was some domestic political support for Trump's actions,³⁰ but there were also many politicians as well as military members who disagreed with the actions—apparently including some officials inside the Pentagon.³¹ News reports indicate that Navy Secretary Richard Spencer personally contacted Trump requesting that he not interfere publicly with Gallagher's discipline,³² and Army Secretary Ryan McCarthy, Defense Secretary Mark T. Esper, and the Chairman of the Joint Chiefs of Staff Mark A. Milley all opposed the November pardons.³³ Nonetheless, as noted above, Trump tweeted that the Navy would not remove Gallagher's Trident; further, Spencer was fired three days later by Esper for having contacted Trump without going through the chain of command.³⁴ Spencer responded to Trump's decision in a letter of resignation dated the same date that he was fired:

The Constitution, and the Uniform Code of Military Justice, are the shields that set us apart, and the beacons that protect us all. Through my Title Ten Authority, I have strived to ensure our proceedings are fair, transparent and consistent, from the newest recruit to the Flag and General Officer level.

Unfortunately it has become apparent that in this respect, I no longer share the same understanding with the Commander in Chief who appointed me, in regards to the key principle of good order and discipline.³⁵

("[W]e know of no modern (since the Civil War) precedent for a President's cutting short ongoing military criminal prosecutions of service members formally accused of violent crimes").

³⁰ See e.g., Behenna Press Release, *supra* note 4 (asserting that there was "broad support from the military, Oklahoma elected officials, and the public"); Golsteyn, Lorange, and Gallagher Press Release, *supra* note 20 (listing congressional and public supporters for Trump's pardon of Golsteyn and Lorange); see also Lindsay L. Rodman, *Post-9/11 Veterans Have Mixed Feelings About Trump's War Crimes Pardons*, JUST SECURITY (May 24, 2019), at <https://www.justsecurity.org/64256/post-9-11-veterans-have-mixed-feelings-about-trumps-war-crimes-pardons> (displaying polling data concerning public support for Trump's pardons).

³¹ See e.g., Philipps, *supra* note 29 ("Top military leaders have pushed back hard against clearing the three men. Defense Secretary Mark Esper and Army Secretary Ryan McCarthy have argued that such a move would undermine the military code of justice, and would serve as a bad example to other troops in the field, administration officials said."); Martin E. Dempsey (@Martin_Dempsey), TWITTER (May 21, 2019, 5:15 AM), at https://twitter.com/Martin_Dempsey/status/1130809276191035392 [<https://perma.cc/Z4J4-Z88X>] (responding to Trump's actions, as a retired U.S. Army general and the eighteenth chairman of the Joint Chiefs of Staff: "Absent evidence of innocence or injustice the wholesale pardon of US servicemembers accused of war crimes signals our troops and allies that we don't take the Law of Armed Conflict seriously. Bad message. Bad precedent. Abdication of moral responsibility. Risk to us."); Alexander Bolton & Rebecca Kheel, *Republicans Raise Concerns Over Trump Pardoning Service Members*, THE HILL (Dec. 3, 2019), at <https://thehill.com/policy/defense/472910-republicans-raise-concerns-over-trump-pardoning-service-members> (quoting Senate Republicans who disagreed with Trump's actions, including Senator Lindsey Graham who was "concerned" about Trump's interventions "hav[ing] a chilling effect").

³² Dan Lamothe & Josh Dawsey, *Pentagon Chief Says He Was "Flabbergasted" by Navy Secretary's Attempt to Make a Private Deal with Trump*, WASH. POST (Nov. 25, 2019), at <https://www.washingtonpost.com/national-security/2019/11/25/pentagon-chief-says-he-was-flabbergasted-by-navy-secretarys-attempt-make-private-deal-with-trump>.

³³ *Id.*

³⁴ *Id.* (noting that Spencer had proposed to Trump that Gallagher could retire with his pin if Trump did not publicly intervene).

³⁵ Letter from Richard V. Spencer, U.S. Navy Secretary, to President Donald J. Trump (Nov. 24, 2019), *available at* <https://www.washingtonpost.com/context/read-navy-secretary-richard-spencer-s-letter-to-president-trump/2bf70c2a-f811-43be-9e21-b02f1fe54a26>.

Rupert Colville, the spokesperson for the United Nations High Commissioner for Human Rights, expressed dismay over the pardons.³⁶ Colville stated that the three most recent acts of leniency by Trump “involve serious violations of international humanitarian law” and, thus, the pardons “run against the letter and the spirit of international law which requires accountability for such violations.”³⁷ Colville specifically mentioned Golsteyn’s case as being “particularly troubling,” considering Trump’s failure to allow the judicial process to conclude before intervening.³⁸ Colville concluded: “These pardons send a disturbing signal to military forces all around the world.”³⁹

These pardons occurred while the International Criminal Court (ICC) was considering an investigation into international crimes allegedly committed in Afghanistan, including by U.S. personnel. In April 2019, the Trump administration revoked the U.S. visa of the ICC prosecutor as she sought, following a preliminary investigation, to persuade the ICC’s Pre-Trial Chamber (PTC) to authorize a full investigation into the situation in Afghanistan.⁴⁰ Soon after, the PTC denied her request, reasoning that the investigation would likely not be successful due in part to the challenge of obtaining international cooperation.⁴¹ The PTC’s decision was appealed.⁴² Although the United States did not participate in this appeal, Trump’s personal lawyer—Jay Sekulow—entered an appearance as *amicus curiae* on behalf of the European Centre for Law and Justice seeking affirmance of the PTC decision.⁴³ As part of his oral argument on December 4, 2019, Sekulow submitted that “the United States is demonstrably both willing and able to investigate and prosecute its own cases.”⁴⁴ His brief remarks did not discuss Trump’s recent pardons or their implications for the willingness and ability of the United States to bring accountability to the perpetrators of war crimes.⁴⁵ On March 5, 2020, the Appeals Chamber of the ICC reversed the PTC decision and authorized an investigation into the situation in Afghanistan.⁴⁶

³⁶ United Nations High Commissioner for Human Rights Press Release, Press Brief on the United States (Nov. 19, 2019), at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25314&LangID=E> [hereinafter UNHCHR Press Release].

³⁷ *Id.* As stated by the International Committee for the Red Cross, “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.” International Committee for the Red Cross, *Rule 158: Prosecution of War Crimes*, CUSTOMARY IHL DATABASE, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

³⁸ UNHCHR Press Release, *supra* note 36.

³⁹ *Id.*

⁴⁰ Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 625, 625–28 (2019).

⁴¹ *Id.* at 629.

⁴² See International Criminal Court Press Release, Afghanistan: ICC Pre-Trial Chamber II Authorises Prosecutor to Appeal Decision Refusing Investigation (Sept. 17, 2019), at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1479> [<https://perma.cc/6SJS-LG5G>].

⁴³ See Situation in the Islamic Republic of Afghanistan, ICC-02/17-98 OA OA2 OA3 OA4, Confirmation that Mr Jay Alan Sekulow Will Make Oral Submissions at the Oral Hearing to Be Held Between 4 and 6 December 2019, at 3 (Oct. 24, 2019), available at https://www.icc-cpi.int/CourtRecords/CR2019_06261.PDF.

