

Chapter 18

Use of Force, Arms Control and Disarmament, and Nonproliferation

A. USE OF FORCE

1. General

a. Overview

On December 10, 2009, President Barack H. Obama accepted the Nobel Peace Prize. Excerpts follow from President Obama's remarks concerning the wars in Iraq and Afghanistan and the use of force generally. The full text of President Obama's acceptance speech is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00985, pp. 1–8.

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... [P]erhaps the most profound issue surrounding my receipt of this prize is the fact that I am the Commander in Chief of the military of a nation in the midst of two wars. One of these wars is winding down. The other is a conflict that America did not seek; one in which we are joined by 42 other countries—including Norway—in an effort to defend ourselves and all nations from further attacks.

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... I believe that all nations, strong and weak alike, must adhere to standards that govern the use of force. I, like any head of state, reserve the right to act unilaterally if necessary to defend my nation. Nevertheless, I am convinced that adhering to ... international standards strengthens those who do and isolates and weakens those who don't.

The world rallied around America after the 9/11 attacks, and continues to support our efforts in Afghanistan, because of the horror of those senseless attacks and the recognized principle of self-defense. Likewise, the world recognized the need to confront Saddam Hussein when he invaded Kuwait, a consensus that sent a clear message to all about the cost of aggression.

Furthermore, America—in fact, no nation—can insist that others follow the rules of the road if we refuse to follow them ourselves. For when we don't, our actions appear arbitrary and undercut the legitimacy of future interventions, no matter how justified.

And this becomes particularly important when the purpose of military action extends beyond self-defense or the defense of one nation against an aggressor. More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government, or to stop a civil war whose violence and suffering can engulf an entire region.

I believe that force can be justified on humanitarian grounds, as it was in the Balkans or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That's why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace.

America's commitment to global security will never waver. But in a world in which threats are more diffuse, and missions more complex, America cannot act alone. America alone cannot secure the peace. This is true in Afghanistan. This is true in failed states like Somalia, where terrorism and piracy is joined by famine and human suffering. And sadly, it will continue to be true in unstable regions for years to come.

The leaders and soldiers of NATO countries and other friends and allies demonstrate this truth through the capacity and courage they've shown in Afghanistan. But in many countries, there is a disconnect between the efforts of those who serve and the ambivalence of the broader public. I understand why war is not popular, but I also know this: The belief that peace is desirable is rarely enough to achieve it. Peace requires responsibility; peace entails sacrifice. That's why NATO continues to be indispensable. That's why we must strengthen U.N. and regional peacekeeping, and not leave the task to a few countries. That's why we honor those who return home from peacekeeping and training abroad to Oslo and Rome, to Ottawa and Sydney, to Dhaka and Kigali. We honor them not as makers of war, but . . . as wagers of peace.

Let me make one final point about the use of force. Even as we make difficult decisions about going to war, we must also think clearly about how we fight it. The Nobel Committee recognized this truth in awarding its first prize for peace to Henry Dunant, the founder of the Red Cross and a driving force behind the Geneva Conventions.

Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend, and we honor those ideals by upholding them not when it's easy, but when it is hard.

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b. Use of force issues related to specific conflicts

(1) Gaza: UN Fact Finding Mission on the Gaza Conflict

As discussed in Chapter 6.A.3.b., on September 29, 2009, Justice Richard L. Goldstone, head of the United Nations Fact Finding Mission on the Gaza Conflict, addressed the Human Rights Council on the mission's report ("Goldstone Report"). On that day, Assistant Secretary of State for Human Rights, Democracy and Labor Michael H. Posner provided the U.S. position on the Goldstone Report in a statement to the Council. Excerpts below provide U.S. views on the report's allegations of violations of international

humanitarian law. The full text of Mr. Posner's statement is available at www.state.gov/s/l/c8183.htm.

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... [W]e are guided by our commitment to the universal application of international law, including humanitarian law and human rights law, in assessing the findings and recommendations of this report, but that cannot be understood to imply a moral equivalence between Israel, a democratic state with the right of self-defense, and the terrorist group Hamas, that responded to Israel's pull-out of Gaza by terrorizing civilians in southern Israel. The report includes a number of very serious allegations charging Israel and the Palestinians with violations of human rights and humanitarian law. We take these allegations seriously. We are confident that Israel, as a democracy with a well-established commitment to rule of law, has the institutions and ability to carry out robust investigations into these allegations. We note that Israel has stated publicly it has already investigated at least 100 complaints related to the Gaza conflict, including about some incidents mentioned in the report, and is currently pursuing action in 23 individual cases. The findings from each of its investigations is subject to multiple independent layers of review. We encourage Israel to utilize appropriate domestic review procedures and meaningful accountability mechanisms to investigate and address all credible allegations of misconduct or violations of international law. Hamas, a terrorist group that has seized control of a territory, has neither democratic structures, nor an independent judiciary, nor willingness to examine its own violations of international humanitarian law and human rights law. Nevertheless, this body should certainly demand from Hamas that it do so, as well as demand an end to Hamas' deliberate targeting of civilians and its use of its own population as human shields. This body also should ask the Palestinian Authority to carry out its own investigation into Hamas' violations of international law.

... [A] genuine commitment to the truth should compel this body to discuss the weaknesses of the report. Those weaknesses will appear clearer to those who actually have read the full report and understood its implications. The report makes extraordinarily negative inferences about the intentions of Israeli military commanders, senior political leaders, and the entire Israeli criminal justice system on the basis of a limited factual record and from those inferences draws condemnatory conclusions of law, treating accusations and inferences as fact. One example is the report's call for UNGA to establish an escrow account to which only Palestinians could make compensation claims and which only Israel is required to fund. The report further calls on Israel to undertake a moratorium on the use of certain munitions; it makes no such demand of Hamas with regard to its use of indiscriminate rockets. These unbalanced recommendations taint many of the report's suggestions for international action.

Another significant problem with the report is its failure to deal adequately with the asymmetrical nature of this conflict or assign appropriate responsibility to Hamas for its decision to base itself and its military operations in heavily civilian-populated urban areas. The conflict in Gaza is emblematic of a new kind of conflict in our world, where some of those engaged in combat use civilian spaces—schools, hospitals and religious institutions—to store weapons and as staging grounds for rocket attacks and armed combat. National militaries engaged in asymmetrical warfare must remain bound by humanitarian law, but it is a stark and tragic reality that terrorists systematically ignore these laws. Actions by terrorist groups that have the effect of employing civilians as human shields put enormous pressures on militaries that are trying to protect civilians

and their own soldiers, an issue faced by many militaries today. Although the Goldstone report deals briefly with these issues, its findings of fact and law are tentative and equivocating.

We also have very serious concerns about the recommendations spelled out in this report, especially that these allegations be taken up by the UN Security Council and then possibly referred to the International Criminal Court. The role of the Human Rights Council would be dramatically different if this approach were to be applied in every conflict situation around the world where there are alleged violations of human rights or humanitarian law.

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On October 15–16, 2009, the Human Rights Council held its twelfth special session, focusing on the Goldstone Report. Douglas M. Griffiths, Chargé d’Affaires, a.i., U.S. Mission to the United Nations, Geneva, addressed the Council on October 15. In his statement, Mr. Griffiths addressed the use of force in the conflict, noting in part that “[t]he Report makes clear that the Gaza operation was commenced lawfully after civilians in Israel came under sustained attack by Hamas, in violation of international human rights and humanitarian law.” Mr. Griffiths also stated:

. . . [W]ith respect to the Gaza conflict early this year, a question left unaddressed by the Goldstone Report and other human rights reports on the conflict relates to how Israel can effectively defend itself against Hamas’s attacks in a manner consistent with international law. The Report affirms the bedrock principles of proportionality and distinction, which exist to help protect civilians from harm during armed conflict. But the report leaves open crucial questions regarding the complications associated with implementing fundamental law of war principles—including proportionality, distinction, and precautions—in the face of deliberate tactics by Hamas which target civilians, and in view of the physical footprint and population density of Gaza. It is not the job of this body to proffer military strategies, and we recognize states’ continuing obligations to comply with these principles even in difficult circumstances. Israel is not the only nation–state facing conflicts in which non–state actors launch attacks against the state and its population from civilian areas. Virtually every region of the world has similar conflict situations. This is one of the complex issues presented by the Report and is an issue that requires more consideration than this body has given it.

The full text of the U.S. statement is available at www.state.gov/s/l/c8183.htm. For discussion of related developments in 2009, see Chapter 6.A.3.b.

(2) *Russia/Georgia*

During 2009 the United States issued several statements expressing support for Georgia's sovereignty and territorial integrity and calling on the Russian Federation to fulfill its commitments under the August 12 and September 8, 2008 ceasefire agreements between the Russian Federation and Georgia. For example, on February 6, 2009, Robert Wood, Acting State Department Spokesman, issued a statement concerning the Russian Federation's intention to establish bases in Georgia. The press statement, excerpted below, is available at www.state.gov/r/pa/prs/ps/2009/02/116247.htm. For background on the conflict that broke out in Georgia in August 2008, see *Digest 2008* at 863-70.

The United States regrets the Russian Federation's expressed intention to establish bases in the territory of Georgia as contrary to the spirit and the letter of Russia's existing commitments. These Russian plans include a naval base at the port of Ochamchire, army bases in the Abkhazia and South Ossetia regions of Georgia, and the possible deployment of combat aircraft.

Under the August 12 and September 8 ceasefire agreements between Georgia and Russia, mediated by the French EU Presidency, Russia committed to return its forces to their pre-war numbers and locations in South Ossetia and Abkhazia. This latest announced build-up of the Russian Federation's military presence in the Georgian regions of Abkhazia and South Ossetia without the consent of the Georgian Government would clearly violate that commitment. Implementation of these basing plans would also violate Georgia's sovereignty and territorial integrity, to which Russia repeatedly committed itself in numerous United Nations Security Council resolutions.

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On April 30, 2009, Robert Wood, Acting State Department Spokesman, issued a statement expressing concern about an agreement between Russia and the de facto authorities in the Georgian separatist regions of Abkhazia and South Ossetia to permit Russia, among other things, to station border guards along the two regions' administrative boundaries. "This action contravenes Russia's commitments under the August 12 ceasefire agreement brokered by President Nicolas Sarkozy between Russia and Georgia, and violates Georgia's territorial integrity," Mr. Wood stated. He also called on Russia

to honor its commitments under the August 12 and September 8 ceasefire agreements. This includes removing its troops to positions held prior to the start of the conflict, allowing unfettered humanitarian access, and allowing human rights organizations to investigate allegations of ethnic cleansing in the two regions. Establishing a “border” under the control of Russian soldiers marks another step in the opposite direction.

The full text of the statement is available at www.state.gov/r/pa/prs/ps/2009/04/122520.htm.

On December 17, 2009, Casey Christensen, Acting Deputy Chief of Mission, U.S. Mission to the Organization for Security and Cooperation in Europe (“OSCE”), delivered a statement to the Permanent Council of the OSCE concerning the Abkhazia region of Georgia. The U.S. statement, excerpted below, is available at http://osce.usmission.gov/media/pdfs/2009-statements/st_121709_abkhazia.pdf.

The United States regrets the decision to hold “elections” in the Abkhazia region of Georgia on December 12 and recognizes neither their legitimacy nor their results.

We reiterate our support for Georgia’s sovereignty and territorial integrity within its internationally recognized borders.

We remain committed to the achievement of a long-term, peaceful resolution to the conflict.

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We also renew our call for Russia to fulfill the provisions of the August 12 cease-fire agreement and the September 8 implementing measures Russia’s characterization of these regions [Abkhazia and South Ossetia] as independent does not relieve it of these commitments.

We remain convinced that the continued involvement of the international community is critical. We firmly believe an international presence should be established throughout Georgia, and once more call for access to the South Ossetia and Abkhazia regions for international monitors.

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c. Bilateral agreements and arrangements

(1) Defense Cooperation Agreement with Colombia

On October 30, 2009, the United States and Colombian governments signed a defense cooperation agreement, the Supplemental Agreement for Cooperation and Technical Assistance and Security (“DCA”). The two countries agreed “to deepen their cooperation in areas such as interoperability, joint procedures, logistics and equipment, training and instruction, intelligence exchanges, surveillance and reconnaissance

capabilities, combined exercises, and other mutually agreed activities, in order to address common threats to peace, stability, freedom, and democracy.” DCA, Article III(1). Article III(2) provides that the activities the agreement covers “shall require authorization by and coordination with the appropriate Colombian authorities . . . shall not exceed the provisions established in bilateral and multilateral cooperation agreements signed by the Parties, and shall respect Colombian regulations.” Article III(4) provides that the parties “shall comply with their obligations under this Agreement in a manner consistent with the principles of sovereign equality, territorial integrity of States, and non-intervention in the internal affairs of other States.”

The DCA makes reference to earlier bilateral defense agreements regarding the various privileges and immunities and other benefits U.S. personnel, their dependents, and U.S. contractors will receive. For instance, Article VIII of the DCA confirms that U.S. personnel and their dependents are granted “the privileges, exemptions, and immunities accorded to the administrative and technical staff of a diplomatic mission under the Vienna Convention,” and Article X exempts the United States and U.S. contractors from “all fees, duties, taxes, and other charges otherwise leviable in Colombia on the importation into, and procurement and use of, goods in Colombia, and on funds utilized in Colombia in connection with activities carried out” under the DCA.

The DCA entered into force upon signature. A State Department fact sheet issued on October 30, 2009, excerpted below, provided additional details on the DCA. The full text of the fact sheet is available at www.state.gov/r/pa/prs/ps/2009/oct/131134.htm, and the agreement is available at www.state.gov/documents/organization/131654.pdf.

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. . . The DCA will facilitate effective bilateral cooperation on security matters in Colombia, including narcotics production and trafficking, terrorism, illicit smuggling of all types, and humanitarian and natural disasters.

The DCA does not permit the establishment of any U.S. base in Colombia. It ensures continued U.S. access to specific agreed Colombian facilities in order to undertake mutually agreed upon activities within Colombia.

The agreement facilitates U.S. access to three Colombian air force bases, located at Palanquero, Apiay, and Malambo. The agreement also permits access to two naval bases and two army installations, and other Colombian military facilities if mutually agreed. All these military installations are, and will remain, under Colombian control. Command and control, administration, and security will continue to be handled by the Colombian armed forces. All activities conducted at or from these Colombian bases by the United States will take place only with the express prior approval of the Colombian government. The presence of U.S. personnel at these facilities would be on an as needed, and as mutually agreed upon, basis.

The DCA does not signal, anticipate, or authorize an increase in the presence of U.S. military or civilian personnel in Colombia.

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At a technical level, the DCA harmonizes and updates existing bilateral agreements, practices, and arrangements on security matters, and continues to ensure appropriate protections and status for U.S. personnel. Bilateral U.S.-Colombian engagement in the security sphere is governed by conditions set in a number of bilateral agreements, including the 1952 Mutual Defense Assistance Agreement, the 1962 General Agreement for Economic, Technical and Related Assistance, and related subsequent agreements in 1974, 2000, and 2004.

(2) Supplemental Status of Forces Agreement with Poland

On December 11, 2009, Under Secretary of State for Arms Control and International Security Ellen O. Tauscher and Polish Under Secretary of Defense Stanislaw Komorowski signed the Agreement Between the Government of the United States of America and the Government of the Republic of Poland on the Status of the Armed Forces of the United States of America in the Territory of the Republic of Poland (“SOFA”) in Warsaw. The SOFA “supplements the NATO SOFA [signed on June 19, 1951] and further defines the status of, and terms and conditions governing the presence of, United States forces, members of the force and the civilian component, and dependents in the territory of the Republic of Poland. This Agreement, in specific situations indicated herein, also defines the status of, and terms and conditions governing the presence of, United States contractors and United States contractor employees in the territory of the Republic of Poland in connection with the provision of goods and services to United States forces.” SOFA, Article 1(1).

In a statement released on December 11, 2009, Department of State Spokesman Ian Kelly explained that the agreement “will facilitate a range of mutually agreed activities, including joint training and exercises, deployments of U.S. military personnel and prospective Ballistic Missile Defense deployments.” The full text of Mr. Kelly’s statement is available at www.state.gov/r/pa/prs/ps/2009/dec/133470.htm. The text of the agreement is available at www.state.gov/documents/organization/142328.pdf. For additional background, see *Digest 2008* at 1009–10.

(3) Russia

(i) Strategic framework for military-to-military engagement

On July 6, 2009, Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff, and General Nikolai Makarov, Chief of Defense for the Russian Federation, signed a strategic framework to enable the United States and Russia to resume bilateral military-to-military activities. Those activities had

been suspended since August 2008. The White House issued a press statement on that day, excerpted below, providing details on the new framework, which is not binding under international law. The full text of the press statement is available at www.whitehouse.gov/the_press_office/United-States-Russia-Military-to-Military-Relations.

... This new framework will set conditions that raise military cooperation to a new level and deepen mutual understanding between our respective armed forces.