⁴⁴ Situation in the Islamic Republic of Afghanistan, ICC-02/17-T-001-ENG OA OA2 OA3 OA4, Appeals Hearing Transcript, at 87 (Dec. 4, 2019), available at https://www.icc-cpi.int/Transcripts/CR2019_07359.PDF.

⁴⁵ See generally *id.* at 84–87.

⁴⁶ Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation into the Islamic Republic of Afghanistan (Mar. 5, 2020), at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-138>.

USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani

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On January 3, 2020, the U.S. military conducted a drone strike near Baghdad International Airport that killed Qasem Soleimani, the leader within the Iranian military of the Quds Force of the Islamic Revolutionary Guard Corps (IRGC). The Trump administration initially appeared to justify the strike as an effort to deter imminent attacks on U.S. embassies and personnel, but later insisted that Iran's actions in the months leading up to the strike triggered the U.S. right to self-defense. Domestically, the Trump administration claimed the authority to carry out the strike based on both the president's inherent constitutional powers and the Authorization for Use of Military Force Against Iraq passed by Congress in 2002. In the aftermath of the strike, Iraq voted to expel U.S. troops from its territory, and Iran conducted a missile strike on American bases in Iraq. Iran also announced that it would cease to observe limits on its production of nuclear fuel—a core tenet of the Joint Comprehensive Plan of Action (JCPOA), from which the United States withdrew in 2018.

Over the last few months of 2019, Iranian-backed militias, including Kataib Hezbollah, launched multiple rocket attacks at U.S. military bases in Iraq.¹ One such attack, undertaken on December 27, killed a U.S. citizen who was working as a military contractor.² Shortly thereafter, the United States carried out airstrikes in Iraq and Syria against Kataib Hezbollah, reportedly resulting in over twenty deaths.³ Following these airstrikes, militia supporters tried unsuccessfully to storm the U.S. embassy in Baghdad.⁴ On December 31, President Trump tweeted that “Iran will be held fully responsible for lives lost, or damage incurred, at any of our facilities. They will pay a very BIG PRICE! This is not a Warning, it is a Threat. Happy New Year.”⁵

On January 2, 2020, Trump ordered the U.S. military to conduct a precision drone strike on two vehicles leaving the Baghdad International Airport in Iraq.⁶ The strike, carried out in the early hours of the following day, targeted and killed Soleimani, who led the IRGC's Quds

¹ Julian E. Barnes, *U.S. Launches Airstrikes on Iranian-Backed Forces in Iraq and Syria*, N.Y. TIMES (Dec. 30, 2019), at <https://www.nytimes.com/2019/12/29/world/middleeast/us-airstrikes-iran-iraq-syria.html>.

² *Id.*

³ *Id.* A U.S. State Department official explained that the strikes were “aimed at deterring Iran” and that “we are not going to let Iran get away with using a proxy force to an attack – to attack American interests.” U.S. Dep't of State Press Release, Press Briefing by Senior State Department Officials on U.S. Airstrikes in Iraq and Syria (Dec. 30, 2019), at <https://www.state.gov/senior-state-department-officials-on-u-s-airstrikes-in-iraq-and-syria> [perma.cc/K9GZ-7HTJ].

⁴ Ghassan Adnan & Isabel Coles, *Militia Supporters Retreat from U.S. Embassy Site in Iraq*, WALL ST. J. (Jan. 1, 2020), at <https://www.wsj.com/articles/protesters-retreat-from-u-s-embassy-site-in-iraq-11577891592>.

⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 31, 2019, 4:19 PM), at <https://twitter.com/realdonaldtrump/status/1212121026072592384> [<https://perma.cc/XE3D-K3AE>].

⁶ Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qasim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (Jan. 7, 2020), at <https://www.nytimes.com/2020/01/02/world/middleeast/qasem-soleimani-iraq-iran-attack.html>. The Trump administration apparently also attempted a drone strike in Yemen targeting senior IRGC official Abdul Reza Shahlai, although the strike ultimately failed. Eric Schmitt, Edward Wong & Julian Barnes, *U.S. Unsuccessfully Tried Killing a Second Iranian Military Official*, N.Y. TIMES (Jan. 10, 2020), at <https://www.nytimes.com/2020/01/10/world/middleeast/trump-iran-yemen.html>.

Force, a special operations branch that carries out covert and military activities.⁷ The United States has long deemed the Quds Force to be a supporter of terrorism, and, in April of 2017, the United States designated the IRGC itself as a foreign terrorist organization for purposes of a domestic statute, notwithstanding the IRGC's status as an arm of a state.⁸ Both the George W. Bush and Obama administrations reportedly considered, but ultimately rejected, attempts to eliminate Soleimani due to concerns about the potential repercussions.⁹ Several other individuals were killed in the January 3 strike, including Abu Mahdi al-Muhandis, an Iraqi who was a likely second intended target in light of his position as the leader of Kataib Hezbollah.¹⁰

The international legality of the strike turns on the scope of the right to self-defense provided for by international law.¹¹ Article 51 of the UN Charter allows states to exercise "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."¹² Under customary international law, imminent self-defense prior to an attack is widely recognized as permissible when the threat is "instant, overwhelming and leaving no choice and means, and leaves no moment for deliberation."¹³ The United States has previously articulated a more expansive view of imminence. During the Obama administration, for example, the legal adviser to the State Department identified multiple factors relevant to an imminence analysis and observed that, conditional on "a reasonable and objective basis for concluding that an armed attack is imminent," the "absence of specific evidence of where an attack will take place or the precise nature of an attack does not preclude a conclusion that an armed attack is imminent."¹⁴ The legal adviser also explained "the view of the United States [that] once a State has lawfully resorted to force in self-defense against a particular armed group following an actual or imminent attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group."¹⁵

⁷ Crowley, Hassan & Schmitt, *supra* note 6.

⁸ Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 609, 609–11 n. 17 (2019) (noting that the Department of Treasury had sanctioned the Quds Force as a terrorism supporter as far back as 2007).

⁹ Zeke Miller & Julie Pace, *US Long Watched Soleimani, but Feared Risks of a Strike*, AP NEWS (Jan. 4, 2020), at <https://apnews.com/57b4e6ffca604eb010b3dfd29aeed2b>.

¹⁰ Crowley, Hassan & Schmitt, *supra* note 6; Matthew S. Schwartz, *Who Was the Iraqi Commander Also Killed in the Baghdad Drone Strike?*, NPR (Jan. 4, 2020), at <https://www.npr.org/2020/01/04/793618490/who-was-the-iraqi-commander-also-killed-in-baghdad-drone-strike>.

¹¹ For a compilation of state reactions to the strike and its legality, see Mehrnusch Anssari & Benjamin Nußberger, *Compilation of States' Reactions to U.S. and Iranian Uses of Force in Iraq in January 2020*, JUST SECURITY (Jan. 22, 2020), at <https://www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020> (also compiling reactions to a later strike carried out by Iran).

¹² UN Charter Art. 51.

¹³ See Letter from Daniel Webster to Lord Ashburton (July 27, 1842), in CORRESPONDENCE BETWEEN MR. WEBSTER AND LORD ASHBURTON 14 (1842) (articulating this test).

¹⁴ Brian Egan, Legal Adviser, Dep't of State, Remarks to the American Society of International Law (Apr. 1, 2016), at <https://2009-2017.state.gov/s/l/releases/remarks/255493.htm> [perma.cc/6BNY-URHH] [hereinafter Egan Remarks]; see also Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 110 AJIL 587, 592 (2016) (discussing the standard set forth by Egan and considering how it related to air strikes conducted against al-Shahaab).

¹⁵ Egan Remarks, *supra* note 14.

The Department of Defense's initial press release, published the night of the strike, justified the strike on the grounds that

General Soleimani was actively developing plans to attack American diplomats and service members in Iraq and throughout the region. General Soleimani and his Quds Force were responsible for the deaths of hundreds of American and coalition service members and the wounding of thousands more. He had orchestrated attacks on coalition bases in Iraq over the last several months – including the attack on December 27th – culminating in the death and wounding of additional American and Iraqi personnel. General Soleimani also approved the attacks on the U.S. Embassy in Baghdad that took place this week. This strike was aimed at deterring future Iranian attack plans.¹⁶

In the days that followed, the administration began to use the language of imminence, suggesting that it sought to justify the strike as a preemptive measure in addition to—or perhaps instead of—self-defense in response to prior attacks. Trump stated: “Soleimani was plotting imminent and sinister attacks on American diplomats and military personnel, but we caught him in the act and terminated him. . . . We took action last night to stop a war. We did not take action to start a war.”¹⁷ Trump claimed that the administration had intelligence suggesting that Soleimani was planning to bomb four U.S. embassies, including one in Iraq.¹⁸

¹⁶ U.S. Dep't of Defense Press Release, Statement by the Department of Defense (Jan. 2, 2020), at <https://www.defense.gov/Newsroom/Releases/Release/Article/2049534/statement-by-the-department-of-defense> [perma.cc/2SUT-XK3V].

¹⁷ Donald J. Trump, Remarks on the Death of Islamic Revolutionary Guard Corps Major General and Quds Force Commander Qasem Soleimani of Iran, 2020 DAILY COMP. PRES. DOC. 005, at 1 (Jan. 3, 2020) (also stating that “the recent attacks on U.S. targets in Iraq . . . were carried out at the direction of Soleimani”). The following day, Trump tweeted that “if Iran strikes any Americans, or American assets, we have . . . targeted 52 Iranian sites . . . some at a very high level & important to Iran & the Iranian culture.” Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 4, 2020, 5:52 PM), at <https://twitter.com/realDonaldTrump/status/1213593974679769093> [perma.cc/4NQJ-N2JE]. The secretary of defense later clarified that the United States would not target cultural sites, as that would be impermissible under the law of armed conflict. Peter Baker & Maggie Haberman, *Pentagon Rules Out Striking Iranian Cultural Sites, Contradicting Trump*, N.Y. TIMES (Jan. 7, 2020), at <https://www.nytimes.com/2020/01/06/us/politics/trump-esper-iran-cultural-sites.html>. Iran expressed outrage at Trump's tweet, stating that the “threat to target Iranian cultural sites is certainly a flagrant violation of the basic norms and principles of international law, and any attack against such sites would be a war crime.” Permanent Rep. of the Islamic Republic of Iran, Letter Dated 7 January 2020 to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2020/16 (Jan. 8, 2020), at <https://undocs.org/en/S/2020/16>.

¹⁸ Phillip Ruckert, John Hudson, Shane Harris & Josh Dawsey, “Four Embassies”: *The Anatomy of Trump's Unfounded Claim About Iran*, WASH. POST (Jan. 13, 2020), at https://www.washingtonpost.com/politics/four-embassies-the-anatomy-of-trumps-unfounded-claim-about-iran/2020/01/13/2dcd6df0-3620-11ea-bf30-ad313e4ec754_story.html. Secretary of State Mike Pompeo similarly stated:

We had specific information on an imminent threat, and those threats included attacks on U.S. embassies . . . We don't know exactly which day it would've been executed. But it was very clear: Qasem Soleimani himself was plotting a broad, large-scale attack against American interests. And those attacks were imminent . . . [a]gainst American facilities, including American embassies, military bases [and] American facilities throughout the region.

Mike Pompeo, Sec'y of State Press Release, Press Briefing by Secretary of State Mike Pompeo and Secretary of the Treasury Steven Mnuchin on Iran Sanctions (Jan. 10, 2020), available at <https://www.whitehouse.gov/briefings-statements/press-briefing-secretary-state-mike-pompeo-secretary-treasury-steven-mnuchin-iran-sanctions> [perma.cc/P8UF-PJDD].

The United States did not discuss imminence, however, when notifying the UN Security Council of the strike pursuant to its obligations under Article 51 of the UN Charter.¹⁹ Instead, the United States defended the strike as a response to prior Iranian attacks. On January 8—five days after the strike—the U.S. permanent representative to the United Nations wrote to the Security Council that:

the United States has undertaken certain actions in the exercise of its inherent right of self-defence. These actions were in response to an escalating series of armed attacks in recent months by the Islamic Republic of Iran and Iran-supported militias on United States forces and interests in the Middle East region, in order to deter the Islamic Republic of Iran from conducting or supporting further attacks against the United States or United States interests, and to degrade the Islamic Republic of Iran and Islamic Revolutionary Guard Corps Qods Force-supported militias' ability to conduct attacks.²⁰

The letter referred specifically to Iran's destruction of a U.S. drone in June 2019, an Iranian drone threat presented to a U.S. military ship in July 2019, and the attacks aimed at U.S. military bases in Iraq by Kataib Hezbollah and other "Qods Force-backed militia groups in Iraq."²¹ The letter did not offer specific reasoning for its conclusion that the acts of the militia groups could be attributed to Iran. In a subsequent domestic communication, the administration similarly asserted that "[a]lthough the threat of further attack existed, recourse to the inherent right of self-defense was justified sufficiently by the series of attacks that preceded the January 2 strike."²²

In response to the strike, the Iranian government promised "severe revenge"²³ and condemned the strike as a violation of international law. Iran's permanent representative to the United Nations wrote:

Conducted "at the direction of the President" of the United States, the assassination of Major General Qasem Soleimani, by any measure, is an obvious example of State terrorism and, as a criminal act, constitutes a gross violation of the fundamental principles of international law, including, in particular, those stipulated in the Charter of the United Nations, and thus entails the international responsibility of the United States. . . .

The designation, by one State, of an official branch of the armed forces of other State(s) as

¹⁹ See Permanent Rep. of U.S. to the UN, Letter Dated 8 January 2020 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc S/2020/20 (Jan. 9, 2020), at <https://undocs.org/en/S/2020/20>.

²⁰ *Id.*

²¹ *Id.*; see also Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 845, 847–48 (2019) (describing the two drone-related incidents from the summer of 2019). For a critique of the legal reasoning underlying this letter, see Adil Ahmad Haque, *U.S. Legal Defense of the Soleimani Strike at the United Nations: A Critical Assessment*, JUST SECURITY (Jan. 10, 2020), at <https://www.justsecurity.org/68008/u-s-legal-defense-of-the-soleimani-strike-at-the-united-nations-a-critical-assessment>.

²² White House, Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations (2020), available at https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf [perma.cc/B5AQ-GXVQ] [hereinafter White House Notice].