The Armed Forces of the United States and Russian Federation have agreed in their work plan for 2009 to conduct nearly 20 exchanges and operational events before the end of the year, including a strategic discussion between the U.S. Joint Staff and the Russian General Staff, orientation for Russian military cadets at the U.S. Military Academy at West Point, planning for a joint exercise to respond to a hijacked aircraft in national and international airspace, visit of the faculty of the Russian Combined Arms Academy to the U.S. Army Combined Arms Center at Ft. Leavenworth, and a naval war game conducted by the Kuznetsov Naval Academy and the U.S. Naval War College. In addition, the U.S. European Command and the Russian Ministry of Defense have agreed to meet to plan a robust and more ambitious work plan for 2010.

... Reestablishing our military-to-military bonds will enhance transparency, establish clear paths of communication, and focus our collective efforts on today's global strategic challenges.

(ii) Military air transit agreement

On July 6, 2009, the United States and Russia concluded a military air transit agreement, which "defines the procedure for the transit [by air] by the U.S. . . . of armaments, military equipment, military property, and personnel through the territory of the Russian Federation for purposes of supporting international efforts for ensuring the security, stabilization, and reconstruction of the Islamic Republic of Afghanistan." Article 1.A. In concluding the agreement, the two parties acted to carry out UN Security Council Resolution 1386 (2001), concerning international efforts to ensure Afghanistan's security and stabilization, and also took into account Resolutions 1368 (2001), 1373 (2001), and 1444 (2002). U.N. Docs. S/RES/1386, S/RES/1368, S/RES/1373, and S/RES/1444. Article 5 of the agreement provides for the application of Russian Federation jurisdiction over personnel, except in cases involving U.S. personnel who commit crimes against the United States or other U.S. personnel, or which arise from the performance of official duties. Article 9 of the agreement provides that "[q]uestions regarding payment of air navigation fees shall be addressed separately, based on the principles of reciprocity." A White House fact sheet, excerpted below, provided additional background on the agreement. The full text of the fact sheet is available at www.whitehouse.gov/the-press-office/fact-sheet-united-states-russia-military-transit-agreement.

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This agreement complements a NATO-Russia arrangement, under which the United States began shipping non-lethal equipment to Afghanistan through Russian territory earlier this year.

This agreement will enable the United States to further diversify the crucial transportation routes and decrease the amount of time needed to move troops and critical equipment to resupply international forces in Afghanistan and to bring needed supplies to the government and people of Afghanistan. This will permit 4,500 flights per year. The new transit routes will save the United States government up to \$133 million annually in fuel, maintenance and other transportation costs, and this agreement is free of any air navigation charges. By providing access to these transit routes, the Russian Federation is enabling a substantial increase in the efficiency of our common effort to defeat the forces of violent extremism in Afghanistan and to ensure Afghanistan's and the broader region's security.

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(iii) U.S.-Russia Joint Commission on Prisoners of War and Missing in Action

On July 6, 2009, the United States and the Russian Federation exchanged diplomatic notes establishing a non-binding framework for the U.S.-Russia Joint Commission on Prisoners of War and Missing in Action (POW/MIAs) to resume its activities. As a White House fact sheet explained, “[t]he Commission serves as a forum through which both nations seek to determine the fates of their missing servicemen” from World War II, the Korean War, the Vietnam War, and the Cold War. The exchange of notes “restores in full the important work of the Joint Commission,” which the two countries established initially in 1992. The fact sheet is available in full at www.whitehouse.gov/the_press_office/FACT-SHEET-US-Russia-Joint-Commission-on-POW-MIAs. For additional background, see http://bushlibrary.tamu.edu/research/public_papers.php?id=4089&year=1992&month=3.

d. International humanitarian law

(1) 60th anniversary of Geneva Conventions

On September 26, 2009, State Department Legal Adviser Harold Hongju Koh spoke at an event to commemorate the sixtieth anniversary of the Geneva Conventions, “Ensuring Respect for International Humanitarian Law in a Changing Environment and the Role of the United Nations.” Jeh Charles Johnson, General Counsel, U.S. Department of Defense, and Vice Admiral James W. Houck, Judge Advocate General, U.S. Navy, also made statements.

Excerpts follow from Mr. Koh's statement. The full texts of all of the statements are available at www.state.gov/s/l/c8183.htm.

. . . On behalf of the United States Government, I thank the Government of Switzerland for organizing this important event, which marks the 60th anniversary of the Geneva Conventions. Today we also pay tribute to the work of the ICRC, which over 60 years has established an astonishing record of professionalism, neutrality, bravery, independence and sacrifice.

The relationship between the United States and the Geneva Conventions has been the subject of much commentary since September 2001. Today, it is clear that individuals taken into custody by the United States must, as a matter of law, be treated humanely. The entire United States Government has worked to achieve this result, which is true to the letter and spirit of the Geneva Conventions.

As President Barack Obama said before this body earlier this week, we live our values. If there is any doubt about our character as a nation, it is revealed in the concrete actions of the past nine months. . . .

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On December 3, 2009, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, addressed a commemoration of the sixtieth anniversary of the Geneva Conventions, "The Geneva Conventions at 60: Taking Stock," which the Law Library of Congress and the American Red Cross sponsored. Ambassador Rice's remarks, excerpted below, are available at <http://usun.state.gov/briefing/statements/2009/133122.htm>.

. . . I want to begin by saying as simply as possible: The United States will support and advance international humanitarian law—both as a matter of national policy and as a basic precept for the entire international community. We embrace the Geneva Conventions because it is the right thing to do. We embrace them because hard experience has taught us that we are safer and stronger when we do. And we embrace them because we honor the legal obligations we undertake.

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Many wars have indeed been fought since 1949. The Geneva Conventions have obviously not prevented the many tragedies and atrocities those wars have wrought. But the existence of the Geneva Convention rules has often stayed the hand of warring parties and saved innocent lives. The code of conduct they established has brought humane treatment and due care to prisoners of war. It spurred the design of military technologies so as to avoid civilian suffering. And it has helped us to mobilize pressure against those who violate it.

In recent years, some have called the Geneva Conventions outdated as we face an enemy that is loyal to no state, that hides among civilians, and that routinely violates the laws our own forces are obliged to uphold. However, for all the enormity of al-Qaeda's deadly ambitions, the challenge we face today has its own unfortunate tradition. The framers of the Conventions were perfectly familiar with terrorism, albeit of a different sort.

If anything, the conflict we are waging today in Afghanistan, and the struggle against violent extremists and terrorists more broadly, make the Geneva Conventions even more relevant and important. This conflict is not about winning territory but about winning the confidence and respect of a population. That requires distinguishing civilians from combatants and protecting them from violence. As the commander of our forces in Afghanistan has said, while “civilian protection is a legal and moral issue, it [also] is an overarching operational issue—[a] clear-eyed recognition that loss of popular support will be decisive to either side in this struggle.”

Our enemies may reject the values embodied in the Geneva Conventions. But that is just the point. Our insistence on distinguishing civilians from combatants is what distinguishes us from our enemies. So does our rejection of torture and cruelty. These are values from which our men and women in uniform draw strength and pride, and they help define what we stand for as a nation. And we are well served by our military lawyers who ensure that we live up to these rules every day, drawing on fundamental values and fortitude that go all the way back to 1775. As Senator McCain so rightly said when he challenged the Congress to reject torture, this is not about who our enemies are—“it is about who we are.”

The rules we embrace create a playing field on which those who take hostages, or send truck bombs into apartment buildings, or rockets into civilian neighborhoods, have no legitimacy. They favor the way we and other democratic countries are already pledged to fight, not the way our enemies fight. They are morally right in and of themselves, but they also give us a great advantage. That’s why, in his inaugural address, President Obama rejected the false choice between our security and our values. It’s why in his first week in office he signed Executive Orders to close the Guantanamo Bay detention facility, to end without question the use of torture, and to ensure America’s compliance with the Geneva Conventions. We also deeply value our continuing, confidential dialogue with the International Committee of the Red Cross on and off the battlefield, and we welcome its advice on how we can do better.

By taking these steps, we are in a stronger position to challenge other nations and groups to uphold international humanitarian law, and to marshal opposition to those who do not. We are also in a better position to support the extraordinarily important work of the Red Cross and Red Crescent Movement around the world, including its support for and protection of civilians in crisis zones like Darfur and Sri Lanka. Finally, we are also able to better support the indispensable work of the American Red Cross, which introduces the concepts of international humanitarian law through its Exploring Humanitarian Law program to schools and universities around the United States and in 40 countries worldwide. Our actions are an example to the youth of America that we are prepared to honor the principles of the Geneva Conventions.

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(2) Protection of civilians in armed conflict

On November 11, 2009, the Security Council adopted Resolution 1894 on the protection of civilians in armed conflict. U.N. Doc. S/RES/1894. Ambassador Rosemary A. DiCarlo, U.S. Alternate Representative to the United Nations for Special Political Affairs, made a statement following the vote, highlighting ways in which the resolution addressed actions to strengthen the protection of civilians in armed conflict. Ambassador

DiCarlo's statement, excerpted below, is available in full at
<http://usun.state.gov/briefing/statements/2009/131799.htm>.

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On occasion the severity of the threat cannot be managed by UN Peacekeepers. What is needed is a much more sophisticated combat capability and enforcement action. It is especially important that military forces undertaking such actions abide by the Geneva Conventions, whose 60th anniversary we celebrate this year. U.S. Forces are committed to compliance with the laws of war, including the Geneva Conventions, even as we face an enemy that is loyal to no state, that hides amongst civilians, and that routinely violates laws.

Mr. President, the lives of innocent civilians in all the world's conflict zones demand our concern. But the situations in which civilians are imperiled differ radically. As such, the resolution adopted today addresses a wide range of actions to strengthen the protection of civilians. . . .

. . . [W]e must continue to develop the means to ensure that the Security Council has prompt access to accurate and objective information on threats to civilians in armed conflict, impediments to humanitarian access, and alleged violations of international humanitarian, human rights, and refugee law.

. . . [W]e must strengthen the tools to hold accountable those who flout the laws of war. The Security Council must be prepared to impose sanctions on those who violate international humanitarian law, whether by freezing assets, banning international travel, or restricting the flow of goods and arms. Establishing accountability and promoting reconciliation through credible and effective national courts when possible, or through international or hybrid tribunals when necessary are essential to end impunity. Those responsible must be held to account.

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2. Convention on Certain Conventional Weapons

a. Cluster munitions: Negotiation of CCW protocol

During 2009 the United States participated in meetings of the Group of Governmental Experts ("GGE") to negotiate a new protocol to the Convention on Certain Conventional Weapons ("CCW") to address the humanitarian harm that cluster munitions can cause. In his opening statement to the GGE on April 14, 2009, excerpted below, Stephen Mathias, head of the U.S. delegation, reiterated U.S. views on the humanitarian benefit of the draft protocol and concerns about a proposal to exempt certain cluster munitions from the draft text. The full texts of Mr. Mathias's statement and other U.S. interventions in the negotiations are available at <http://ccwtreaty.state.gov>. See also *Digest 2007* at 899-905 and *Digest 2008* at 885-88.

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As we embark on this process, we once again want to reiterate the need for compromise on all sides if we are to reach agreement. For example, while we have repeatedly stated our strong preference for an article that sets forth key provisions of international humanitarian law that are particularly relevant to the use of cluster munitions, and we continue to believe that including such an article would be strongly preferable, in the spirit of compromise, we are willing to negotiate on the basis of the text you have put forward.

We would, however, note a couple of important issues that we think we should draw to other delegations' attention at the outset of this round of negotiations.

- First, there is the question of what standard we should measure our work here against. We believe that the standard we should strive for in this process is to achieve a significant humanitarian benefit. As we have outlined in more detail in previous statements to the GGE, we believe in particular that weapons possessing the technical requirements set forth in Article 4 would have significant humanitarian benefits over existing stockpiles. Currently, the vast majority of the world's stockpiles of cluster munitions are outside of any international agreement specifically addressing these weapons. It is open to the CCW to remedy this situation. Some have argued that success in the CCW requires that we find a way to eliminate all human suffering caused by cluster munitions. In our view, this overstates what will be achievable here. All weapons cause human suffering, and the only way to eliminate such suffering would be to ban them. As we all realize, that will not be possible in this forum with respect to cluster munitions. We should rather commit ourselves in this forum to strong measures that will result in a significant humanitarian benefit when compared to the status quo.
- Second, we feel it is important to note once again our serious concern about exempting entirely from this draft protocol the cluster munitions that fall within the exceptions currently found in paragraph 2 of Article 2. Conceptually, as we have stated in previous sessions, we believe that these weapons are in fact cluster munitions. However, because we understand the complication this may cause for countries that have signed the (Oslo) Convention on Cluster Munitions, we have indicated that we have no objection to keeping an exception along these lines in this protocol. Nevertheless, we can see no justification for exempting them from all of the substantive provisions (other than, for example, the technical requirements in Article 4) in the Protocol, such as the ban on transfers to non-state actors.

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Excerpts below from Mr. Mathias's closing statement to the GGE on April 17, 2009, provide U.S. views on the state of the negotiations. *See also Digest 2007* at 899-905.

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- My delegation has a mixed view of the results of this week of negotiations. On the one hand, we are disappointed that more progress has not been made. In addition, there are elements in this new Chairman's text that are of concern to my delegation. It also contains a number of

new elements (such as the new reporting requirement, the provisions on anti-ship and anti-runway munitions, and the new treatment of direct fire weapons) that will require careful review by my delegation and presumably other delegations as well. However, in general, we believe that this text remains a good basis for continued work, it moves us closer to a draft protocol that could achieve consensus, and it contains provisions that will have a significant humanitarian benefit.

- We are well aware of the complaint that a text along the lines of the one in front of us does not go far enough. However, we have to keep in mind that the perfect can become the enemy of the good. This is particularly true in large multilateral negotiations which, by their very nature, involve compromises among many competing interests. We have in front of us a text that, while certainly not perfect from any delegation's perspective, clearly would have a major positive humanitarian impact.

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- This text would have a very significant impact on the world's existing stocks of cluster munitions. Many, if not most, of the cluster munitions that currently exist do not meet the requirements that are set forth in article 4 of this text. The result is that these cluster munitions would have to be removed from the active stocks of any state party to this potential new protocol.
- As we have said with regard to our own stocks, our domestic policy that we would use to implement these obligations would affect almost our entire arsenal of cluster munitions. Over 95% of our cluster munitions will be affected by this new standard. We understand that other countries' arsenals will also be similarly dramatically affected.
- We believe that many of the countries participating in this process who have large stockpiles of cluster munitions could agree to a text along the lines of the one before us, and that these countries will live up to the commitments they make. Therefore, we continue to hope that we will be able to reach agreement and realize the humanitarian gains that are within our grasp here.

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On November 12, 2009, Mr. Mathias addressed the meeting of the CCW High Contracting Parties. Mr. Mathias's statement, excerpted below, reiterated the U.S. preference for states to continue efforts to negotiate a new instrument addressing cluster munitions within the CCW framework. The full text of the statement is available at www.state.gov/s/l/c8183.htm.

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We remain committed to negotiating a legally binding Protocol on Cluster Munitions in the CCW to mitigate the threat to civilian populations resulting from the use of cluster munitions. We have acknowledged that many States represented here are parties to the Convention on Cluster Munitions (CCM). However, many other States, including the United States, are not parties. It is for each State here to determine whether its national security interests can be fully ensured consistent with the terms of the CCM. As we have noted on other occasions, a comprehensive international response to the humanitarian concerns associated with cluster munitions must include action by those States that

are not in a position to become parties to the CCM, because among those States are the States that produce and stockpile the vast majority of the world's cluster munitions. The United States believes that it should be possible to reach agreement in the CCW on a protocol on cluster munitions that will have significant humanitarian benefits. The U.S. delegation is committed to working cooperatively with delegations across the spectrum of views represented here to achieve this positive result.

. . . A CCW protocol that imposes meaningful requirements on the countries that hold 90 percent of the world's stockpiles of cluster munitions would be an important step forward from a humanitarian standpoint. On behalf of the United States, let me reaffirm that we have come prepared to listen to all reasonable proposals and comments regarding the existing text and believe that this text provides a foundation for our work next year. . . .

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b. CCW-related instruments

On November 9–10, 2009, the United States participated in the Third Conference of the High Contracting Parties to Protocol V on Explosive Remnants of War. The United States had deposited its instruments of ratification for Protocol V, as well as Protocols III and IV and the amendment to Article 1 of the CCW, on January 21, 2009. As a result, the United States participated in the review conference for the first time as a High Contracting Party. See www.state.gov/r/pa/prs/ps/2009/01/115309.htm; see also *Digest 2008* at 885–88. In his opening statement to the conference on November 9, Department of State Legal Adviser Harold Hongju Koh stressed the significance of the U.S. action, stating:

. . . The United States took a leading role in negotiating these protocols and the amendment, has long complied with the norms contained in them, and is pleased to now finally be a party to each of them. This action reaffirms the U.S. commitment to the development and implementation of international humanitarian law (IHL).