²³ Louisa Loveluck, Adam Taylor & Michael Brice-Saddler, *Trump Says Iranian Military Leader Was Killed by Drone Strike "to Stop a War," Warns Iran Not to Retaliate*, WASH. POST (Jan. 3, 2020), at https://www.washingtonpost.com/world/iran-strike-live-updates/2020/01/03/3779f55c-2e33-11ea-bcb3-ac6482c4a92f_story.html.

a so-called “foreign terrorist organization” constitutes a breach of generally recognized principles of international law and of the Charter of the United Nations, including the principle of sovereign equality of States, and cannot, under any circumstances, justify any threat or use of force against them, including in the territory of other States.

Categorically rejecting all reasoning and references made by the officials of the United States for justifying the criminal assassination of Martyr Major General Qasem Soleimani, and condemning this heinous crime in the strongest possible terms, the Islamic Republic of Iran reserves all of its rights under international law to take necessary measures in this regard, in particular in exercising its inherent right to self-defence.²⁴

In a subsequent communication, Iran’s permanent representative “categorically reject[ed] the attribution to Iran” of attacks carried out by militias and disputed U.S. claims that the drone-related incidents over the summer of 2019 could serve as international legal justifications for the U.S. strike.²⁵

Because the U.S. airstrike occurred on the territory of Iraq, a further international legal issue is whether the United States violated its legal duty to “refrain . . . from the threat or use of force against the territorial integrity or political independence” of Iraq.²⁶ The government of Iraq did not indicate that it had given consent to the strike, instead swiftly denouncing it as a violation of international law. The Iraqi permanent representative to the United Nations wrote:

The Government of the Republic of Iraq condemns in the strongest possible terms these American attacks, which violate the sovereignty of Iraq and the principles of international law. It stresses that it is fully committed to the provisions of the Iraqi Constitution and, in particular, the provision that Iraqi territory shall not be used as a theatre of operations against neighbouring States. It is committed to ensuring that foreign forces active in Iraq at its request do not come under attack. It emphasizes that any military mobilization or operations on Iraqi territory that take place without its approval and without prior coordination constitute provocative and hostile acts that violate the Charter of the United Nations²⁷

²⁴ Permanent Rep. of the Islamic Republic of Iran to the UN, Letter Dated 3 January 2020 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2020/13 (Jan. 3, 2020), at <https://undocs.org/S/2020/13> (footnote omitted). Iran’s Foreign Minister claimed the strike

violated territorial integrity and sovereignty of Iraq This was an act of aggression, an armed attack, albeit a cowardly armed attack, against an Iranian official in foreign territory. It amounts to war, and we will respond according to our own timing and choice [I]n exercising our right to self-defense, we are only bound by international law, unlike the United States, which is not bound by international law.

Transcript: NPR’s Full Interview with Iran’s Foreign Minister, NPR (Jan. 7, 2020), at <https://www.npr.org/2020/01/07/794175782/transcript-nprs-full-interview-with-iran-s-foreign-minister?t=1578520157145>.

²⁵ Permanent Rep. of the Islamic Republic of Iran to the UN, Letter Dated 29 January 2020 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2020/81 (Jan. 30, 2020), at <https://undocs.org/pdf/symbol=en/S/2020/81> [perma.cc/E7ZB-6K8Q].

²⁶ See UN Charter Art. 2(4).

²⁷ Permanent Rep. of Iraq to the UN, Identical Letters Dated 6 January 2020 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, UN Doc. S/2020/15 (Jan. 6, 2020),

The United States has previously taken the position that, in acting in self-defense under Article 51, it may use force against a nonstate actor on the territory of a state whose government does not consent to the use of force, provided that this state is “unwilling or unable” to prevent the actual or imminent threat posed by the nonstate actor.²⁸ To date, the Trump administration has not explicitly invoked the “unwilling or unable” argument—which would need to be expanded to include uses of force against the agents of *foreign states*—as justifying its decision to carry out the strike on Iraqi territory. Discussing the attacks by Iran-backed militias in a press briefing shortly before the Soleimani strike, State Department officials observed that “we do not make a distinction between the Iranian regime and any of its proxies that they organize, train, and equip,” and that the “the Iraqi Government needs to ensure the safety of American forces [in Iraq], and there’s just been too many attacks, attempted attacks against American and Iraqi forces.”²⁹

Domestically, the executive branch reportedly did not notify Congress of the strike beforehand, but did submit a report on the strike on January 4.³⁰ The report was fully classified and the briefing was held behind closed doors, rather than the usual procedure of sending an unclassified report with a classified annex.³¹ On February 14, the administration released a document summarizing its legal justifications for the strike, consistent with the National Defense Authorization Act for Fiscal Year 2018 as amended, which requires notification of changes to legal and policy frameworks for uses of force.³²

at <https://undocs.org/en/S/2020/15>; accord Government of Iraq - العراقية لحكومة (@IraqiGovt), TWITTER (Jan. 3, 2020, 5:11 AM), at <https://twitter.com/IraqiGovt/status/1213040106115866626> [perma.cc/TWZ2-KWP4] (quoting Iraqi Prime Minister Adil Abdul-Mahdi as stating: “We condemn in the strongest terms the assassination by US forces of Iraqi and Iranian figures who were symbols of the victory against Daesh”).

²⁸ E.g., Egan Remarks, *supra* note 14 (stating that this “unable or unwilling standard” applies “only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using its territory as a base for attacks and related operations against other States”); Permanent Rep. of U.S. to the UN, Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, UN Doc. S/2014/695 (Sept. 23, 2014), available at securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf (using an “unwilling or unable” argument in 2014 to justify airstrikes in Syria targeting ISIL).

²⁹ Press Briefing by Senior State Department Officials, *supra* note 3. One official referenced a 2018 statement by the White House condemning Iran for “not act[ing] to stop [certain] attacks by its proxies in Iraq, which it has supported with funding, training, and weapons” and stating that the “United States will hold the regime in Tehran accountable for any attack that results in injury to our personnel or damage to United States Government facilities.” White House Press Release, Statement by the Press Secretary (Sept. 11, 2018), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-33> [https://perma.cc/PKC9-FU48]; see also Press Briefing by Senior State Department Officials, *supra* note 3 (referencing this statement).

³⁰ Maggie Haberman & Catie Edmondson, *White House Notifies Congress of Suleimani Strike Under War Powers Act*, N.Y. TIMES (Jan. 6, 2020), at <https://www.nytimes.com/2020/01/04/us/politics/white-house-war-powers-resolution.html>. The War Powers Resolution requires the president to notify Congress within forty-eight hours of the introduction of U.S. military forces into hostilities. 50 U.S.C. § 1543 (2018).

³¹ John B. Bellinger III, *Does the U.S. Strike on Soleimani Break Legal Norms?*, COUNCIL ON FOREIGN REL. (Jan. 6, 2020), at <https://www.cfr.org/in-brief/does-us-strike-soleimani-break-legal-norms>; see also Letter from Senators Charles E. Schumer and Robert Menendez to President Donald Trump (Jan. 5, 2020), available at <https://www.foreign.senate.gov/imo/media/doc/010520cMenendez%20Shcumer%20Letter%20War%20Powers.pdf> [perma.cc/73NV-3M8X] (asking the president to declassify the War Powers notification because “[a]n entirely classified notification is simply not appropriate in a democratic society, and there appears to be no legitimate justification for classifying this notification”).

³² Pub. L. No. 115-91, § 1264, 131 Stat. 1689-90 (2017), amended by Pub. L. No. 116-92, § 1261 (2019); White House Notice, *supra* note 22.

This notice invoked two separate domestic legal bases for the strike. First, it relied on the president's constitutional power as commander in chief under Article II of the Constitution. Second, it claimed statutory authorization for the strike based on the 2002 congressional statute that had authorized the Second Gulf War in Iraq. The notice provided a brief explanation of the reasoning underlying these claims. It stated:

Article II of the United States Constitution empowers the President, as Commander in Chief, to direct the use of military forces to protect the Nation from an attack or threat of imminent attack and to protect important national interests. Article II thus authorized the President to use force against forces of Iran, a state responsible for conducting and directing attacks against United States forces in the region. In addition, under the 2002 Authorization for Use of Military Force Against Iraq (2002 AUMF) “the President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq.” Although the threat posed by Saddam Hussein's regime was the initial focus of the statute, the United States has long relied upon the 2002 AUMF to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq. Such uses of force need not address threats from the Iraqi Government apparatus only, but may address threats to the United States posed by militias, terrorist groups, or other armed groups in Iraq.

The airstrike against Soleimani in Iraq is consistent with this longstanding interpretation of the President's authority under Article II and the 2002 AUMF. Iran's past and recent activities, coupled with intelligence at the time of the air strike, indicated that Iran's Qods Force posed a threat to the United States in Iraq, and the air strike against Soleimani was intended to protect United States personnel and deter future Iranian attack plans against United States forces and interests in Iraq and threats emanating from Iraq. The use of military force against Iranian Armed Forces was tailored narrowly to the identified Qods Force target's presence in Iraq and support to, including in some cases direction of, Iraqi militias that attacked United States personnel.³³

While the Obama administration had taken the position that the 2002 AUMF applied to U.S. military actions against the Islamic State of Iraq and Levant (ISIL), at least within Iraq,³⁴ the Trump administration's extension of the interpretation of the 2002 AUMF to encompass military actions against Iran is notable. Anticipating such an extension and concerned about its legal validity, members of Congress inquired during the summer of 2019 whether the administration considered itself to have statutory authority to use force against Iran based on the 2002 AUMF or the Authorization for Use of Military Force passed in 2001 (2001 AUMF), which authorized the use of force in response to the terrorist attacks of

³³ White House Notice, *supra* note 22 (footnotes omitted). For criticism of the legal reasoning underlying the notice, see Ryan Goodman, *White House “1264 Notice” and Novel Legal Claims for Military Action Against Iran*, JUST SECURITY (Feb. 14, 2020), at <https://www.justsecurity.org/68594/white-house-1264-notice-and-novel-legal-claims-for-military-action-against-iran>.

³⁴ See President Barack Obama, Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 23, 2014), at <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq> [<https://perma.cc/6JFQ-69LX>].

September 11, 2001.³⁵ In response, the State Department represented that “the Administration’s goal is to find a diplomatic solution to Iran’s activities, not to engage in conflict with Iran” and that “the Administration has not, to date, interpreted either AUMF as authorizing military force against Iran, except as may be necessary to defend U.S. or partner forces engaged in counterterrorism operations or operations to establish a stable, democratic Iraq.”³⁶ In concluding that the 2002 AUMF authorized the strike against Soleimani, the Trump administration signaled a capacious understanding of the self-defense that it interpreted the 2002 AUMF to authorize.

Following the strike, a majority of both houses of Congress signaled strong concern about unconstrained executive-branch uses of force against Iran. On January 13, 2020, by a vote of 224–194, the House of Representatives passed a resolution finding that “Congress has not authorized the President to use military force against Iran.”³⁷ The resolution “direct[ed] the President to terminate the use of United States Armed Forces to engage in hostilities in or against Iran or any part of its government or military” in the absence of specific congressional authorization or the need to defend “against an imminent armed attack upon the United States . . . or its Armed Forces.”³⁸ One month later, on February 13, the Senate passed a similar resolution calling for the cessation of hostilities by a vote of 55–45.³⁹ Though the Senate resolution is expected to pass the House as well, Trump is likely to veto it.⁴⁰ Based on the roll call for the House and Senate resolutions, Congress does not have the two-thirds supermajority needed to override a veto.

The strike on Soleimani prompted a strong reaction in Iraq. Most notably, on January 5, 2020, two days after the strike, the Iraqi parliament voted to expel U.S. troops from Iraq.⁴¹ But despite this vote, the United States has remained in Iraq, and it is unclear what steps, if any, the Iraqi government will take to trigger U.S. withdrawal.

Iran responded to the strike with several significant actions. On January 5, Iran announced that it was abandoning the limitations on its production of nuclear fuel contained in the JCPOA.⁴²

³⁵ Galbraith, *supra* note 21, at 845–48 (describing these inquiries).

³⁶ Letter from Mary Elizabeth Taylor, Assistant Sec’y, Bureau of Legis. Aff., to Eliot L. Engel, Chairman, H. Comm. on Foreign Aff. (June 28, 2019), available at <https://perma.cc/9YLU-59FL>.

³⁷ H.R. Con. Res. 83, 116th Cong. (2020); 166 CONG. REC. H115 (daily ed. Jan. 9, 2020) (Roll No. 7).

³⁸ H.R. Con. Res. 83, 116th Cong. (2020).

³⁹ See S.J. Res. 68, 116th Cong. (2020) (stating that, subject to an exception for defense against imminent attacks aimed at the United States, “Congress hereby directs the President to terminate the use of United States Armed Forces for hostilities against the Islamic Republic of Iran or any part of its government or military, unless explicitly authorized by a declaration of war or specific authorization for use of military force against Iran”); 166 CONG. REC. S1061 (daily ed. Feb. 13, 2020) (Vote No. 52). Because the War Powers Resolution set up a fast-track process for the consideration of such resolutions, this resolution progressed in the Senate without being subject to the filibuster and, like the parallel resolution in the House, benefited from other expedited procedures. See 50 U.S.C. § 1546 (2018).

⁴⁰ Catie Edmondson, *In Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution*, N.Y. TIMES (Feb. 13, 2020), at <https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html>; see Exec. Office of the President, Statement of Administration Policy (2020), available at https://www.whitehouse.gov/wp-content/uploads/2020/02/SAP_SJ-RES-68.pdf [perma.cc/S9WQ-VA5L] (“If S.J. Res. 68 were presented to the President, his advisors would recommend that he veto the joint resolution.”).

⁴¹ Arwa Ibrahim, *Iraqi Parliament Calls for Expulsion of Foreign Troops*, AL JAZEERA (Jan. 5, 2020), at <https://www.aljazeera.com/news/2020/01/iraqi-parliament-calls-expulsion-foreign-troops-200105150709628.html>.

⁴² Laurel Wamsley & Emily Kwong, *Iran Abandons Nuclear Deal Limitations in Wake of Soleimani Killing*, NPR (Jan. 5, 2020), at <https://www.npr.org/2020/01/05/793814276/iran-abandons-nuclear-deal-limitations-in-wake-of-soleimani-killing>.