Further excerpts follow from Mr. Koh's statement, which is available at www.state.gov/s/l/c8183.htm.

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The United States is concerned by risks created by Explosive Remnants of War (ERW) and continues to be a world leader in Humanitarian Mine Action (HMA). For many years our HMA assistance programs have addressed both ERW and landmines. Since 1993, the United States has provided more than \$1.5 billion for HMA in over 46 countries. This amounts to between one-quarter to one-third of the global humanitarian assistance in this area. In 2009, the Department of

State provided \$113 million in assistance to 35 countries and continues to work bilaterally and multilaterally to reduce the threat to civilians. . . .

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The United States takes seriously Protocol V’s guidance on generic preventive measures to limit the creation of ERW. The U.S. Department of Defense carries out a robust Physical Security and Stockpile Management program for all U.S. munitions that include regular surveillance to ensure that weapons are performing effectively. Through the Defense Threat Reduction Agency and the Department of State, we offer technical advice, training, and in some cases technical assistance to help states improve their stockpile management.

With respect to cluster munitions, let me confirm today that the United States remains committed to negotiate a legally binding Protocol on Cluster Munitions in the CCW to mitigate the threat to civilian populations resulting from the use of cluster munitions. We realize many delegations here are parties to the Convention on Cluster Munitions (CCM). However, many States, including the United States, have determined that their national security interests cannot be fully ensured consistent with the terms of the CCM. A comprehensive international response to the humanitarian concerns associated with cluster munitions must include action by those States that are not in a position to become parties to the CCM, because those States produce and stockpile the vast majority of the world’s cluster munitions. The United States believes that it should be possible to reach agreement in the CCW on a protocol on cluster munitions that will have significant humanitarian benefits. The U.S. delegation is committed to working cooperatively with delegations across the spectrum of views represented here to achieve this positive result.

On the national level, the United States continues to implement the cluster munitions policy that was signed by Secretary of Defense Robert Gates in June 2008. . . . [Editor’s note: *See Digest 2008* at 884–85.]

We know that negotiations on a cluster munitions protocol in the CCW will continue to be difficult, and we realize that strong differences remain among the various delegations. Nevertheless, we believe that it is worth devoting a significant effort to achieve a successful result. A CCW protocol that imposes meaningful requirements on the countries that hold 90 percent of the world’s stockpiles of cluster munitions would be an important step forward from a humanitarian standpoint.

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3. Ottawa Convention

From November 29–December 4, 2009, the United States attended the Second Review Conference of the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction (“Ottawa Convention”), in Cartagena, Colombia, as an observer. The United States is not a party to the Ottawa Convention and participated for the first time in the conference as a result of an ongoing comprehensive review of U.S. landmine policy that President Obama initiated. On December 1, 2009, James Lawrence, Deputy Director, Office of Weapons Removal and Abatement, Department of State Bureau of Political–

Military Affairs, delivered a statement stressing the U.S. commitment to eliminating the humanitarian risks posed by landmines. The U.S. statement, excerpted below, is available at www.state.gov/r/pa/prs/ps/2009/dec/132891.htm.

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Our acceptance of President Uribe's invitation affirms that the United States shares the humanitarian concerns of parties to the Ottawa Convention. The Administration is strongly committed to continued U.S. global leadership in eliminating the humanitarian risks posed by landmines.

No country does more to support humanitarian mine action in strong support of the Convention's goals, including in landmine clearance, mine risk education, and victim assistance. . . .

Equally significant, the United States has ended use of all non-detectable mines, both anti-personnel and anti-vehicle mines.

The United States will also end all use of persistent mines, both anti-personnel and anti-vehicle, by the end of . . . 2010.

The United States continues to abide by its obligations as a member of the Amended Mines Protocol to the Convention on Certain Conventional Weapons.

The Administration's decision to attend this Review Conference is the result of an on-going comprehensive review of U.S. landmine policy initiated at the direction of President Obama.

This is the first comprehensive review since 2003. As such, it will take some time to complete, given that we must ensure that all factors are considered, including possible alternatives to meet our national defense needs and security commitments to our friends and allies to ensure protection of U.S. troops and the civilians they protect around the world.

The Administration applauds the significant accomplishments to date by the Convention in addressing the harmful effects of indiscriminate landmines and is committed to a continued U.S. leadership role in humanitarian mine action.

4. Cultural Property

On March 13, 2009, the United States deposited its instrument of ratification for the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded on May 14, 1954. S. Treaty Doc. No. 106-1 (1999). For background, see *II Cumulative Digest 1991-99* at 2197-206 and *Digest 2008* at 888-89.

5. Detainees

a. Overview

On May 21, 2009, President Obama made remarks on national security at the National Archives. The President outlined the steps he had taken,

including with respect to individuals detained by the Department of Defense, to make U.S. counterterrorism efforts more effective while relying on U.S. legal traditions and institutions. The text of the President's speech, excerpted below, is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00388, pp. 1-11. Other entries in this section provide additional details on the initiatives President Obama outlined at the National Archives, as well as other developments in 2009 relating to U.S. detention policy.

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After 9/11, we knew that we had entered a new era; that enemies who did not abide by any law of war would present new challenges to our application of the law; that our Government would need new tools to protect the American people, and that these tools would have to allow us to prevent attacks instead of simply prosecuting those who try to carry them out.

Unfortunately, faced with an uncertain threat, our Government made a series of hasty decisions. I believe that many of these decisions were motivated by a sincere desire to protect the American people. But I also believe that all too often, our Government made decisions based on fear rather than foresight; that all too often our Government trimmed facts and evidence to fit ideological predispositions. Instead of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us—Democrats and Republicans, politicians, journalists, and citizens—fell silent.

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Now let me be clear: We are indeed at war with Al Qaida and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability. For reasons that I will explain, the decisions that were made over the last 8 years established an ad hoc legal approach for fighting terrorism that was neither effective nor sustainable, a framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass. And that's why I took several steps upon taking office to better protect the American people.

First, I banned the use of so-called enhanced interrogation techniques by the United States of America. Now, I know some have argued that brutal methods like waterboarding were necessary to keep us safe. I could not disagree more. As Commander in Chief, I see the intelligence; I bear the responsibility for keeping this country safe. And I categorically reject the assertion that these are the most effective means of interrogation. What's more, they undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists, and increase the will of our enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops by making it less likely that others will surrender to them in battle, and more likely that Americans will be mistreated if they are captured. In short, they did not advance our war and counterterrorism efforts; they undermined them. And that is why I ended them once and for all.

Now, I should add, the arguments against these techniques did not originate from my administration. As Senator McCain once said, torture "serves as a great propaganda tool for those who recruit people to fight against us." And even under President Bush, there was recognition among members of his own administration—including a Secretary of State, other senior officials, and many in the military and intelligence community—that those who argued for these tactics were

on the wrong side of the debate, and the wrong side of history. That's why we must leave these methods where they belong, in the past. They are not who we are, and they are not America.

Now, the second decision that I made was to order the closing of the prison camp at Guantanamo Bay. For over 7 years, we have detained hundreds of people at Guantanamo. During that time, the system of military commissions that were in place at Guantanamo succeeded in convicting a grand total of three suspected terrorists. Let me repeat that: three convictions in over 7 years. Instead of bringing terrorists to justice, efforts at prosecution met setback after setback, cases lingered on, and in 2006 the Supreme Court invalidated the entire system. Meanwhile, over 525 detainees were released from Guantanamo under not my administration, under the previous administration. Let me repeat that: Two-thirds of the detainees were released before I took office and ordered the closure of Guantanamo.

There is also no question that Guantanamo set back the moral authority that is America's strongest currency in the world. Instead of building a durable framework for the struggle against Al Qaida that drew upon our deeply held values and traditions, our Government was defending positions that undermined the rule of law. In fact, part of the rationale for establishing Guantanamo in the first place was the misplaced notion that a prison there would be beyond the law, a proposition that the Supreme Court soundly rejected. Meanwhile, instead of serving as a tool to counter terrorism, Guantanamo became a symbol that helped Al Qaida recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained.

So the record is clear. Rather than keeping us safer, the prison at Guantanamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it. That's why I argued that it should be closed throughout my campaign, and that is why I ordered it closed within 1 year.

And the third decision that I made was to order a review of all pending cases at Guantanamo. I knew when I ordered Guantanamo closed that it would be difficult and complex. There are 240 people there who have now spent years in legal limbo. In dealing with this situation, we don't have the luxury of starting from scratch. We're cleaning up something that is, quite simply, a mess, a misguided experiment that has left in its wake a flood of legal challenges that my administration is forced to deal with on a constant, almost daily basis, and it consumes the time of Government officials whose time should be spent on better protecting our country.

Indeed, the legal challenges that have sparked so much debate in recent weeks here in Washington would be taking place whether or not I decided to close Guantanamo. For example, the court order to release . . . 17 Uighur detainees took place last fall, when George Bush was President. The Supreme Court that invalidated the system of prosecution at Guantanamo in 2006 was overwhelmingly appointed by Republican Presidents, not wild-eyed liberals. In other words, the problem of what to do with Guantanamo detainees was not caused by my decision to close the facility; the problem exists because of the decision to open Guantanamo in the first place.

So—now let me be blunt. There are no neat or easy answers here. I wish there were. But I can tell you that the wrong answer is to pretend like this problem will go away if we maintain an unsustainable status quo. As President, I refuse to allow this problem to fester; I refuse to pass it on to somebody else. It is my responsibility to solve the problem. Our security interests will not permit us to delay. Our courts won't allow it, and neither should our conscience.

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. . . We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people. Where demanded by justice and national security, we will seek to transfer some detainees to the same type of facilities in which we hold all manner of dangerous and violent criminals within our borders, namely highly secure prisons that ensure the public safety.

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. . . [W]e are currently in the process of reviewing each of the detainee cases at Guantanamo to determine the appropriate policy for dealing with them. And as we do so, we are acutely aware that under the last administration, detainees were released and, in some cases, returned to the battlefield. That's why we are doing away with the poorly planned, haphazard approach that let those detainees go in the past. Instead, we are treating these cases with the care and attention that the law requires and that our security demands. Now, going forward, these cases will fall into five distinct categories.

First, whenever feasible, we will try those who have violated American criminal laws in Federal courts, courts provided for by the United States Constitution. Some have derided our Federal courts as incapable of handling the trials of terrorists. They are wrong. Our courts and our juries, our citizens, are tough enough to convict terrorists. The record makes that clear. Ramzi Yousef tried to blow up the World Trade Center. He was convicted in our courts and is serving a life sentence in U.S. prisons. Zacarias Moussaoui has been identified as the 20th 9/11 hijacker. He was convicted in our courts, and he too is serving a life sentence in prison. If we can try those terrorists in our courts and hold them in our prisons, then we can do the same with detainees from Guantanamo.

Now, recently, we prosecuted and received a guilty plea from a detainee, al-Marri, in federal court after years of legal confusion. We're preparing to transfer another detainee to the Southern District Court of New York, where he will face trial on charges related to the 1998 bombings of our Embassies in Kenya and Tanzania, bombings that killed over 200 people. Preventing this detainee from coming to our shores would prevent his trial and conviction. And after over a decade, it is time to finally see that justice is served, and that is what we intend to do.

The second category of cases involves detainees who violate the laws of war and are therefore best tried through military commissions. . . .

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. . . Instead of using the flawed commissions of the last 7 years, my administration is bringing our commissions in line with the rule of law. . . .

The third category of detainees includes those who have been ordered released by the courts. Now let me repeat what I said earlier: This has nothing to do with my decision to close Guantanamo; it has to do with the rule of law. The courts have spoken. They have found that there's no legitimate reason to hold 21 of the people currently held at Guantanamo. Nineteen of these findings took place before I was sworn into office. I cannot ignore these rulings because as President, I too am bound by the law. The United States is a nation of laws and so we must abide by these rulings.

The fourth category of cases involves detainees who we have determined can be transferred safely to another country. So far, our review team has approved 50 detainees for transfer. And my administration is in ongoing discussions with a number of other countries about the transfer of detainees to their soil for detention and rehabilitation.

Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. And I have to be honest here: This is the toughest single issue that we will face. We're going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who, nonetheless, pose a threat to the security of the United States. Examples of that threat include people who've received extensive explosives training at Al Qaida training camps, or commanded Taliban troops in battle, or expressed their allegiance to Usama bin Laden, or otherwise made it clear that they want to kill Americans. These are people who, in effect, remain at war with the United States.

Let me repeat: I am not going to release individuals who endanger the American people. Al Qaida terrorists and their affiliates are at war with the United States, and those that we capture, like other prisoners of war, must be prevented from attacking us again. Now, having said that, we must recognize that these detention policies cannot be unbounded; they can't be based simply on what I or the executive branch decide alone. And that's why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review so that any prolonged detention is carefully evaluated and justified.

I know that creating such a system poses unique challenges. And other countries have grappled with this question; now, so must we. But I want to be very clear that our goal is to construct a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred. Our goal is not to avoid a legitimate legal framework. In our constitutional system, prolonged detention should not be the decision of any one man. If and when we determine that the United States must hold individuals to keep them from carrying out an act of war, we will do so within a system that involves judicial and congressional oversight. And so, going forward, my administration will work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution.

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b. Ensuring lawful interrogations: Executive Order 13491

On January 22, 2009, President Obama issued Executive Order 13491, "Ensuring Lawful Interrogations." 74 Fed. Reg. 4893 (Jan. 27, 2009). The President acted "in order to improve the effectiveness of human intelligence-gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and to take care that the laws of the United States are faithfully executed." A White House press statement issued on the same day summarized the order as follows:

[The] Executive Order revokes Executive Order 13440 that interpreted Common Article 3 of the Geneva Conventions. [Editor's note: See 72 Fed. Reg. 40,707 (July 24, 2007); see also *Digest 2007* at 922-25.] It requires that all interrogations of detainees in armed conflict, by any government agency, follow the Army Field Manual interrogation guidelines. The Order also prohibits reliance on any Department of Justice or other legal advice concerning interrogation that was issued between September 11, 2001 and January 20, 2009.

The Order requires all departments and agencies to provide the ICRC [International Committee of the Red Cross] access to detainees in a manner consistent with Department of Defense regulations and practice. It also orders the CIA to close all existing detention facilities and prohibits it from operating detention facilities in the future.

Finally, the Order creates a Special Task Force with two missions. The Task Force will conduct a review of the Army Field Manual interrogation guidelines to determine whether different or additional guidance is necessary for the CIA. It will also look at rendition and other policies for transferring individuals to third countries to be sure that our policies and practices comply with all obligations and are sufficient to ensure that individuals do not face torture and cruel treatment if transferred. . . .

See www.whitehouse.gov/the-press-office/background-president-obama-signs-executive-orders-detention-and-interrogation-polic. Section 3 of the order, which is set forth below, addresses "Standards and Practices for Interrogation of Individuals in the Custody or Control of the United States in Armed Conflicts."

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(a) **Common Article 3 Standards as a Minimum Baseline.** Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340-2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

(b) **Interrogation Techniques and Interrogation-Related Treatment.** Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2–22.3 (Manual). Interrogation techniques, approaches, and treatments described in the Manual shall be implemented strictly in accord with the principles, processes, conditions, and limitations the Manual prescribes. Where processes required by the Manual, such as a requirement of approval by specified Department of Defense officials, are inapposite to a department or an agency other than the Department of Defense, such a department or agency shall use processes that are substantially equivalent to the processes the Manual prescribes for the Department of Defense. Nothing in this section shall preclude the Federal Bureau of Investigation, or other Federal law enforcement agencies, from continuing to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises.

(c) **Interpretations of Common Article 3 and the Army Field Manual.** From this day forward, unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government may, in conducting interrogations, act in reliance upon Army Field Manual 2–22.3, but may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation—including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2–22.3, and its predecessor document, Army Field Manual 34–52—issued by the Department of Justice between September 11, 2001, and January 20, 2009.

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c. Guantanamo Bay detention facilities

(1) Executive Order 13492

On January 22, 2009, President Obama issued Executive Order 13492, “Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities.” 74 Fed. Reg. 4897 (Jan. 27, 2009). A White House press release summarized the new order as follows:

[The] Executive Order requires closure of the Guantanamo detention center no later than one year from the date of the Order. Closure of the facility is the ultimate goal but not the first step. The Order establishes a review process with the goal of disposing of the detainees before closing the facility.

The Order sets up an immediate review to determine whether it is possible to transfer detainees to third countries, consistent with national security. If transfer is not approved, a second review will determine

whether prosecution is possible and in what forum. The preference is for prosecution in Article III courts or under the Uniform Code of Military Justice (UCMJ), but military commissions, perhaps with revised authorities, would remain an option. If there are detainees who cannot be transferred or prosecuted, the review will examine the lawful options for dealing with them. . . .

The Executive Order directs the Secretary of State to seek international cooperation aimed at achieving the transfers of detainees.

The Order directs the Secretary of Defense to halt military commission proceedings pending the results of the review.

Finally, the Executive Order requires that conditions of confinement at Guantanamo, until its closure, comply with Common Article 3 of the Geneva Conventions and all other applicable laws.