Since the United States withdrew from the JCPOA in 2018,⁴³ Iran had been moving away from full compliance with its terms, but this development was a significant additional step. In response to Iran's announcement, Britain, France, and Germany triggered the dispute resolution provision of the JCPOA, causing Iran to threaten withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons should this dispute settlement process lead to a referral to the UN Security Council.⁴⁴ Separate from the announcement related to the JCPOA, the Iranian parliament expressed fury at the U.S. strike, passing a bill on January 7 that designated U.S. military members as terrorists.⁴⁵

The government of Iran also took military action against the United States in response to the strike. On January 8, the IRGC launched sixteen ballistic missiles at U.S. military bases in Iraq, though claiming that the missiles were "not intend[ed] to kill."⁴⁶ The Iranian strike caused some damage to the bases but killed no one.⁴⁷ In the weeks that followed, however, the Pentagon announced that over one hundred U.S. troops had suffered brain injuries from the strike.⁴⁸ Though the missile strike came after Iran repeatedly promised "revenge" for Soleimani's death,⁴⁹ Iran stated in its Article 51 notification to the UN Security Council that

in the early morning hours (Tehran time), in exercising our inherent right to self-defence in accordance with Article 51 of the Charter of the United Nations, the armed forces of the Islamic Republic of Iran took and concluded a measured and proportionate military response targeting an American air base in Iraq from which the cowardly armed attack against Martyr Soleimani was launched. The operation was precise and targeted

⁴³ Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 514 (2018) (discussing the U.S. withdrawal in 2018 from the JCPOA).

⁴⁴ Babak Dehghanpisheh, *Iran Says It Will Quit Global Nuclear Treaty If Case Goes to UN*, REUTERS (Jan. 20, 2020), at <https://uk.reuters.com/article/uk-iran-nuclear/iran-says-it-will-quit-global-nuclear-treaty-if-case-goes-to-u-n-idUKKBN1ZJ0L5>. The United States also imposed a new round of sanctions against Iran in response to Iran's announcement. Mike Pompeo, Sec'y of State Press Release, *Designation of the Atomic Energy Organization of Iran, Its Head Ali Akbar Salehi and Renewing Nuclear Restrictions* (Jan. 31, 2020), at <https://www.state.gov/designation-of-the-atomic-energy-organization-of-iran-its-head-ali-akbar-salehi-and-renewing-nuclear-restrictions> [perma.cc/9UPR-MUGS].

⁴⁵ *Iran's Parliament Designates All US Forces As "Terrorists"*, AL JAZEERA (Jan. 7, 2020), at <https://www.aljazeera.com/news/2020/01/iran-parliament-designates-forces-terrorists-200107081230324.html>.

⁴⁶ Kareem Fahim & Sarah Dadouch, *"We Did Not Intend to Kill," Iranian Commander Says of Missile Strike on U.S. Targets*, WASH. POST (Jan. 9, 2020), at https://www.washingtonpost.com/world/middle_east/missile-strike-on-us-bases-did-not-intend-to-kill-says-iranian-commander/2020/01/09/c5c2295c-3260-11ea-971b-43bec3ff9860_story.html; Shane Harris, Josh Dawsey, Dan Lamothe & Missy Ryan, *"Launch, Launch, Launch": Inside the Trump Administration as the Iranian Missiles Began to Fall*, WASH. POST (Jan. 8, 2020), at https://www.washingtonpost.com/national-security/us-officials-knew-iranian-missiles-were-coming-hours-in-advance/2020/01/08/b6297b4c-3235-11ea-a053-dc6d944ba776_story.html. The same day as launching the missile strikes on U.S. bases, Iran shot down a Ukrainian passenger flight that was allegedly misidentified as a cruise missile, killing all 176 people on board. *Plane Shot Down Because of Human Error, Iran Says*, N.Y. TIMES (Jan. 11, 2020), at <https://www.nytimes.com/2020/01/11/world/middleeast/plane-crash.html>. The Iranian government claimed that "[h]uman error at time of crisis caused by US adventurism led to disaster." Javad Zarif (@JZarif), TWITTER (Jan. 10, 2020, 8:05 PM), at <https://twitter.com/JZarif/status/1215847283381755914> [perma.cc/YF8T-5Z9G].

⁴⁷ Harris, Dawsey, Lamothe & Ryan, *supra* note 46.

⁴⁸ Lolita C. Baldor, *Pentagon: 109 Troops Suffer Brain Injuries from Iran Strike*, AP NEWS (Feb. 10, 2020), at <https://apnews.com/ea6f6766d717a2dd518a3c6319bb2430> (noting that "nearly 70 percent of those diagnosed [had] return[ed] to duty").

⁴⁹ *E.g.*, Loveluck, Taylor & Brice-Saddler, *supra* note 23.

military objectives, thus leaving no collateral damage to civilians and civilian assets in the area.⁵⁰

The letter “reiterate[d] the full respect of the Islamic Republic of Iran for the independence, sovereignty, unity and territorial integrity of the Republic of Iran.”⁵¹ The letter did not detail how the Iranian strikes would deter against future attacks, as distinct from amounting to a reprisal, and nor did it explain how these strikes were consistent with Iran’s international legal obligations toward Iraq.

Iraq protested the Iranian strike as a violation of international law:

For Iraqi territory to be bombarded by the Islamic Republic of Iran on the pretext of self-defence under Article 51 of the Charter of the United Nations is unacceptable and constitutes a breach of the sovereignty of Iraq and a violation of the principles of good-neighbourliness, the Charter of the United Nations and international law.⁵²

In response to the Iranian missiles, Trump authorized additional sanctions on Iran,⁵³ and the administration imposed sanctions against eight senior Iranian officials⁵⁴ and added seventeen sanctions targeting the metals industry in Iran.⁵⁵ But Trump seemed to reject further military action:

Iran appears to be standing down, which is a good thing for all parties concerned and a very good thing for the world. . . . The fact that we have this great military and equipment, however, does not mean we have to use it. We do not want to use it. American strength, both military and economic, is the best deterrent. . . . [T]o the people and leaders of Iran: We want you to have a future and a great future – one that you deserve, one of prosperity at home, and harmony with the nations of the world. The United States is ready to embrace peace with all who seek it.⁵⁶

Although neither the United States nor Iran have engaged in overt strikes against each other in the immediate aftermath of Iran’s January 8 strike, tensions between the two countries remain high throughout the region.⁵⁷ In mid-January, the U.S. Maritime

⁵⁰ Permanent Rep. of the Islamic Republic of Iran to the UN, Letter Dated 8 January 2020 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2020/19 (Jan. 8, 2020), at <https://undocs.org/en/S/2020/19>.

⁵¹ *Id.*

⁵² Permanent Rep. of the Republic of Iraq to the UN, Identical Letters Dated 9 January 2020 from the Permanent Representative of the Republic of Iraq to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2020/26 (Jan. 9, 2020), at <https://undocs.org/S/2020/26> [perma.cc/A3RR-TLQC]. For analysis of international reactions and the legality of the Iranian strike, see Ansari & Nußberger, *supra* note 11.

⁵³ Exec. Order 13,902, 85 Fed. Reg. 2003 (Jan. 14, 2020).