See www.whitehouse.gov/the-press-office/background-president-obama-signs-executive-orders-detention-and-interrogation-polic. Excerpts follow from the new order.

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

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Sec. 3. *Closure of Detention Facilities at Guantánamo.* The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. *Immediate Review of All Guantánamo Detentions.*

(a) **Scope and Timing of Review.** A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

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(c) **Operation of Review.** The duties of the Review participants shall include the following:

(1) **Consolidation of Detainee Information.** The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently

detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) **Determination of Transfer.** The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) **Determination of Prosecution.** In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) **Determination of Other Disposition.** With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) **Consideration of Issues Relating to Transfer to the United States.** The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. Diplomatic Efforts. The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. Humane Standards of Confinement. No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

Sec. 7. Military Commissions. The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

* * * *

(2) U.S.–EU Joint Statement

On June 15, 2009, the European Union and its member states and the United States issued a Joint Statement on the closure of the detention facility at Guantanamo. The Joint Statement, excerpted below, is available at www.state.gov/r/pa/prs/ps/2009/06a/124796.htm. See also the statement of the State Department Office of the Spokesman, welcoming the EU Council of Ministers' adoption of the Joint Statement, available at www.state.gov/r/pa/prs/ps/2009/06a/124795.htm.

The European Union and the United States share fundamental values of freedom, democracy, and respect for international law, the rule of law and human rights. We, the leaders of the European Union and the United States of America, refer to the longstanding tradition of humanitarian assistance that is shared by the European Union and its Member States and the United States of America, our commitment to security, and our deep and abiding friendship. Efforts to combat terrorism should be conducted in a manner that comports with the rule of law, respects our common values, and complies with our respective obligations under international law, in particular international human rights law, refugee law, and humanitarian law. We consider that efforts to combat terrorism conducted in this manner make us stronger and more secure.

Closure of Guantanamo:

We note the positive actions taken by the President of the United States of America when he ordered the closure of the Guantanamo Bay detention facility by January 22, 2010.

We welcome the determination of the United States of America to close the facility together with other steps taken, including the intensive review of its detention, transfer, trial and interrogation policies in the fight against terrorism and increased transparency about past practices in regard to these policies, as well as the elimination of secret detention facilities.

We reaffirm that the primary responsibility for closing Guantanamo and finding residence for the former detainees rests with the United States.

However, we also recall the request made by the Government of the United States to assist it in finding residence for some of those persons cleared for release from the Guantanamo Bay detention facility, who the United States has determined it will not prosecute, and who for compelling reasons cannot return to their countries of origin, but have expressed the wish to be received by the one or the other EU Member State or Schengen associated country.

We take note of the commitment of the United States to develop a new and more sustainable approach to security-related issues and of the thorough review of US policies initiated by President Obama's Executive Orders of January 22, 2009. [Editor's note: See discussion in A.5.b. and A.5.c.(1) *supra*; see also Executive Order 13493, "Review of Detention Policy Options," 74 Fed. Reg. 4901 (Jan. 27, 2009).] Against this background and in the expectation that underlying policy issues will be addressed, the EU and its Member States wish to help the US turn the page. In this context, certain Member States of the European Union have expressed their readiness to assist with the reception of certain former Guantanamo detainees, on a case-by-case basis.

* * * *

(3) Thomson Correctional Center

On December 15, 2009, President Obama issued a memorandum to the Secretary of Defense and the Attorney General, "Directing Certain Actions With Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantanamo Bay Naval Base." Excerpts from the memorandum follow, providing the legal basis for the President's action and discussing the specific actions the President ordered the Secretary of Defense and the Attorney General to take. 74 Fed. Reg. 67,047 (Dec. 17, 2009).

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force (Public Law 107-40, 115 Stat. 224), and in order to facilitate the closure of detention facilities at the Guantanamo Bay Naval Base, I hereby direct that the following actions be taken as expeditiously as possible with respect to the facility known as the Thomson Correctional Center (TCC) in Thomson, Illinois:

1. The Attorney General shall acquire and activate the TCC as a United States Penitentiary The Attorney General shall also provide to the Department of Defense a sufficient portion of the TCC to serve as a detention facility to be operated by the Department of Defense in order to accommodate the relocation of detainees by the Secretary of Defense in accordance with paragraph 2 of this memorandum.

2. The Secretary of Defense, working in consultation with the Attorney General, shall prepare the TCC for secure housing of detainees currently held at the Guantanamo Bay Naval Base who have been or will be designated for relocation, and shall relocate such detainees to the TCC, consistent with laws related to Guantanamo detainees and the findings in, and interagency Review established by, Executive Order 13492 of January 22, 2009.

* * * *

(4) Procedures for ensuring humane treatment of detainees transferred from Guantanamo

During 2009 the Department of State engaged in intensive diplomatic efforts to repatriate or resettle individuals detained at Guantanamo, consistent with Executive Order 13492. In a declaration submitted in habeas litigation brought by detainees at Guantanamo, Ambassador Daniel Fried, Special Envoy for the Closure of the Guantanamo Bay Detention Facility, described those efforts in the context of "U.S. policies with respect to post-transfer security and post-transfer humane treatment, including the policy that the U.S. government will not transfer individuals to countries where it

has determined that they are more likely than not to be tortured.” Excerpts from Ambassador Fried’s declaration follow, discussing the procedures the Department of State follows in negotiating the terms of detainees’ transfers from Guantanamo with other governments, including the measures the Department takes to ensure that a detainee, once transferred, is treated humanely (footnote omitted). The full text of Ambassador Fried’s declaration is available at www.state.gov/s//c8183.htm. Section A.5.e.(1) below discusses the Guantanamo detainee habeas litigation.

* * * *

4. Of particular concern to the Department of State is the question of whether the foreign government concerned will treat the detainee humanely, in a manner consistent with its international obligations, and will not persecute the individual on the basis of his race, religion, nationality, membership in a social group, or political opinion. The Department is particularly mindful of the longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. This policy is consistent with the approach taken by the United States in implementing the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Protocol Relating to the Status of Refugees. The Department of State works closely with relevant agencies to advise on the likelihood of persecution or torture in a given country and the adequacy and credibility of assurances obtained from a particular foreign government prior to any transfer.

5. The Department of State generally has responsibility for communications on transfer-related matters between the United States and foreign governments. The Department of State receives requests from foreign governments for the transfer of detainees and forwards such requests to the Guantanamo Review Task Force and the Department of Defense for coordination with appropriate Departments and agencies of the United States Government. The Department of State also conveys requests from the United States to foreign governments to accept the transfer of their nationals. In cases where approved detainees cannot be transferred to their countries of nationality because of humane treatment concerns, the Department of State communicates with foreign governments to explore third-country resettlement possibilities. Numerous countries have been approached to date with respect to various detainees who fall within this category, and the U.S. Government has had success in resettling in third countries detainees with no prior legal ties to that location (including Albania, Belgium, Bermuda, France, Ireland, Palau, and Portugal).

6. Once a detainee has been approved for transfer through the processes on the Guantanamo Review Task Force, my office generally takes the lead in discussions with the foreign government concerned or, where repatriation is not an available option because of humane treatment concerns or for other reasons, with third country governments where resettlement might be appropriate. The primary purpose of these discussions is to learn what measures the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies, including resettlement arrangements, and to obtain appropriate transfer assurances. My office seeks assurances that the United States Government considers necessary and appropriate for the country in question. Among the assurances sought in every transfer case in which security measures or (in fewer cases, detention) by the government concerned are foreseen or possible is the assurance of

humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer. The Department of State considers whether the State in question is party to the relevant treaties, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and ensures that assurances are tailored accordingly if the State concerned is not a party or other circumstances warrant.

7. Decisions with respect to disposition of Guantanamo detainees are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the receiving country, the individual concerned, and any concerns regarding torture or persecution either extant or that may arise. Recommendations by the Department of State are decided at senior levels through a process involving Department officials most familiar with international legal standards and obligations and the conditions in the countries concerned. Within the Department of State, my office, together with the Office of the Legal Adviser, the Bureau of Democracy, Human Rights, and Labor, and the relevant regional bureau, normally evaluate foreign government assurances in light of the circumstances of the individual concerned and the overall record of the country in question with respect to human rights and other relevant issues. The views of the Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports, and of the relevant regional bureaus, country desk, or U.S. Embassy are important in evaluating foreign government assurances and any individual fear of persecution or torture claims, because they are knowledgeable about matters such as human rights, prison conditions, and prisoners' access to counsel both in general and as they may apply to a particular case in the foreign country concerned, and knowledgeable as well as to particular information about the entity or individual that is offering the assurance in any particular case and as to relevant background about any allegations of mistreatment that may have surfaced in connection with past transfers to the country in question. If deemed appropriate, my office and other relevant offices brief the Secretary or other Department Principals before finalizing the position of the Department of State.

8. The essential question in evaluating foreign government assurances relating to humane treatment is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, the competent Department of State officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred. In determining whether it is "more likely than not" that an individual would be tortured, the United States takes into account the treatment the individual is likely to receive upon transfer, including, *inter alia*, the expressed commitments of officials from the foreign government accepting transfer. When evaluating the adequacy of any assurances, Department officials consider the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the foreign country concerned that would provide context (and credibility) for the assurances provided. Department officials may also consider U.S. diplomatic relations with the country concerned when evaluating assurances. For instance, Department officials may make a judgment regarding [a] foreign government's incentives and capacities to fulfill its assurances to the United States, including the importance to the government concerned of maintaining good relations and cooperation with the United States. In an appropriate case, the Department of State may also consider seeking the foreign government's assurance of access by governmental or non-governmental entities in the country concerned to monitor the condition of an individual returned to that country, or of U.S. Government access to the individual for such purposes. In instances in which the United States transfers an individual subject to assurances, it would pursue any credible report and take appropriate action if it had reason to believe that those assurances would not be, or had not been, honored. We take seriously past

practices by governments. In an instance in which specific concerns about the treatment an individual may receive cannot be resolved satisfactorily, we have in the past and would in the future recommend against transfer, consistent with the United States policy.

9. The Department of State's ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with the foreign government with discretion. This is especially the case with respect to issues having to do with detainees at the Guantanamo Bay Detention Facility. Consistent with the diplomatic sensitivities that surround the Department's communications with foreign governments concerning allegations relating to torture, the Department of State does not unilaterally make public the specific assurances or other precautionary measures obtained in order to avoid the chilling effects of making such discussions public and the possible damage to our ability to conduct foreign relations. Seeking assurances may be seen as raising questions about the requesting State's institutions or commitment to the rule of law, even in cases where the assurances are sought to highlight the issue for the country concerned and satisfy the Department that the country is aware of the concerns raised and is in a position to undertake a commitment of humane treatment of a particular individual. There also may be circumstances where it may be important to protect sources of information (such as sources within a foreign government) about a government's willingness or capability to abide by assurances concerning humane treatment or relevant international obligations.

* * * *

12. The Executive Branch, and in particular the Department of State, has the tools to obtain and evaluate assurances of humane treatment, to make recommendations about whether transfers can be made consistent with U.S. government policy on humane treatment, and where appropriate to follow up with receiving governments on compliance with those assurances. The Department of State has used these tools in the past to facilitate transfers in a responsible manner that comports with the policies described herein. . . .

d. Procedures for reviewing status of aliens detained at Bagram Theater Internment Facility

On July 2, 2009, the Deputy Secretary of Defense, William J. Lynn, III, approved policy guidance modifying the Department of Defense's procedures for reviewing the status of aliens it detains at the Bagram Theater Internment Facility ("BTIF") in Afghanistan.* The Deputy Secretary also approved related policy guidance providing criteria for Defense Department officials to use in assessing the threat posed by detainees at the BTIF and concerning DOD's authority to transfer and release detainees from the BTIF. On July 14, 2009, DOD transmitted the new policy guidance to Congress, pursuant to § 1405(c) of the Detainee Treatment Act of 2005, Title XIV, Pub. L. No. 109-163, 119 Stat. 3474. Excerpts below from a letter from Philip Carter, Deputy Assistant Secretary of Defense for Detainee Policy, to Senator Carl Levin (D-Michigan), Chairman, U.S. Senate Armed

* Editor's note: In late 2009, the BTIF was replaced by a new theater internment facility, called the Detention Facility in Parwan ("DFIP").

Services Committee, transmitting the DOD guidance, describe the modified review procedures. The full text of the report is available at www.state.gov/s/l/c8183.htm.

... The enhanced detainee review procedures significantly improve the Department of Defense's ability to assess whether the facts support the detention of each detainee as an unprivileged enemy belligerent, the level of threat the detainee represents, and the detainee's potential for rehabilitation and reconciliation. The modified procedures also enhance the detainee's ability to challenge his or her detention.

The modified procedures adopt the definitional framework of detention authority that the Administration first published in a Guantanamo habeas filing on March 13, 2009. [Editor's note: See A.5.e.(1)(i) below.] Under this framework, the Department of Defense has the authority to detain "[p]ersons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks." The Department of Defense also has the authority to detain "[p]ersons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces."

In addition to assessing whether the facts support the detention of each detainee as an unprivileged enemy belligerent under this framework, the modified procedures require detainee review boards to consider each detainee's threat level and potential for rehabilitation and reconciliation. Moreover, these threat assessments will no longer be linked to the criteria for transferring the detainee to Guantanamo.

The modified procedures generally follow the procedures prescribed in Army Regulation (AR) 190-8, such as that the proceedings generally shall be open (with certain exceptions including for matters that would compromise national or operational security), including to representatives of the ICRC and possibly non-governmental organizations. Detainees will be allowed to attend all open sessions and call reasonably available witnesses.

Key supplemental procedures not found in AR 190-8 that enhance the detainee's ability to challenge his or her detention include appointment of a personal representative who "shall act in the best interests of the detainee"; whose "good faith efforts on behalf of the detainee shall not adversely affect his or her status as a military officer (e.g., evaluations, promotions, future assignments)"; and who has access to all reasonably available information (including classified information) relevant to the proceedings. The end result is a process that approximates the process used to screen American citizens captured in Iraq.

* * * *

e. U.S. court decisions and other proceedings

(1) Detainees at Guantanamo: Habeas litigation

(i) Standard for detention of aliens at Guantanamo

Following the U.S. Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which held that detainees at Guantanamo have a right under the U.S. Constitution to seek a writ of habeas corpus and stated that "[t]he detainees in these cases are entitled to a prompt habeas corpus hearing," the U.S. District Court for the District of Columbia began to consider more than 200 Guantanamo detainees' habeas petitions. In doing so, the district court considered whether the President had the authority to detain the petitioners, a question the Supreme Court did not address. On March 13, 2009, in a filing in Guantanamo habeas litigation before the U.S. District Court for the District of Columbia, the Department of Justice articulated a revised basis for the President's authority to detain individuals at Guantanamo. *In re Guantanamo Bay Litig.*, Misc. No. 08-442 (TFH) (D.D.C. 2009). A Department of Justice press release, dated March 13, explained the significance of the U.S. filing as follows:

. . . The definition does not rely on the President's authority as Commander-in-Chief independent of Congress's specific authorization. . . . And it does not employ the phrase "enemy combatant."

* * * *

. . . [T]he government bases its authority to hold detainees at Guantanamo on the Authorization for the Use of Military Force, which Congress passed in September 2001, and which authorized the use of force against nations, organizations, or persons the president determines planned, authorized, committed, or aided the September 11 attacks, or harbored such organizations or persons. The government's new standard relies on the international laws of war to inform the scope of the president's authority under this statute, and makes clear that the government does not claim authority to hold persons based on insignificant or insubstantial support of al Qaeda or the Taliban.

The full text of the press release is available at www.justice.gov/opa/pr/2009/March/09-ag-232.html. Excerpts follow from the U.S. memorandum (footnotes omitted), which is available in full at

www.justice.gov/opa/documents/memo-re-det-auth.pdf. Attorney General Holder's accompanying declaration is available at www.justice.gov/opa/documents/ag-declaration.pdf.

Through this submission, the Government is refining its position with respect to its authority to detain those persons who are now being held at Guantanamo Bay. The United States bases its detention authority as to such persons on the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001). The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality). The laws of war include a series of prohibitions and obligations, which have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 603–04 (2006).

The laws of war have evolved primarily in the context of international armed conflicts between the armed forces of nation states. This body of law, however, is less well-codified with respect to our current, novel type of armed conflict against armed groups such as al-Qaida and the Taliban. Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict. Accordingly, under the AUMF, the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks. The President also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.

Thus, these habeas petitions should be adjudicated under the following definitional framework:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

There are cases where application of the terms of the AUMF and analogous principles from the law of war will be straightforward. It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of "substantial support," or the precise characteristics of "associated forces," that are or would be sufficient to bring persons and organizations within the foregoing framework. Although the concept of "substantial support," for example, does not justify the detention at Guantanamo Bay of those who provide unwitting or insignificant support to the organizations identified in the AUMF, and the Government is not asserting that it can detain anyone at Guantanamo on such grounds, the particular facts and circumstances justifying detention will vary from case to case, and may require the identification

and analysis of various analogues from traditional international armed conflicts. Accordingly, the contours of the “substantial support” and “associated forces” bases of detention will need to be further developed in their application to concrete facts in individual cases.