⁵⁴ Mike Pompeo, Sec’y of State Press Release, Intensified Sanctions on Iran (Jan. 10, 2020), at <https://www.state.gov/intensified-sanctions-on-iran> [perma.cc/A6D4-5L42].

⁵⁵ U.S. Dep’t of the Treasury Press Release, Treasury Targets Iran’s Billion Dollar Metals Industry and Senior Regime Officials (Jan. 10, 2020), at <https://home.treasury.gov/news/press-releases/sm870> [perma.cc/B4KC-JXVX].

⁵⁶ White House Press Release, President Donald Trump, Remarks by President Trump on Iran (Jan. 8, 2020), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-iran> [perma.cc/94PF-DGSL].

⁵⁷ In mid-March of 2020, the United States carried out further strikes against Kataib Hezbollah, following the death of two U.S. service-members from rockets attributed to Iranian-backed militias. Louisa Loveluck,

Administration warned of continuing “serious threats to commercial vessels” by Iran and its proxies in the Strait of Hormuz and the Arabian Sea,⁵⁸ causing increased patrols by countries whose industries rely on passage through the strait.⁵⁹ On February 9, while patrolling the area, the United States intercepted Iranian-made weapons destined for the Houthi rebels in Yemen,⁶⁰ who have been fighting a Saudi-led and U.S.-backed coalition since 2015.⁶¹ In Syria, Iran has continued to back the Syrian government forces, who have engaged in a months-long offensive to retake Idlib, which sits on the Syrian-Turkish border and has been the last rebel-held area.⁶² The United States has condemned the “unjustifiable, and ruthless assaults on the people of Idlib” and reiterated that it “stand[s] by [its] NATO Ally Turkey.”⁶³

United States Creates the U.S. Space Command and the U.S. Space Force to Strengthen Military Capabilities in Space

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President Trump first announced his plans for increasing U.S. military capabilities in space in 2018. In August 2019, his administration created the United States Space Command. With the passage in December 2019 of the 2020 National Defense Authorization Act, the United States established the United States Space Force as a new branch of the armed forces.

Dan Lamothe & Mustafa Salim, *U.S. Counters Iraq’s Condemnation of Airstrikes on Iran-Backed Militia Facilities*, WASH. POST (Mar. 13, 2020), at https://www.washingtonpost.com/world/iraq-condemns-us-strikes-on-iran-backed-militias-say-they-killed-soldiers-and-a-civilian/2020/03/13/33650322-6519-11ea-8a8e-5c5336b32760_story.html.

⁵⁸ 2020-001-Persian Gulf, Strait of Hormuz, Gulf of Oman, Arabian Sea, Red Sea, Gulf of Aden, and Indian Ocean-Threats to Commercial Vessels by Iran and its Proxies, MARAD (Jan. 13, 2020), at <https://maritime.dot.gov/content/2020-001-persian-gulf-strait-hormuz-gulf-oman-arabian-sea-red-sea-gulf-aden-and-indian-ocean> [perma.cc/G8RS-3S3Z].

⁵⁹ Tim Kelly, *Japanese Warship Departs for Gulf to Patrol Oil Lifeline*, REUTERS (Feb. 1, 2020), at <https://www.reuters.com/article/us-mideast-iran-japan/japanese-warship-departs-for-gulf-to-patrol-oil-lifeline-idUSKBN1ZW02D>.

⁶⁰ See U.S. Central Command Press Release, *US Navy Seizes Illegal Weapons in Arabian Sea* (Feb. 13, 2020), at <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/2083824/us-navy-seizes-illegal-weapons-in-arabian-sea> [perma.cc/6JNF-L6HU] (describing the seizure of weapons resembling those made by Iran); Mike Pompeo (@SecPompeo), TWITTER (Feb. 14, 2020), at <https://twitter.com/SecPompeo/status/1228285173936140290> [perma.cc/S5MG-54M3] (“The U.S. Navy interdicted 358 Iranian-made missiles + other weapons components on their way to the Houthis in Yemen”); see generally Panel of Experts on Yemen, Final Report of the Panel of Experts on Yemen, Transmitted Letter Dated 27 January 2020 from the Panel of Experts on Yemen Addressed to the President of the Security Council, UN Doc. S/2020/70 (Jan. 27, 2020), at <https://undocs.org/s/2020/70> (discussing Iranian support for the Houthis, including potentially illicitly providing weapons).

⁶¹ Claire Parker & Rick Noack, *Iran Has Invested in Allies and Proxies Across the Middle East. Here’s Where They Stand After Soleimani’s Death*, WASH. POST (Jan. 3, 2020), at <https://www.washingtonpost.com/world/2020/01/03/iran-has-invested-allies-proxies-across-middle-east-heres-where-they-stand-after-soleimanis-death>.

⁶² *Id.*; Adam Taylor, *The Idlib Crisis Is a Reminder that the Syrian War Is Not Over*, WASH. POST (Feb. 6, 2020), at <https://www.washingtonpost.com/world/2020/02/06/idlib-crisis-is-reminder-that-syrian-war-is-not-over>.

⁶³ Mike Pompeo, Sec’y of State Press Release, *Escalation of Violence in Idlib* (Feb. 4, 2020), at <https://www.state.gov/escalation-of-violence-in-idlib> [perma.cc/UZ49-JXMB].

These developments do not directly implicate international law, but they reflect a growing divergence between the U.S. approach to space and that taken by the UN General Assembly.

In June 2018, Trump publicly announced his intention to establish “American dominance in space” through the creation of a Space Force.¹ His announcement came after the release of the “Worldwide Threat Assessment of the US Intelligence Community,” which warned of China and Russia’s capacity to “offset any perceived US military advantage derived from military, civil, or commercial space systems” through their antisatellite weapons, should the United States engage in military confrontation with the two countries.² A year later, on August 29, 2019, the Pentagon established the U.S. Space Command as a new geographic combatant command.³ The U.S. Space Command is authorized to employ assigned forces from the various military service branches to achieve its mission “to deter aggression and conflict, defend U.S. and allied freedom of action, deliver space combat power for the Joint/Combined force, and develop joint warfighters to advance U.S. and allied interests in, from, and through the space domain.”⁴

During the preparations for the negotiations between the White House and Congress over the 2020 National Defense Authorization Act (2020 NDAA), Trump reportedly instructed White House negotiators to make the creation of the Space Force their most important priority.⁵ As a military service branch focused on space, the Space Force would complement the

¹ Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 634, 638 (2019) (quoting Associated Press, *Trump Announces Creation of Space Force*, YOUTUBE (June 18, 2018), at <https://www.youtube.com/watch?v=Kna3YYX7XeE>). A Space Command had previously existed within the U.S. military from 1985–2002. *Id.* at 638 n. 24.

² Daniel R. Coats, Director of National Intelligence, Statement for the Record, Worldwide Threat Assessment of the US Intelligence Community 13 (2018), available at <https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA—Unclassified-SSCI.pdf> [<https://perma.cc/2PGY-ANKM>].