This position is limited to the authority upon which the Government is relying to detain the persons now being held at Guantanamo Bay. It is not, at this point, meant to define the contours of authority for military operations generally, or detention in other contexts. . . .

* * * *

I. THE AUMF GIVES THE EXECUTIVE POWER TO DETAIN CONSISTENT WITH THE LAW OF ARMED CONFLICT.

The United States can lawfully detain persons currently being held at Guantanamo Bay who were “part of,” or who provided “substantial support” to, al-Qaida or Taliban forces and “associated forces.” This authority is derived from the AUMF, which empowers the President to use all necessary and appropriate force to prosecute the war, in light of law-of-war principles that inform the understanding of what is “necessary and appropriate.” Longstanding law-of-war principles recognize that the capture and detention of enemy forces “are ‘important incident[s] of war.’” *Hamdi*, 542 U.S. at 518 (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)).

The AUMF authorizes use of military force against those “nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” AUMF, § 2(a). By explicitly authorizing the use of military force against “*nations, organizations, or persons*” that were involved in any way in the September 11 attacks (or that harbored those who were), the statute indisputably reaches al-Qaida and the Taliban. Indeed, the statute’s principal purpose is to eliminate the threat posed by these entities.

Under international law, nations lawfully can use military force in an armed conflict against irregular terrorist groups such as al-Qaida. The United Nations Charter, for example, recognizes the inherent right of states to use force in self defense in response to any “armed attack,” not just attacks that originate with states. United Nations Charter, art. 51. The day after the attacks, the United Nations Security Council adopted Resolution 1368, which affirmed the “inherent right of individual or collective self-defence in accordance with the Charter” and determined “to combat by all means threats to international peace and security caused by terrorist acts.” U.N. General Assembly Security Council Resolution of Sept. 12, 2001 (S/RES/1368). . . . The North Atlantic Treaty Organization and the Organization of American States treated the attacks as “armed attacks” for purposes of their collective self-defense provisions. The AUMF invokes the internationally recognized right to self-defense. *See* AUMF, Preamble (it is “both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad”). Other nations joined or cooperated closely with the United States’ military campaign against al-Qaida and the Taliban. *See* [Michael N.] Schmitt, 27 Harv. J.L. & Pub. Pol’y [737,] 748–49 [(2004)].

The United States has not historically limited the use of military force to conflicts with nation-states:

[A] number of prior authorizations of force have been directed at non-state actors, such as slave traders, pirates, and Indian tribes. In addition, during the Mexican-American War, the Civil War, and the Spanish-American War, U.S. military forces

engaged military opponents who had no formal connection to the state enemy. Presidents also have used force against non-state actors outside of authorized conflicts.

Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2066–67 (2005) (citing U.S. use of military force in the Chinese Boxer Rebellion, against the Mexican rebel leader Pancho Villa, and in the 1998 cruise missile attacks against al-Qaida targets in Sudan and Afghanistan).

Thus, consistent with U.S. historical practice, and international law, the AUMF authorizes the use of necessary and appropriate military force against members of an opposing armed force, whether that armed force is the force of a state or the irregular forces of an armed group like al-Qaida. Because the use of force includes the power of detention, *Hamdi*, 542 U.S. at 518, the United States has the authority to detain those who were part of al-Qaida and Taliban forces. Indeed, long-standing U.S. jurisprudence, as well as law-of-war principles, recognize that members of enemy forces can be detained even if “they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.” *Ex parte Quirin*, 317 U.S. at 38; *Khalid v. Bush*, 355 F. Supp. 2d 311, 320 (D.D.C. 2005), *rev’d on other grounds sub nom.*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *see also* Geneva Convention (III) Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 4, 6 U.S.T.S. 3316 (contemplating detention of members of state armed forces and militias without making a distinction as to whether they have engaged in combat). Accordingly, under the AUMF as informed by law-of-war principles, it is enough that an individual was part of al-Qaida or Taliban forces, the principal organizations that fall within the AUMF’s authorization of force.

Moreover, because the armed groups that the President is authorized to detain under the AUMF neither abide by the laws of war nor issue membership cards or uniforms, any determination of whether an individual is part of these forces may depend on a formal or functional analysis of the individual’s role. Evidence relevant to a determination that an individual joined with or became part of al-Qaida or Taliban forces might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaida (as reflected in some cases by staying at al-Qaida or Taliban safehouses that are regularly used to house militant recruits) or taking positions with enemy forces. In each case, given the nature of the irregular forces, and the practice of their participants or members to try to conceal their affiliations, judgments about the detainability of a particular individual will necessarily turn on the totality of the circumstances.

Nor does the AUMF limit the “organizations” it covers to just al-Qaida or the Taliban. In Afghanistan, many different private armed groups trained and fought alongside al-Qaida and the Taliban. In order “to prevent any future acts of international terrorism against the United States,” AUMF, § 2(a), the United States has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.

Finally, the AUMF is not limited to persons captured on the battlefields of Afghanistan. Such a limitation “would contradict Congress’s clear intention, and unduly hinder both the President’s ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary.” *Khalid*, 355 F. Supp. 2d at 320; *see also Ex parte Quirin*, 317 U.S. at 37–38. Under a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of

the world may properly be deemed part of al-Qaida itself. Such activities may also constitute the type of substantial support that, in analogous circumstances in a traditional international armed conflict, is sufficient to justify detention. *Cf. Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008) (upholding lawfulness of detaining a facilitator who planned to send recruits to fight in Afghanistan, based on “credible and reliable evidence linking Mr. Bensayah to al-Qaida and, more specifically, to a senior al-Qaida facilitator” and “credible and reliable evidence demonstrating Mr. Bensayah’s skills and abilities to travel between and among countries using false passports in multiple names”).

* * * *

II. READ IN LIGHT OF THE LAWS OF WAR, THE AUMF AUTHORIZES THE NATION TO USE ALL NECESSARY AND APPROPRIATE MILITARY FORCE TO DEFEND ITSELF AGAINST THE IRREGULAR FORCES OF AL-QAIDA AND THE TALIBAN.

Petitioners have sought to restrict the United States’ authority to detain armed groups by urging that all such forces must be treated as civilians, and that, as a consequence, the United States can detain only those “directly participating in hostilities.” The argument should be rejected. Law-of-war principles do not limit the United States’ detention authority to this limited category of individuals. A contrary conclusion would improperly reward an enemy that violates the laws of war by operating as a loose network and camouflaging its forces as civilians.

It is well settled that individuals who are part of private armed groups are not immune from military detention simply because they fall outside the scope of Article 4 of the Third Geneva Convention, which defines categories of persons entitled to prisoner-of-war status and treatment in an international armed conflict. *See* Third Geneva Convention, art. 2, 4. Article 4 does not purport to define all detainable persons in armed conflict. Rather, it defines certain categories of persons entitled to prisoner-of-war treatment. *Id.*, art. 4. As explained below, other principles of the law of war make clear that individuals falling outside Article 4 may be detainable in armed conflict. Otherwise, the United States could not militarily detain enemy forces except in limited circumstances, contrary to the plain language of the AUMF and the law-of-war principle of military necessity.

For example, Common Article 3 of the Geneva Conventions provides standards for the treatment of, among others, those persons who are part of armed forces in non-international armed conflict and have been rendered *hors de combat* by detention. Third Geneva Convention, art. 3. Those provisions pre-suppose that states engaged in such conflicts can detain those who are part of armed groups. Likewise, Additional Protocol II to the Geneva Conventions expressly applies to “dissident armed forces” and “other organized armed groups” participating in certain non-international armed conflicts, distinguishing those forces from the civilian population. Additional Protocol II, art. 1(1), 13.

Moreover, the Commentary to Additional Protocol II draws a clear distinction between individuals who belong to armed forces or armed groups (who may be attacked and, *a fortiori*, captured at any time) and civilians (who are immune from direct attack except when directly participating in hostilities). That Commentary provides that “[t]hose who belong to armed forces or *armed groups* may be attacked at any time.” *See* ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), ¶ 4789, <http://www.icrc.org/ihl.nsf/COM/475-760019?OpenDocument> (emphasis added). Accordingly, neither the Geneva Conventions nor the Additional Protocols suggest that the “necessary and

appropriate” force authorized under the AUMF is limited to al-Qaida leadership or individuals captured directly participating in hostilities, as some petitioners have suggested.

Finally, for these reasons, it is of no moment that someone who was part of an enemy armed group when war commenced may have tried to flee the battle or conceal himself as a civilian in places like Pakistan. Attempting to hide amongst civilians endangers the civilians and violates the law of war. Cf. ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), ¶ 1944, <http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument> (“Further it may be noted that members of armed forces feigning civilian non-combatant status are guilty of perfidy.”). Such conduct cannot be used as a weapon to avoid detention. A different rule would ignore the United States’ experience in this conflict, in which Taliban and al-Qaida forces have melted into the civilian population and then regrouped to relaunch vicious attacks against U.S. forces, the Afghan government, and the civilian population.

* * * *

On April 22 and May 19, 2009, in memorandum opinions concerning different habeas petitions, two judges on the D.C. District Court reached slightly different conclusions concerning the new standard the government proposed on March 13. On April 22, Judge Reggie B. Walton agreed with the government that the Authorization for Use of Military Force (“AUMF”), Pub. L. No. 107–40, § 2(a), 115 Stat. 224 (2001), “functions as an independent basis in domestic law for the President’s asserted detention authority,” and adopted “the basic framework advanced by the government for determining whether an individual is subject to that authority,” subject to certain “non-exclusive” limiting principles he articulated in the memorandum opinion. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69–70 (D.D.C. 2009). The court held that “the President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners, provided that the terms ‘substantially supported’ and ‘part of’ are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.” *Id.* at 71. Excerpts below from the April 22 memorandum opinion provide the court’s analysis in interpreting the government’s detention standard (most footnotes, citations to other submissions and the hearing transcript in the case, and internal cross references omitted).*

* Editor’s note: On January 10, 2010, the U.S. Court of Appeals for the District of Columbia Circuit adopted a broader standard for the government’s authority to detain individuals at Guantanamo. *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010). The D.C. Circuit reasoned that the scope of the President’s detention authority is not limited by the international laws of war and held that, under the AUMF and other statutes, the category of persons the President is authorized to detain “includes those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.” *Id.* at

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. . . In [the AUMF], Congress conferred upon the President all “necessary and proper” authority to execute military combat against both “nations” *and* “organizations” that carried out the 9/11 attacks. And in *Hamdi*, the Supreme Court found that the “detention of individuals falling into the limited category” before it was “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress ha[d] authorized the President to use.” *Hamdi*, 542 U.S. at 518 (plurality opinion). Given that the “detention of individuals” is an “exercise” of military force authorized by Congress in the AUMF with respect to the enemy nations named therein, and given that Congress authorized the same amount of force with respect to enemy “organizations” as it did with respect to enemy nations, it stands to reason that Congress intended to confer upon the President the same authority to detain individuals fighting on behalf of enemy organizations that it conferred upon him with respect to enemy nations. See *al-Marri [v. Pucciarelli]*, 534 F.3d [213,] 260 [(4th Cir. 2008)] (Traxler, J., concurring) (“[I]t strains reason to believe that Congress, in enacting the AUMF in the wake of [the 9/11] attacks, did *not* intend for it to encompass al[-]Qaeda operatives standing in the exact position as the attackers who brought about its enactment.” (emphasis in original)).

* * * *

. . . Khan has no adequate explanation for why the Court *should* not apply the plurality’s reasoning [in *Hamdi*] to the conflict between the United States and enemy organizations named in the AUMF. The only reason provided by Khan is that the war against the Taliban is an “international” conflict, whereas the war against al-Qaeda and its ilk are not. . . . [T]hat is no reason to refuse to apply the plurality’s logic in *Hamdi* to the situation at hand.

The distinction drawn between “international” and “non-international” conflicts has its roots in the Geneva Conventions, four treaties that comprise a part of “the rules and precepts of the law of nations.” *Hamdan*, 548 U.S. at 613. Two articles are identical in the Third and Fourth Conventions, and thus are known as “common articles”: Common Article 2, which specifies that the Conventions apply to “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties,” Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (the “Third Geneva Convention”), and Common Article 3, which governs “armed conflict[s] not of an international character,” *id.*, art. 3. Participants in a conflict falling under Common Article 2 are subject to the requirements and protections of the Conventions, whereas participants in a conflict falling under Common Article 3 are subject only to the strictures of that article International armed conflicts are also governed by a subsequently enacted treaty known as the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, or “Additional Protocol I,” whereas yet another treaty, the Protocol Additional to the Geneva

871, 872. On August 31, 2010, the D.C. Circuit denied rehearing en banc “to determine the role of international law-of-war principles in interpreting the AUMF, because . . . the panel’s discussion of that question is not necessary to the disposition of the merits.” *Al-Bihani v. Obama*, 2010 U.S. App. LEXIS 18169, at *2 (D.C. Cir. 2010).

Conditions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, or “Additional Protocol II,” applies to non-international armed conflicts.¹⁰

Among the protections afforded in international armed conflicts are the prisoner-of-war provisions set forth in the Third Geneva Convention. . . . In contrast, Common Article 3 is silent with respect to prisoners of war. Thus, in non-international armed conflicts, the Geneva Conventions are “silent, in deference to national law, on questions of detention.” Gabor Rona, *An Appraisal of U.S. Practice Relating to “Enemy Combatants”*, 10 Y.B. Int’l Humanitarian L. 232, 241 (2007).

Khan argues that this silence forecloses military detention in non-international armed conflicts under the AUMF. . . .

* * * *

. . . [R]egarding the “authority” to detain individuals in an armed conflict, the laws of war are silent with respect to both international and non-international armed conflicts. Yet, these same laws require the state to detain rather than summarily execute fighters in such conflicts. The obvious implication, consistent with historical practice, is that these provisions, far from “authorizing” detention in one context but not another, act as restraints on the inherent authority of the state to exercise military force in whatever manner it deems appropriate.

The Court is therefore baffled by the assertion, repeated throughout Khan’s memorandum of law and at oral argument, that the President could take military action against an organization like al-Qaeda under the AUMF but could not detain anyone fighting on behalf of that organization as part of that military action. . . .

¹⁰ The United States has signed but not ratified Additional Protocol I. It has neither signed nor ratified Additional Protocol II. [Editor’s note: The United States signed Additional Protocol II on December 12, 1977, and President Ronald Reagan transmitted it to the Senate for its advice and consent to ratification on January 29, 1987, but the United States has not ratified the treaty.] However, the Department of State has explicitly recognized that “certain provisions” of Additional Protocol I reflect customary international law, see Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. Univ. J. Int’l L. & Pol’y 419, 421 (1987), including “the principle that no order be given that there shall be no survivors . . . contained in [A]rticle 40” of the protocol, “the principle that persons entitled to combatant status be treated as prisoners of war in accordance with the 1949 Geneva Conventions,” *id.* at 425, the principle that “immunity not be extended to civilians who are taking part in hostilities,” *id.* at 426, and, “in particular[,] the fundamental guarantees contained in [A]rticle 75” of the protocol, “such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the [Geneva] Conventions be treated humanely in all circumstances,” *id.* at 427. Similarly, the Department of State has opined that “[t]he basic core of [Additional] Protocol II,” as “reflected in [C]ommon [A]rticle 3 of the 1949 [Geneva] Conventions[,] . . . is[] and should be[] a part of generally accepted customary law.” *Id.* at 430–31. “This specifically includes its prohibitions on violence toward persons taking no active part in hostilities, hostage-taking, degrading treatment, and punishment without due process.” *Id.* at 431. The Court therefore construes Additional Protocol I and Additional Protocol II to constitute customary international law at least with respect to the principles listed above, and also as elucidations of the customary humanitarian protections enshrined in the Geneva Conventions where appropriate.

* * * *

... The reality is that Congress authorized the same use of military force, and thus conferred upon the President the same degree of detention authority, with respect to “organizations” responsible for the 9/11 attacks as it did with respect to the “nations” responsible for those attacks. Only the extent to which that authority is restricted by the laws of war varies based on whether the armed conflict falls under the rubric of Common Article 2 or Common Article 3. Khan’s arguments to the contrary are without merit and are therefore rejected in their entirety.

* * * *

... [W]hereas the Geneva Conventions rigorously protect individuals who participate in hostilities in the international context, they are silent with respect to individuals who engage in intranational (or, in this case, transnational) combat.

The petitioners evidently interpret this lack of protection for “combatants” in non-international armed conflicts to mean that every individual associated with the enemy to any degree in such a conflict must be treated as a civilian. . . . [T]his assumption rests on the notion that the Geneva Conventions must specifically enable its signatories to act in a specific manner for a signatory to have the authority necessary to take such action. . . . [T]his notion gets things exactly backwards. The Geneva Conventions restrict the conduct of the President in armed conflicts; they do not enable it. And the absence of any language in Common Article 3 and Additional Protocol II regarding prisoners of war or combatants means only that no one fighting on behalf of an enemy force in a non-international armed conflict can lay claim to the protections of such status, not that every signatory to the Geneva Conventions must treat the members of an enemy force in a civil war or transnational conflict as civilians regardless of how important the members in question might be to the command and control of the enemy force or how well organized and coordinated that force might be.

* * * *

... Common Article 3, Additional Protocol II, and the commentaries of the International Committee of the Red Cross all contemplate a division in the treatment of the members of an enemy’s “armed forces” and civilians. Unless they surrender or are incapacitated, members of the enemy’s armed forces are always “taking [an] active part in hostilities,” Third Geneva Convention, art. 3(1), and therefore “may be attacked” and, incident to that attack, detained “at any time,” [Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 522 (Sandoz et al. eds. 1987) (the “ICRC Additional Protocols Commentary”)], at 1453. “[C]ivilians who do not participate in hostilities,” on the other hand, “should be spared” those consequences. *Id.* at 1443.

* * * *

This result is also consonant with the intended purpose of Common Article 3. While its scope may encompass the transnational conflict at issue here, the article was drafted “to aid the victims of civil wars and internal conflicts.” [International Committee of the Red Cross, 29 Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War, at 178 (Pictet et al. eds. 1960)], at 28. As counsel for the government pointed out at oral argument on this issue, permitting a State to detain members of the armed forces of a non-state entity in a non-international armed conflict only when those members directly participated in hostilities, at least as

that term is defined by the petitioners, “would encourage . . . armed groups to try to blend into the civilian population, which then necessarily subjects the civilian population to increased danger.” . . .

The Court therefore rejects the petitioners’ argument that the laws of war permit a state to detain only individuals who “directly participate” in hostilities in non-international armed conflicts. Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy’s armed forces to go to and fro as they please so long as, for example, shots are not fired, bombs are not exploded, and planes are not hijacked. Consistent with Common Article 3 and Additional Protocol II, the President may detain anyone who is a member of the “armed forces” of an organization that “he determines planned, authorized, committed, or aided” the 9/11 attacks, as well as any member of the “armed forces” of an organization harboring the members of such an organization. Pub. L. No. 107-40 § 2(a), 115 Stat. at 224.

As for the criteria used to determine membership in the “armed forces” of the enemy, the Court agrees with the government that the criteria set forth in Article 4 of the Third Geneva Convention and Article 43 of Additional Protocol I should inform the Court’s assessment as to whether an individual qualifies as a member of the “armed forces” of an enemy organization like al-Qaeda. Although these provisions obviously cannot be applied literally to the enemy organizations contemplated in the AUMF—if that were the case, the conflict at hand would not be governed by Common Article 3 in the first place—they may nevertheless serve as templates from which the Court can glean certain characteristics necessary to identify those individuals who comprise an “armed force” for purposes of Common Article 3. This approach is also consistent with Common Article 3’s command that the “[p]arties to the conflict . . . endeavor[r] to bring into force . . . all or part of the other provisions of the [Third Geneva Convention].”

Foremost among these basic distinguishing characteristics of an “armed force” is the notion that the group in question be “organized . . . under a command responsible . . . for the conduct of its subordinates,” Additional Protocol I, art. 43.1. Although “[t]he term ‘organized’ is obviously rather flexible, . . . [a]ll armed forces, groups[,] and units are necessarily structured and have a hierarchy.” ICRC Additional Protocols Commentary, *supra*, at 512 . . . Thus, mere sympathy for or association with an enemy organization does not render an individual a member of that enemy organization’s armed forces. Instead, the individual must have some sort of “structured” role in the “hierarchy” of the enemy force.

Obviously, “the ‘organizations’ that the President is authorized to target under the AUMF do not . . . issue membership cards or uniforms.” Nevertheless, there is a distinction to be made between members of a terrorist organization involved in combat operations and civilians who may have some tangential connections to such organizations. As Curtis Bradley and Jack Goldsmith note in their lengthy article on the validity of the AUMF and its implications, “terrorist organizations do have leadership and command structures, however diffuse, and persons who receive and execute orders within this command structure are analogous to combatants” in international armed conflicts. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2114–15 (May 2005). Thus, under Additional Protocol I, only “persons who receive and execute orders” from the enemy’s “command structure” can be considered members of the enemy’s armed forces. Sympathizers, propagandists, and financiers who have no involvement with this “command structure,” while perhaps members of the enemy organization in an abstract sense, cannot be considered part of the enemy’s “armed forces” and therefore cannot be detained militarily unless they take a direct part in the hostilities.

At the same time, the armed forces of the enemy consist of more than those individuals who would qualify as “combatants” in an international armed conflict. . . . The key question is whether

an individual “receive[s] and execute[s] orders” from the enemy force’s combat apparatus, not whether he is an al-Qaeda fighter. Thus, an al-Qaeda member tasked with housing, feeding, or transporting al-Qaeda fighters could be detained as part of the enemy armed forces notwithstanding his lack of involvement in the actual fighting itself, but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, could not be detained assuming such individuals had no independent role in al-Qaeda’s chain of command. . . .

With these non-exclusive limiting principles in mind, the Court agrees with the government that “[i]t is neither possible nor advisable” to define “the precise nature and degree of ‘substantial support,’ or the precise characteristics of ‘associated forces,’ that are or would be sufficient to bring persons and organizations” within the government’s proposed standard for detention. As the government aptly suggests, the exact contours of the standard must and will be fleshed out on a case-by-case basis. . . .

But while the precise meaning of the definition for detention now invoked by the government cannot be definitively settled in the abstract, it is not the case that the standard is, as the petitioners’ designated lead counsel suggests, “entirely nebulous.” For, as counsel for the government conceded at oral argument on this issue, the “substantial support” model advanced by the government is restricted to those individuals that are “effectively part of the [armed] force[s]” of the enemy. And that inquiry must, at a minimum, be made consistent with the limiting principles articulated above. Any attempt by the government to apply its “substantial support” standard in a manner contradictory to these principles would give rise to the constitutional concerns raised by the petitioners regarding the clarity of the scope of Congress’s delegation of authority to the President and, as such, would have to be rejected by the Court.

In other words, the Court interprets the government’s “substantial support” standard to mean individuals who were members of the “armed forces” of an enemy organization at the time of their initial detention. It is not meant to encompass individuals outside the military command structure of an enemy organization, as that term is understood in view of the limiting principles set forth above. With these caveats in play, the Court adopts the government’s “substantial support” standard for detention in favor of the “direct participation” model advanced by the petitioners.

* * * *

On May 19, 2009, Judge John D. Bates concurred with most of the court’s analysis and conclusions in *Gherebi*, concluding that the government has the authority to detain individuals who are “‘part of’ the ‘Taliban or al Qaida forces,’” or “members of ‘associated forces,’” but did not adopt all aspects of the government’s proposed standard. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009). Because he found no basis in U.S. law or the laws of the war “to justify the concept of ‘support’ as a valid ground for detention,” Judge Bates “reject[ed] the concept of ‘substantial support’ as an independent basis for detention” and held that “‘directly support[ing] hostilities’ is not a proper basis for detention.” *Id.* at 69. In reaching that conclusion, however, Judge Bates noted that “evidence tending to demonstrate that a petitioner provided significant ‘support’ is relevant in assessing whether he was ‘part of’ a covered organization

(through membership or otherwise) or ‘committed a belligerent act’ (through direct participation in hostilities).” *Id.* at 70.

(ii) Habeas petitions: Uighurs

On February 18, 2009, the U.S. Court of Appeals for the District of Columbia Circuit reversed a lower court decision granting the writ of habeas corpus to 17 Uighurs held at Guantanamo Bay and ordering their immediate release into the United States. The D.C. Circuit held that the district court had no legal authority to order the executive branch to bring the petitioners to the United States and release them. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

On April 3, 2009, the plaintiffs petitioned the U.S. Supreme Court for a writ of certiorari, and on May 29, 2009, the United States filed a brief opposing the petitioners’ request (available at www.justice.gov/osg/briefs/2008/0responses/2008-1234.resp.html). On October 20, 2009, the Supreme Court granted certiorari on the question “whether a federal court exercising its habeas corpus jurisdiction may order the United States government to bring petitioners into the United States for release, outside of the framework of the federal immigration laws.” *Kiyemba v. Obama*, 130 S. Ct. 458 (2009). The case was pending at the end of 2009.**

Before the Supreme Court granted certiorari, four of the petitioners were released and resettled in Bermuda, pursuant to an arrangement between the United States and the Government of Bermuda. On October 31, 2009, six of the petitioners were released and resettled in Palau, pursuant to an arrangement between the United States and the Government of Palau.

(2) Thirty-day notice orders

On April 7, 2009, the U.S. Court of Appeals for the District of Columbia Circuit reversed a lower court’s decision granting the writ of habeas corpus to nine Uighurs held at Guantanamo Bay and requiring the United States to

** Editor’s note: On March 1, 2010, the Supreme Court vacated the D.C. Circuit’s judgment and remanded the case. The Court noted that since it had granted certiorari, each of the petitioners had received an offer of resettlement in a country other than the United States. The Court remanded the case to the court of appeals to “determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments.” *Kiyemba v. Obama*, 130 S. Ct. 124 (2010). On May 28, 2010, after holding further proceedings, considering the parties’ motions, and hearing oral arguments, the D.C. Circuit issued a Per Curiam opinion granting the government’s motion to reinstate the court’s original judgment and reinstating its original opinion, as modified to take into account recent developments. *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010).

provide 30 days' notice to the district court and to the petitioners' counsel before transferring them from Guantanamo. *Kiyemba v. Obama* ("Kiyemba II"), 561 F.3d 509 (D.C. Cir. 2009). The petitioners in the case, who were also among those who brought the litigation described in A.5.e.(1)(ii) *supra*, sought to prevent the United States from transferring them to any country where they would be likely to be tortured or further detained. For additional background, see *Digest 2008* at 915-16. The D.C. Circuit determined that it had jurisdiction and reversed the lower court's decision on the merits. The court concluded that

[t]he Supreme Court's ruling in *Munaf* [*v. Geren*, 553 U.S. 674 (2008)] precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country. The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood. Nor may the district court bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws. In sum, the detainees' claims do not state grounds for which habeas relief is available. . . .

Kiyemba II, 561 F.3d at 516. For discussion of the Supreme Court's decision in *Munaf v. Geren*, see *Digest 2008* at 73-78 and 918-20. The petitioners sought certiorari in the Supreme Court on November 10, 2009, and the Court's decision was pending at the end of 2009.***

(3) Former detainees at Guantanamo: Civil suit against U.S. officials

On April 24, 2009, on remand from the U.S. Supreme Court for consideration in view of *Boumediene v. Bush*, 553 U.S. 723 (2008), the U.S. Court of Appeals for the District of Columbia Circuit reinstated its judgment, "on a more limited basis," in *Rasul v. Myers* ("*Rasul I*"), 512 F.3d 644 (D.C. Cir. 2008). *Rasul v. Myers* ("*Rasul II*"), 563 F.3d 527 (D.C. Cir. 2009). For discussion of *Rasul I*, see *Digest 2008* at 914-15.

In its Per Curiam opinion, the D.C. Circuit concluded that *Boumediene* did not change the outcome in *Rasul I*, in which the D.C. Circuit upheld a lower court's dismissal of claims that four former Guantanamo detainees brought against the U.S. Secretary of Defense and certain military officers

*** Editor's note: The Supreme Court denied certiorari on March 22, 2010. *Kiyemba v. Obama*, 130 S. Ct. 1880 (2010).

based on the Alien Tort Claims Act, the Geneva Conventions, and the Fifth and Eighth Amendments to the Constitution. In analyzing the plaintiffs' constitutional claims, the court relied on the Supreme Court's decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), to conduct a narrower review than it had in *Rasul I*. The court assessed whether the rights the plaintiffs asserted were "'clearly established' . . . in light of the circumstances in the particular case at hand," *Rasul II*, 563 F.3d at 530 (quoting *Pearson*, 129 S. Ct. at 818), and concluded that "there was no authority for—and ample authority against—plaintiffs' asserted rights at the time of the alleged misconduct. The defendants are therefore entitled to qualified immunity against plaintiffs' *Bivens* claims [for damages based on a constitutional violation]." *Rasul II*, 563 F.3d at 532. The court also reinstated its dismissal of the plaintiffs' claims under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb–4. *Id.* at 533.

The Supreme Court denied certiorari on December 14, 2009. *Rasul v. Myers*, 130 S. Ct. 1013 (2009).

(4) *Detainees held at Bagram Air Force Base in Afghanistan: Habeas litigation*

On April 2, 2009, a judge on the U.S. District Court for the District of Columbia held, based on an application of the factors set out in *Boumediene v. Bush*, that three alien detainees held at the U.S. detention facility at Bagram Air Force Base in Afghanistan had a right under the U.S. Constitution to seek a writ of habeas corpus. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009). The court denied the fourth petition, filed by an Afghan national, because it concluded that "the possibility of friction with Afghanistan . . . precludes his invocation of the Suspension Clause under the *Boumediene* balance of factors." *Id.* at 235.

On July 30, 2009, the U.S. Court of Appeals for the District of Columbia Circuit granted the government's petition for interlocutory appeal, *In re Gates*, 2009 U.S. App. LEXIS 17032 (D.C. Cir. 2009), and the United States filed its Brief for Respondents–Appellants on September 14, 2009. Excerpts below from the U.S. brief summarize the government's argument. The full text of the U.S. brief is available at www.state.gov/s/l/c8183.htm.
The case remained pending at the end of 2009.****

* * * *

Habeas rights under the United States Constitution do not extend to enemy aliens detained in the

**** Editor's note: On May 21, 2010, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's order and ordered that the petitions be dismissed, holding that the court does not have jurisdiction under the U.S. Constitution to hear habeas claims of aliens detained by the executive branch at the Bagram facility in the Afghan theater of war. *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

active war zone at Bagram Airfield in Afghanistan. No court has ever extended the Great Writ so far; the district court's reading of *Boumediene* is wrong. The court therefore erred in declaring Section 7(a) of the Military Commissions Act unconstitutional as applied to these enemy detainees. The court's reading reverses longstanding law, imposes great practical problems, conflicts with the considered judgment of both political branches, and risks opening the federal courts to habeas claims brought by detainees held in other theaters of war during future military actions.

I. The Supreme Court's decisions in [*Johnson v. Eisentrager*], 339 U.S. 763 (1950)] and *Boumediene* establish three controlling principles. First, the extraterritorial reach of the constitutional right to habeas does not depend solely on formal designations of territorial sovereignty, but rather incorporates a functional analysis of "objective factors and practical concerns" concerning the circumstances of the detention being challenged. Second, in that functional analysis, two considerations are paramount: the nature and duration of the United States presence at the site of detention, and the practical obstacles to permitting the detainee to pursue habeas relief in United States court. Third, the extension of habeas rights to Guantanamo in *Boumediene* rested heavily on the "unique status of Guantanamo" in both of these critical respects. The Supreme Court recognized that it had never before extended constitutional rights to non-citizens captured and held abroad, but it concluded that a different result was warranted because of the unique confluence of circumstances that renders Guantanamo effectively part of the United States for habeas purposes. In different circumstances, however, where a site of detention does not share the defining attributes of Guantanamo, an enemy alien apprehended and detained by the military overseas in an active war zone at the very least bears an extremely heavy burden before he may sue his captors civilly and require the federal courts to second guess the judgment of both political branches with respect to the reach of habeas jurisdiction.

II. Application of *Boumediene* and *Eisentrager* to this case makes clear that constitutional habeas rights do not extend to enemy aliens held at Bagram Airfield.

A. First, the nature of the United States presence at Bagram is fundamentally different from that at Guantanamo. Guantanamo has been under the "complete jurisdiction and control" of the United States for more than 100 years, and United States activities there are not constrained by any other nation or by the host government.

The United States presence at Bagram Airfield, in contrast, is less than a decade old, it exists to serve a highly specific set of purposes—to win the active military conflict against the enemies of the United States and Afghanistan, to support Afghan sovereignty, and to protect Afghan territorial integrity—and the United States is obligated under the terms of its lease to leave when it concludes that the Airfield is no longer necessary for "military uses." At Bagram, moreover, the United States must be mindful of the sovereignty of Afghanistan, as the host nation, and respectful of the numerous other countries that operate their own military forces out of that facility. United States activity at Bagram Airfield, specifically including detainee affairs, is conducted with a keen eye toward its implications for the sensitive and active diplomatic dialogue between the United States and Afghanistan. Nothing remotely similar could be said about Guantanamo and United States relations with Cuba.

In light of these essential distinctions, the district court erred in holding that detention at Bagram Airfield is not "appreciably different" from Guantanamo with respect to *Boumediene*'s "site of detention" factor. The court gave short shrift to the disparate histories, foundations, and purposes of the two sites. Moreover, the district court's expansion of habeas jurisdiction on the basis of United States military control over the detention facility could potentially extend United States constitutional habeas rights to other locations in the world where the United States might

hold detainees in future wars, including locations like Bagram in the midst of the theater of active combat. That highly anomalous result cannot be squared with the great pains taken by the Supreme Court to announce a limited and narrow ruling in *Boumediene*.