³ U.S. Space Command Press Release, United States Space Command Fact Sheet (Aug. 29, 2019), at <https://www.spacecom.mil/About/Fact-Sheets-Editor/Article/1948216/united-states-space-command-fact-sheet> [<https://perma.cc/U36G-YJHM>]; U.S. Dep’t of Defense Press Release, Jim Garamone, Pentagon Rolls Out Space Command (Aug. 29, 2019), at <https://www.defense.gov/Explore/News/Article/1948420/pentagon-rolls-out-space-command> [<https://perma.cc/3P7L-HZU5>]. A Combatant Command is “a military command which has broad, continuing missions and which is composed of forces from two or more military departments.” 10 U.S.C. § 161(c)(1) (2018). Currently, there are eleven Combatant Commands, of which six are geographic commands and five are functional commands. KATHLEEN J. McINNIS, CONG. RESEARCH SER., IF10542, DEFENSE PRIMER: COMMANDING U.S. MILITARY OPERATIONS 2 (2020). The three military departments are the Department of the Army, the Department of the Navy, and the Department of the Air Force. HEIDI M. PETERS, CONG. RESEARCH SER., IF10550, DEFENSE PRIMER: THE MILITARY DEPARTMENTS 1 (2018). The decision to establish the Space Command as a full Combatant Command, as distinct from a sub-unified command within a preexisting Combatant Command, was in tension with a prior congressional statute. *See* Galbraith, *supra* note 1, at 639. This prior statute was repealed in December of 2019, several months after the establishment of the Space Command. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1601, 133 Stat. 1198 (2019) [hereinafter 2020 NDAA].

⁴ United States Space Command Fact Sheet, *supra* note 3. The military service branches, also known as the armed forces, refer to the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, and, most recently, the Space Force. *See* U.S. Dep’t of Defense Press Release, Department of Defense Establishes U.S. Space Force (Dec. 20, 2019), at <https://www.defense.gov/Newsroom/Releases/Release/Article/2045981/department-of-defense-establishes-us-space-force> [<https://perma.cc/SMC3-7G27>] [hereinafter DOD Press Release] (noting “the establishment of the U.S. Space Force as the sixth branch of the armed forces”); PETERS, *supra* note 3 (listing the branches of the armed forces).

⁵ Jeff Stein, Lisa Rein & Josh Dawsey, *Democrats Leveraged Trump’s Fixation on Space Force to Pursue Parental-Love Victory for Federal Workers*, WASH. POST (Dec. 8, 2019), at https://www.washingtonpost.com/business/economy/democrats-leveraged-trumps-fixation-on-space-force-to-pursue-parental-leave-victory-for-federal-workers/2019/12/08/92f290fc-19ce-11ea-826b-14ef38a0f45f_story.html.

mission-focused Space Command. To secure Democratic support for the creation of the Space Force, the White House conceded to the inclusion of a provision for twelve-week paid parental leave for civilian federal employees.⁶ Trump signed the 2020 NDAA into law on December 20, 2019,⁷ thus establishing the United States Space Force (USSF) within the Department of the Air Force.⁸

The USSF is headquartered in the Pentagon and is the sixth branch of the armed forces.⁹ According to the USSF's mission statement:

The USSF is a military service that organizes, trains, and equips space forces in order to protect U.S. and allied interests in space and to provide space capabilities to the joint force. USSF responsibilities include developing military professionals, acquiring military space systems, maturing the military doctrine for space power, and organizing space forces to present to [the] Combatant Commands.¹⁰

As the USSF is situated within the Department of the Air Force, the secretary of the air force—overseen by the secretary of defense—is responsible for the USSF.¹¹ In turn, the chief of space operations, a four-star general and a full member of the Joint Chiefs of Staff, serves as the “principal uniformed advisor to the Secretary of the Air Force on Space Force activities.”¹²

The United States is party to the Outer Space Treaty, which obligates states to “carry on activities in the exploration and use of outer space . . . in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security.”¹³ The treaty bars the “place[ment] in orbit around the earth [of] any objects carrying nuclear weapons or any other kinds of weapons of mass destruction” and limits the use of the “moon and other celestial bodies” to “exclusively . . . peaceful purposes.”¹⁴

While the creation of the U.S. Space Command and the USSF does not directly implicate international law, it does raise questions about future U.S. activities in space and about the compatibility of these activities with international law. General Mark A. Milley, chairman of the Joint Chiefs of Staff, stated that space is of strategic military importance because it supplements combat operations on Earth, but it is also a “warfighting domain in and of itself.”¹⁵

⁶ Catie Edmondson, *House Passes \$738 Billion Military Bill with Space Force and Parental Leave*, N.Y. TIMES (Dec. 17, 2019), at <https://www.nytimes.com/2019/12/11/us/politics/house-ndaa-space-force-leave.html>; 2020 NDAA, *supra* note 3, § 7602.

⁷ Donald J. Trump, Remarks on Signing the National Defense Authorization Act for Fiscal Year 2020 at Joint Base Andrews, Maryland, 2019 DAILY COMP. PRES. DOC. NO. 885, at 3 (Dec. 20).

⁸ 2020 NDAA, *supra* note 3, § 952. The 2020 NDAA passed in the House 377 to 48, 165 CONG. REC. H10092 (daily ed. Dec. 11, 2019) (Roll No. 672). In the Senate, it passed 86 to 8, 165 CONG. REC. S7070 (daily ed. Dec. 17, 2019) (Vote No. 400).

⁹ DOD Press Release, *supra* note 4; U.S. Space Force Press Release, U.S. Space Force Fact Sheet (Dec. 20, 2019), at <https://www.spaceforce.mil/About-Us/Fact-Sheet> [<https://perma.cc/86MT-S5VW>].

¹⁰ U.S. Space Force Fact Sheet, *supra* note 9.

¹¹ *Id.*

¹² *Id.*; see also 2020 NDAA, *supra* note 3, § 953 (establishing this position and defining its scope).

¹³ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Art. 3, Jan. 27, 1967, 18 UST 2410, 610 UNTS 205.

¹⁴ *Id.* Art. 4 (specifically proscribing the “establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies”).

¹⁵ DOD Press Release, *supra* note 4.

The mission of the U.S. Space Command reflects Milley's attitude—one of the U.S. Space Command's focus areas is that it “will improve the development of joint space operations forces and capabilities to enhance space warfighting readiness and lethality while accelerating the integration of space capabilities into other warfighting forces.”¹⁶ Similarly, the duties of the USSF are to “deter aggression in, from, and to space” and “conduct space operations.”¹⁷ These developments contrast with recent actions taken at the United Nations, where five resolutions were adopted at the seventy-fourth session of the General Assembly addressing the issue of the prevention of an outer space arms race.¹⁸

¹⁶ United States Space Command Fact Sheet, *supra* note 3.

¹⁷ NDAA 2020, *supra* note 3, § 952.

¹⁸ The five resolutions the General Assembly adopted were on “further practical measures for the prevention of an arms race in outer space,” GA Res. 74/34 (Dec. 12, 2019); “international cooperation in the peaceful uses of outer space,” GA Res. 74/82 (Dec. 12, 2019); “no first placement of weapons in outer space,” GA Res. 74/33 (Dec. 12, 2019); “prevention of an arms race in outer space,” GA Res. 74/32 (Dec. 12, 2019); and “transparency and confidence-building measures in outer space activities,” GA Res. 74/67 (Dec. 12, 2019). The United States voted against all of these resolutions except the one on international cooperation, which was adopted by consensus.