B. Second, because Bagram, unlike Guantanamo, is in an active theater of war, and because the United States maintains close cooperation with the Afghan government on whose sovereign territory the United States military actions and related detentions occur, permitting Bagram detainees to seek release through United States courts would encounter grave practical obstacles. The logistical complications created by civil litigation would divert military officials from their proper focus on the mission of winning the ongoing war. And the intrusion of a United States court adjudicating a habeas petition could cause friction with the host government by interfering with the sensitive diplomatic dialogue that is important to the success of that military mission. Those consequences directly implicate the Supreme Court’s warning in *Eisentrager* about the dangerous effect of granting wartime detainees the right to subject the United States military to habeas suits.

III. The district court also erred because it relied on factors peripheral to the *Boumediene* and *Eisentrager* analyses. By distinguishing these detainees from other Bagram detainees based on whether they were Afghan nationals or captured in Afghanistan, the district court essentially deemed dispositive the “citizenship” and “site of apprehension” factors in *Boumediene*. That reasoning finds no support in *Boumediene* or *Eisentrager*, neither of which even focused upon—much less treated as conclusive—the fact that the petitioners in both cases were moved from the site of their capture and, in the circumstances at Guantanamo, detained in a country where they were not citizens. Moreover, this artificial limitation on habeas jurisdiction is unlikely to hold in practice, because detainees may simply allege that they were captured outside of Afghanistan and use that allegation to surmount the district court’s manufactured jurisdictional barrier.

In addition, the court weighed heavily against the Government the perceived inadequacy of the procedures used for reviewing the status of detainees at Bagram Airfield. But those review procedures (which have recently been enhanced) are at most loosely related to the threshold question of whether the constitutional right to habeas corpus extends to aliens detained at Bagram Airfield; the procedures are critical to the legal analysis in this case only if it were determined that habeas does extend to the detainees and the question then arose whether, consistent with the Suspension Clause, the procedures are sufficiently robust. The Court in *Boumediene* did not hold that the exact quantum of procedures was a central factor to be weighed in determining whether the detainee possessed the right to invoke the constitutional habeas jurisdiction of the federal courts in the first place.

* * * *

(5) U.S. criminal proceedings

(i) Disposition of detainee held in the United States: Ali Saleh Kahlah al-Marri

On April 30, 2009, Ali Saleh Kahlah al-Marri, a national of Saudi Arabia and Qatar, pleaded guilty to one count of conspiracy to provide material support to al-Qaeda, in violation of 18 U.S.C. § 2339B. See www.justice.gov/opa/pr/2009/April/09-nsd-415.html. Al-Marri’s plea was the outcome of a process that began on January 22, 2009, when President

Obama directed an immediate review of the Department of Defense's detention of al-Marri as an enemy combatant within the United States for more than five years. Daily Comp. Pres. Docs., 2009 DCPD No. 00011, pp. 1-2.

On February 26, 2009, the Department of Justice filed an indictment against al-Marri in the U.S. District Court for the Central District of Illinois, Peoria Division, charging him with conspiracy to provide material support and resources to a foreign terrorist organization (al-Qaeda) and provision of material support and resources to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1). On February 27, 2009, President Obama determined that "it is in the interest of the United States that Ali Saleh Kahlah al-Marri be released from detention by the Secretary of Defense and transferred to the control of the Attorney General for the purpose of criminal proceedings against him." Daily Comp. Pres. Docs., 2009 DCPD No. 00110, p. 1. President Obama also specified that his decision "supersede[d] the Presidential directive of June 23, 2003, to the Secretary of Defense, which ordered the detention of Mr. al-Marri as an enemy combatant. Upon Mr. al-Marri's transfer to the control of the Attorney General, the authority to detain Mr. al-Marri provided to the Secretary of Defense in the June 23, 2003, order shall cease." *Id.*

On February 27, 2009, the Department of Justice's Office of the Solicitor General filed a motion in the U.S. Supreme Court, seeking dismissal of the writ of certiorari the Court granted on December 5, 2008, to resolve the question whether the President has authority to detain al-Marri as an enemy combatant. Alternatively, the motion requested the Supreme Court to vacate the July 15, 2008 judgment of the U.S. Court of Appeals for the Fourth Circuit and remand with directions to dismiss the case as moot. The U.S. motion is available at

www.justice.gov/osg/briefs/2008/3mer/2mer/2008-0368.mot.dismiss.mer.pdf, see also the U.S. reply, available at www.justice.gov/osg/briefs/2008/3mer/2mer/2008-0368.mer.rep.pdf.

The Acting Solicitor General filed a separate application with the Chief Justice of the Court on that same day, requesting that the Court acknowledge al-Marri's release from military custody and transfer to civilian custody. On March 6, 2009, the Court granted the Acting Solicitor General's application. The Court also vacated the Fourth Circuit's judgment and remanded the case to the Fourth Circuit "with instructions to dismiss the appeal as moot." *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009). Background on previous developments concerning al-Marri is available at *Digest 2003* at 1029-30, *Digest 2007* at 968-75, and *Digest 2008* at 917-18.

(ii) Prosecution of September 11 conspirators

On November 13, 2009, Attorney General Eric Holder announced that “the Department of Justice will pursue prosecution in federal court of the five individuals accused of conspiring to commit the 9/11 attacks.” The full text of Attorney General Holder’s statement is available at www.justice.gov/ag/speeches/2009/ag-speech-091113.html. The five individuals, Khalid Sheikh Mohammad, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi, had been charged in military commissions and were detained at Guantanamo Bay. The charges against the five detainees had been stayed since February 2009 while attorneys from the Departments of Justice and Defense reviewed their cases. Controversy broke out following the Attorney General’s announcement but no new decisions concerning the five detainees were made in 2009.

f. Military commissions

On October 28, 2009, President Obama signed into law the Military Commissions Act of 2009, Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2587. Section 1802 amended the provisions of 10 U.S.C. § 47A, “Military Commissions,” which were added by § 3 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. Among other things, the amendments eliminate the term “unlawful enemy combatant” and use the term “unprivileged enemy belligerent” instead to describe individuals subject to trial by military commissions (§ 948a(7)); exclude statements obtained by cruel, inhuman, or degrading treatment (§ 948r); limit the use of hearsay evidence (§ 949a(b)(3)); change the rules concerning defense counsel, including by allowing defendants greater opportunities to choose their counsel (§ 949c(b)(2)); make clear the requirement for the government to disclose exculpatory evidence to defendants (§ 949j(b)); modify the procedures for using classified information (§ 949p-1 through § 949p-7); and broaden the scope of appellate review (§ 950g(d)).

Enactment of the new law followed President Obama’s announcement on May 15 that the Department of Defense had made several changes to the rules governing military commissions and that the administration would work with Congress on additional reforms. President Obama explained:

Military commissions have a long tradition in the United States. They are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered. In the past, I have supported the use of military commissions as one avenue

to try detainees, in addition to prosecution in Article III courts. In 2006, I voted in favor of the use of military commissions. But I objected strongly to the Military Commissions Act that was drafted by the Bush Administration and passed by Congress because it failed to establish a legitimate legal framework and undermined our capability to ensure swift and certain justice against those detainees that we were holding at the time. Indeed, the system of Military Commissions at Guantanamo Bay had only succeeded in prosecuting three suspected terrorists in more than 7 years.

Today the Department of Defense will be seeking additional continuances in several pending military commission proceedings. We will seek more time to allow us time to reform the military commission process. The Secretary of Defense will notify the Congress of several changes to the rules governing the commissions. The rule changes will ensure that: First, statements that have been obtained from detainees using cruel, inhuman, and degrading interrogation methods will no longer be admitted as evidence at trial; second, the use of hearsay will be limited, so that the burden will no longer be on the party who objects to hearsay to disprove its reliability; third, the accused will have greater latitude in selecting their counsel; fourth, basic protections will be provided for those who refuse to testify; and fifth, military commission judges may establish the jurisdiction of their own courts.

These reforms will begin to restore the Commissions as a legitimate forum for prosecution, while bringing them in line with the rule of law. In addition, we will work with the Congress on additional reforms that will permit commissions to prosecute terrorists effectively and be an avenue, along with Federal prosecutions in Article III courts, for administering justice. This is the best way to protect our country, while upholding our deeply held values.

Daily Comp. Pres. Docs., 2009 DCPD No. 00364, p. 1. For additional background, see the testimony on the proposed legislation by Jeh C. Johnson, General Counsel, Department of Defense, available at <http://armed-services.senate.gov/statemnt/2009/July/Johnson%2007-07-09.pdf>, and David S. Kris, Assistant Attorney General for National Security,

available at <http://armed-services.senate.gov/statemnt/2009/July/Kris%2007-07-09.pdf>, before the U.S. Senate Armed Services Committee on July 8, 2009.

B. NONPROLIFERATION, ARMS CONTROL, AND DISARMAMENT

1. Nuclear Nonproliferation

a. Overview

In a speech in Prague on April 5, 2009, President Obama announced “clearly and with conviction America’s commitment to seek the peace and security of a world without nuclear weapons” and described steps the United States would take to help realize that goal. President Obama also outlined U.S. initiatives to strengthen the Nuclear Non-Proliferation Treaty and to prevent terrorists from gaining access to nuclear weapons and materials. President Obama’s speech, excerpted below, is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00228, pp. 1–6. See *also* President Obama’s speech to the General Assembly on September 23, 2009, available at Daily Comp. Pres. Docs., 2009 DCPD No. 00742, pp. 1–9.

* * * *

... The existence of thousands of nuclear weapons is the most dangerous legacy of the cold war. . .

Today, the cold war has disappeared but thousands of those weapons have not. In a strange turn of history, the threat of global nuclear war has gone down, but the risk of a nuclear attack has gone up. More nations have acquired these weapons. Testing has continued. Black market trade in nuclear secrets and nuclear materials abound. The technology to build a bomb has spread. Terrorists are determined to buy, build or steal one. Our efforts to contain these dangers are centered on a global non-proliferation regime, but as more people and nations break the rules, we could reach the point where the center cannot hold.

* * * *

Now, just as we stood for freedom in the 20th century, we must stand together for the right of people everywhere to live free from fear in the 21st century. And . . . as a nuclear power, as the only nuclear power to have used a nuclear weapon, the United States has a moral responsibility to act. We cannot succeed in this endeavor alone, but we can lead it; we can start it.

So today I state clearly and with conviction America’s commitment to seek the peace and security of a world without nuclear weapons. I’m not naive. This goal will not be reached quickly, perhaps not in my lifetime. It will take patience and persistence. But now we, too, must ignore the voices who tell us that the world cannot change. We have to insist, “Yes, we can.”

Now, let me describe to you the trajectory we need to be on. First, the United States will take concrete steps towards a world without nuclear weapons. To put an end to cold war thinking, we will reduce the role of nuclear weapons in our national security strategy and urge others to do

the same. Make no mistake, as long as these weapons exist, the United States will maintain a safe, secure, and effective arsenal to deter any adversary, and guarantee that defense to our allies, including the Czech Republic. But we will begin the work of reducing our arsenal.

To reduce our warheads and stockpiles, we will negotiate a new Strategic Arms Reduction Treaty with the Russians this year. President Medvedev and I began this process in London and will seek a new agreement by the end of this year that is legally binding and sufficiently bold. And this will set the stage for further cuts, and we will seek to include all nuclear weapons states in this endeavor.

To achieve a global ban on nuclear testing, my administration will immediately and aggressively pursue U.S. ratification of the Comprehensive Test Ban Treaty. After more than five decades of talks, it is time for the testing of nuclear weapons to finally be banned.

And to cut off the building blocks needed for a bomb, the United States will seek a new treaty that verifiably ends the production of fissile materials intended for use in state nuclear weapons. If we are serious about stopping the spread of these weapons, then we should put an end to the dedicated production of weapons-grade materials that create them. That's the first step.

Second, together we will strengthen the Nuclear Non-Proliferation Treaty as a basis for cooperation. The basic bargain is sound. Countries with nuclear weapons will move towards disarmament, countries without nuclear weapons will not acquire them, and all countries can access peaceful nuclear energy. To strengthen the treaty, we should embrace several principles. We need more resources and authority to strengthen international inspections. We need real and immediate consequences for countries caught breaking the rules or trying to leave the treaty without cause.

And we should build a new framework for civil nuclear cooperation, including an international fuel bank, so that countries can access peaceful power without increasing the risks of proliferation. That must be the right of every nation that renounces nuclear weapons, especially developing countries embarking on peaceful programs. And no approach will succeed if it's based on the denial of rights to nations that play by the rules. We must harness the power of nuclear energy on behalf of our efforts to combat climate change and to advance peace opportunity for all people.

But we go forward with no illusions. Some countries will break the rules. That's why we need a structure in place that ensures when any nation does, they will face consequences. . . .

Rules must be binding. Violations must be punished. Words must mean something. The world must stand together to prevent the spread of these weapons. Now is the time for a strong international response All nations must come together to build a stronger, global regime. . . .

* * * *

So finally, we must ensure that terrorists never acquire a nuclear weapon. This is the most immediate and extreme threat to global security. One terrorist with one nuclear weapon could unleash massive destruction. Al Qaeda has said it seeks a bomb and that it would have no problem with using it. And we know that there is unsecured nuclear material across the globe. To protect our people, we must act with a sense of purpose without delay. So today I am announcing a new international effort to secure all vulnerable nuclear material around the world within 4 years. We will set new standards, expand our cooperation with Russia, pursue new partnerships to lock down these sensitive materials.

We must also build on our efforts to break up black markets, detect and intercept materials in transit, and use financial tools to disrupt this dangerous trade. Because this threat will be lasting, we should come together to turn efforts such as the Proliferation Security Initiative and the Global

Initiative to Combat Nuclear Terrorism into durable international institutions. And we should start by having a Global Summit on Nuclear Security that the United States will host within the next year.

* * * *

b. Comprehensive Test Ban Treaty

The United States played a leading role in negotiating the Comprehensive Test Ban Treaty (“CTBT”), and President William J. Clinton was the first world leader to sign the treaty in September 1996. President Clinton submitted the CTBT to the Senate for advice and consent to ratification in September 1997 (S. Treaty Doc. No. 105–28 (1997)), but on October 13, 1999, the Senate decided against granting advice and consent. See 145 Cong. Rec. S12,505–12,550 (Oct. 13, 1999); see also *II Cumulative Digest 1991–99* at 2271–79. The 44 states listed in Annex 2 to the treaty must ratify the CTBT before it can enter into force, and as of April 2009, the United States was one of nine states listed in Annex 2 that had not yet done so. See www.ctbto.org/the-treaty/article-xiv-conferences/about-the-article-xiv-conferences.

In Prague on April 5, 2009 (discussed in B.1.a. *supra*), President Obama announced that the administration would pursue Senate advice and consent to ratification. Consistent with President Obama’s announcement, the United States participated for the first time in ten years in the Conference on Facilitating Entry into Force of the Comprehensive Nuclear Test Ban Treaty. The conference, which the UN Secretary-General convenes every two years in the UN’s capacity as depositary for the treaty, is generally known as the “CTBT Article XIV Conference” and focuses on ways to promote ratifications of the treaty. On September 24, 2009, Secretary of State Hillary Rodham Clinton addressed the conference. Her remarks, excerpted below, are available at www.state.gov/secretary/rm/2009a/09/129703.htm.

* * * *

The Comprehensive Nuclear Test Ban Treaty is an integral part of our non-proliferation and arms control agenda, and we will work in the months ahead both to seek the advice and consent of the United States Senate to ratify the treaty, and to secure ratification by others so that the treaty can enter into force.

We believe that the CTBT contributes to our global nonproliferation and disarmament strategy as well as the President’s long-range vision. It does so without jeopardizing the safety, security, or credibility of our nuclear arsenal. By pursuing these goals and supporting the CTBT, we are working in the interest of all nations committed to non-proliferation and to reducing the threat of nuclear attack.

The Obama Administration has already begun the work necessary to support U.S. ratification of the Treaty. We know this task will not be quick or easy. But as long as we are confronted with the prospect of nuclear testing by others, we will face the potential threat of newer, more powerful, and more sophisticated weapons that could cause damage beyond our imagination. A test ban treaty that has entered into force will permit the United States and others to challenge states engaged in suspicious testing activities—including the option of calling on-site inspections to be sure that no testing occurs on land, underground, underwater, or in space. CTBT ratification would also encourage the international community to move forward with other essential nonproliferation steps.

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As we work with the Senate to ratify the CTBT, we will encourage other countries to play their part—including the eight remaining Annex 2 countries. Those who haven't signed should sign. Those, like us, who haven't ratified, should ratify. And the 149 countries that have already progressed to ratification can use this opportunity to continue preparations for CTBT implementation.

Even in these times of strained budgets, we are prepared to pay our share of the Preparatory Commission budget so that the global verification regime will be fully operational when the CTBT enters into force.

More than eighty percent of the monitoring stations that will constitute the International Monitoring System have already been installed and we urge all host countries to ensure that the data from these installations are reported to the International Data Center. In the coming months, we will look for new ways to support the monitoring system—including upgrades to the system and other verification capabilities of the CTBT—with the help of all nations, including those who have yet to ratify.

* * * *

Mr. Chairman, after a 10-year absence from this conference, America stands ready to renew its leadership role in the non-proliferation regime. As President Obama said yesterday, we have a shared responsibility for a global response to global challenges. We come to this conference with an optimistic spirit that all parties can make a contribution towards a world without nuclear weapons. That is the promise of the CTBT, and it is why we are rededicating ourselves to this effort. . . .

See also the June 8, 2009, statement to the Comprehensive Nuclear Test-Ban Treaty Organization (“CTBTO”) Preparatory Commission, delivered by Ambassador Gregory L. Schulte, then U.S. Permanent Representative to International Organizations in Vienna, available at <http://vienna.usmission.gov/090608ctbt.html>.

c. Fissile Material Cut-off Treaty

On May 29, 2009, after ten years of negotiations and deadlock, the Conference on Disarmament agreed upon a program of work for 2009, U.N. Doc. CD/1864. Notably, the Conference agreed to begin negotiations on a

Fissile Material Cut-off Treaty ("FMCT"). On May 29, 2009, President Obama welcomed the Conference on Disarmament's decision, stating:

There is no greater security challenge in the world today than turning the tide on nuclear-proliferation, and pursuing the goal of a nuclear-free world. I welcome today's important agreement at the Conference on Disarmament to begin negotiations on a fissile material cutoff treaty, which will end production of fissile materials for use in atomic bombs. As I announced in Prague, a verified cutoff treaty is an essential element of my vision for a world free of nuclear weapons. The treaty will help to cap nuclear arsenals, strengthen the consensus underlying the Non-Proliferation Treaty, and deny terrorists access to nuclear materials.

Today's decision ends more than a decade of inactivity in the Conference on Disarmament, and signals a commitment to work together on this fundamental global challenge. It is good to see the Conference at work again. I am committed to consult and cooperate with the governments represented at the Conference on Disarmament to complete this treaty as soon as possible.

President Obama's statement is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00414, p. 1.

On June 4, 2009, Rose E. Gottemoeller, Acting Under Secretary of State for Arms Control and International Security, addressed the Conference on Disarmament in Geneva on the need to begin the FMCT negotiations. Ms. Gottemoeller's statement, excerpted below, is available at www.state.gov/s/l/c8183.htm.

. . . Your decision last week to begin negotiations on a verifiable fissile material cutoff treaty, as well as to conduct substantive discussions on other core issues, reflects growing recognition of the value of nonproliferation and disarmament agreements to international peace and security. It also demonstrates the importance of all delegations realistically appraising the present situation and showing the necessary flexibility to allow the Conference to move forward. . . .

* * * *

There should be no misapprehensions or illusions on the difficulty of our task. The United States . . . is committed to doing its part. Until the FMCT is completed, I ask delegations to ensure that the CD not return to deadlock, to pledge themselves to passing in the beginning of each year a Program of Work authorizing the resumption of focused negotiations on an FMCT and discussion of related disarmament issues. . . .

. . . It is time that we stopped talking about having an FMCT, and got to work to complete it. If we succeed on FMCT, we'll have taken a necessary but admittedly not sufficient step towards

nuclear disarmament. It must be complemented by deeper respect for nonproliferation rules, consequences for those who violate them, improved verification of compliance, and further progress on arms control.

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See also the August 20, 2009, statement of Garold N. Larson, Chargé d’Affaires, a.i., U.S. Mission to the Conference on Disarmament, available at www.state.gov/s/l/c8183.htm.

d. UNSCR 1887

On September 24, 2009, President Obama chaired a summit of the UN Security Council on nuclear nonproliferation and nuclear disarmament, at which the Council unanimously adopted Resolution 1887. U.N. Doc. S/RES/1887. In the resolution, the Security Council committed to work toward a world without nuclear weapons and endorsed a broad range of actions to reduce the threat of nuclear proliferation and nuclear terrorism. President Obama was the first U.S. President to chair a meeting of the Council, and the summit was the fifth one the Council had ever convened. After the Council adopted the resolution, President Obama delivered a statement welcoming it and outlining its significance. Excerpts follow from President Obama’s statement, which is available at <http://usun.state.gov/briefing/statements/2009/september/129562.htm>.

* * * *

. . . The historic resolution we just adopted enshrines our shared commitment to the goal of a world without nuclear weapons. And it brings Security Council agreement on a broad framework for action to reduce nuclear dangers as we work toward that goal. It reflects the agenda I outlined in Prague, and builds on a consensus that all nations have the right to peaceful nuclear energy; that nations with nuclear weapons have the responsibility to move toward disarmament; and those without them have the responsibility to forsake them.

Today, the Security Council endorsed a global effort to lock down all vulnerable nuclear materials within four years. . . . This resolution will also help strengthen the institutions and initiatives that combat the smuggling, financing, and theft of proliferation-related materials. It calls on all states to freeze any financial assets that are being used for proliferation. And it calls for stronger safeguards to reduce the likelihood . . . that peaceful nuclear programs can be diverted to a weapons program.

The resolution we passed today will also strengthen the Nuclear Non-Proliferation Treaty. We have made it clear that the Security Council has both the authority and the responsibility to respond to violations to this treaty. We’ve made it clear that the Security Council has both the authority and responsibility to determine and respond as necessary when violations of this treaty threaten international peace and security.

That includes full compliance with Security Council resolutions on Iran and North Korea. . .

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On September 24, 2009, the White House Office of the Press Secretary issued a fact sheet on Resolution 1887. Excerpts follow from the fact sheet, which is available at <http://usun.state.gov/briefing/statements/2009/september/129564.htm>.

* * * *

. . . The new measure, **UNSC Resolution 1887**, expresses the Council's grave concern about the threat of nuclear proliferation and the need for international action to prevent it. It reaffirms that the proliferation of weapons of mass destruction and their means of delivery are threats to international peace and security and shows agreement on a broad range of actions to address nuclear proliferation and disarmament and the threat of nuclear terrorism. . . .

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UNSC Resolution 1887 includes new provisions **to deter withdrawal from the NPT** and to ensure that nuclear energy is used in a framework that reduces proliferation dangers and adheres to high standards for security. The Council committed to address without delay any state's notification of withdrawal from the NPT and affirmed that states will be held responsible for any violations of the NPT committed prior to their withdrawal from the Treaty.

The Council also endorsed important norms to reduce the likelihood that a peaceful nuclear program can be diverted to a weapons program, including support for **stricter national export controls on sensitive nuclear technologies** and having nuclear supplier states consider **compliance with safeguards agreements when making decisions about nuclear exports** and reserve the right to require that **material and equipment provided prior to termination be returned** if safeguards agreements are abrogated.

The Council also expressed strong support for ensuring **the IAEA has the authority and resources** necessary to carry out its mission to verify both the declared use of nuclear materials and facilities and the absence of undeclared activities and affirmed the Council's resolve to support the IAEA's efforts to verify whether states are in compliance with their safeguards obligations.

The resolution calls upon states to conclude safeguards agreements and an Additional Protocol with the IAEA, so that the IAEA will be in a position to carry out all of the inspections necessary to ensure that materials and technology from peaceful nuclear uses are not used to support a weapons program. The Council also endorsed IAEA work on **multilateral approaches to the fuel cycle**, including assurances of fuel supply to make it easier for countries to choose not to develop enrichment and reprocessing capabilities.

These steps are important in helping address situations where a country uses access to the civilian nuclear benefits of the NPT to cloak a nascent nuclear weapons program and then withdraws from the NPT once it has acquired sufficient technical expertise for its weapons program.

The resolution strengthens implementation for resolution 1540 which requires governments to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery. . . .

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e. U.S.–IAEA Safeguards Agreement Additional Protocol

On January 6, 2009, Ambassador Gregory L. Schulte, then U.S. Permanent Representative to the International Atomic Energy Agency (“IAEA”), deposited the U.S. instrument of ratification for the U.S. Additional Protocol with the IAEA. Ambassador Schulte issued a statement on January 7, explaining that “[b]y bringing the Additional Protocol into force, the United States has taken another important, tangible step in strong support of the IAEA’s efforts to provide international confidence about the absence of undeclared nuclear activities.” The full text of Ambassador Schulte’s statement, excerpted below, is available at <http://vienna.usmission.gov/090107ap.html>.

* * * *

The Additional Protocol is the IAEA’s highest standard of verification. It provides IAEA inspectors with additional information and access related to a country’s nuclear fuel cycle making it easier for the inspectors to detect a clandestine nuclear weapons program. . . .

* * * *

To date, 118 countries have signed an Additional Protocol with the IAEA and 89, including the United States, have ratified it. We hope that important countries like Brazil and Argentina, which have significant nuclear activities, join us in signing and implementing the Additional Protocol. This would send an important signal to the rest of the world.

We fully support Director General Mohammed El-Baradei in his desire to make the Additional Protocol a universal standard.

f. Country–specific issues

(1) Democratic People’s Republic of Korea and Iran

During 2009 the United States pressed the Democratic People’s Republic of Korea (“DPRK” or “North Korea”) and Iran to fulfill their international obligations concerning nonproliferation of weapons of mass destruction. In his address to the General Assembly on September 23, 2009, for example, President Obama stated:

. . . Those nations that refuse to live up to their obligations must face consequences. Let me be clear: This is not about singling out individual nations; it is about standing up for the rights of all nations that *do* live up to their responsibilities. Because a world in which IAEA

inspections are avoided and the [UN's] demands are ignored will leave all people less safe, and all nations less secure.

In their actions to date, the Governments of North Korea and Iran threaten to take us down this dangerous slope. We respect their rights as members of the community of nations. I have said before, and I will repeat, I am committed to diplomacy that opens a path to greater prosperity and more secure peace for both nations if they live up to their obligations.

But if the Governments of Iran and North Korea choose to ignore international standards, if they put the pursuit of nuclear weapons ahead of regional stability and the security and opportunity of their own people, if they are oblivious to the dangers of escalating nuclear arms races in both East Asia and the Middle East, then they must be held accountable. The world must stand together to demonstrate that international law is not an empty promise, and that treaties will be enforced. We must insist that the future does not belong to fear.

The full text of President Obama's speech is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00742, pp. 1-9.

(i) DPRK

For discussion of U.S. and Security Council responses to North Korea's Taepo-Dong launch on April 5, 2009, and the second test of a nuclear explosive device North Korea announced had taken place on May 25, 2009, see Chapter 16.A.1.a. The nonproliferation sanctions the United States imposed in 2009 against North Korean entities and nationals are discussed in Chapter 16.A.1.a.(2). For general discussion of U.S. nonproliferation initiatives relating to North Korea in 2009, see the testimony of Ambassador Stephen W. Bosworth, Special Representative for North Korea Policy, before the Senate Committee on Foreign Relations on June 11, 2009, available at www.state.gov/p/eap/rls/rm/2009/06/124657.htm.

(ii) Iran

For discussion of the new two-track U.S. strategy toward Iran, which combines direct U.S. diplomatic engagement with the application of sanctions, see Deputy Secretary of State James B. Steinberg's testimony, dated October 6, 2009, before the Senate Committee on Banking, Housing and Urban Affairs. Deputy Secretary Steinberg's testimony is available at

http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=23f97300-5b76-483b-9225-aa14a2a82e79&Witness_ID=d34d2781-7cef-42c4-ba93-8dddb6521a34. Chapter 16.A.1.b. discusses 2009 developments relating to sanctions, export controls, and Iran.

(iii) IAEA resolution on Iran

On November 27, 2009, the IAEA Board of Governors adopted a resolution on Iran by a vote of 25 states in favor and three opposed, with six abstentions. IAEA Doc. GOV/2009/82. The United States, together with the other P5+1 countries (China, France, Germany, Russia, and the United Kingdom) took the lead in preparing the resolution, which was the IAEA's tenth resolution on Iran. The IAEA had not adopted a resolution on Iran since 2006, and it sent a strong signal of serious international concern about Iran's noncompliance with its obligations under its IAEA safeguards agreement and successive Security Council resolutions. The resolution urged Iran to comply fully and without delay with its obligations under Security Council Resolutions 1737 (2006), 1747 (2007), 1803 (2008), and 1835 (2008) and to meet the IAEA Board of Governors' requirements, including by suspending construction immediately at the enrichment facility near Qom. U.N. Docs. S/RES/1737, S/RES/1747, S/RES/1803, and S/RES/1835. For the joint U.S.-French-British statement on September 2, 2009, announcing evidence of the clandestine facility, see www.whitehouse.gov/the_press_office/Statements-By-President-Obama-French-President-Sarkozy-And-British-Prime-Minister-Brown-On-Iranian-Nuclear-Facility. The resolution also urged Iran to comply fully with its obligations under its safeguards agreement, particularly by applying Code 3.1, modified, of the Additional Protocol, and to confirm that Iran does not have any other undeclared nuclear facilities. Third, the resolution urged Iran to engage with the IAEA to resolve all of the outstanding issues concerning Iran's nuclear program and to cooperate fully with the IAEA by providing the IAEA with the information and access to Iranian facilities that it had requested.

As the United States explained in a statement to the Board of Governors following the vote, the resolution reflected "the Board's ongoing and serious concern that Iran continues to defy relevant IAEA Board of Governors and UN Security Council resolutions." The U.S. statement, excerpted below, is available at <http://vienna.usmission.gov/091127iran.html>.

* * * *

We believe that the Board's resolution underscores the imperative for Iran to live up to its international obligations and offer transparency in its nuclear program, if it wishes to demonstrate

its exclusively peaceful intent, rather than carry out more evasions and unilateral reinterpretations of its obligations. The United States fully supports the IAEA in its efforts. We also fully support the Director General's conclusion that Iran does not have the authority to unilaterally modify its safeguards obligations with respect to the provision of design information.

The United States remains firmly committed to a peaceful resolution to international concerns with Iran's nuclear program. We also remain willing to engage Iran to work toward a diplomatic solution to the nuclear dilemma it has created for itself, if only Iran would choose such a course. But our patience and that of the international community is limited. To date, Iran has refused a follow-on meeting to the October 1 meeting with the P5+1 countries if its nuclear program is included on the agenda. The United States strongly supported—and continues to support—the Director General's positive proposal to provide Iran fuel for its Tehran Research Reactor, a proposal intended to help meet the medical and humanitarian needs of the Iranian people while building confidence in Iran's intentions. We continue to encourage Iran to demonstrate a similar willingness to address the serious issues associated with its nuclear program.

On November 27, 2009, White House Press Secretary Robert Gibbs also welcomed the IAEA resolution. The White House statement explained:

Today's overwhelming vote at the IAEA's Board of Governors demonstrates the resolve and unity of the international community with regard to Iran's nuclear program. It underscores broad consensus in calling upon Iran to live up to its international obligations and offer transparency in its nuclear program. It also underscores a commitment to strengthen the rules of the international system, and to support the ability of the IAEA and UN Security Council to enforce the rules of the road, and to hold Iran accountable to those rules. Indeed, the fact that 25 countries from all parts of the world cast their votes in favor shows the urgent need for Iran to address the growing international deficit of confidence in its intentions.

The full text of the press statement is available at www.whitehouse.gov/the-press-office/statement-white-house-press-secretary-robert-gibbs-todays-iaea-vote.

(2) Agreement with the UAE for cooperation on peaceful uses of nuclear energy

On May 21, 2009, President Obama transmitted a proposed agreement with the United Arab Emirates for cooperation concerning the peaceful uses of nuclear energy, pursuant to §§ 123 b. and 123 d. of the Atomic Energy Act

of 1954, as amended (42 U.S.C. § 2153(b), (d)).* On May 19, 2009, President Obama issued Presidential Determination No. 2009-18, as a memorandum for the Secretary of State and the Secretary of Energy. 74 Fed. Reg. 25,385 (May 28, 2009). The President stated:

I have considered the proposed Agreement for Cooperation Between the Government of the United States of America and the Government of the United Arab Emirates Concerning Peaceful Uses of Nuclear Energy, along with the views, recommendations, and statements of the interested agencies.

I have determined that the performance of the Agreement will promote, and will not constitute an unreasonable risk to, the common defense and security. Pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b)), I hereby approve the proposed Agreement and authorize the Secretary of State to arrange for its execution.

On July 8, 2009, Ellen O. Tauscher, Under Secretary of State for Arms Control and International Security, testified before the House Committee on Foreign Affairs in support of the agreement. In her testimony, Ms. Tauscher stressed the agreement's nonproliferation value and discussed the actions the UAE had taken to demonstrate its commitment to nonproliferation and responsible development of civil nuclear energy.

The United States and the UAE exchanged diplomatic notes on December 17, 2009, to bring the agreement into force. The full text of the agreement is available at

www.state.gov/documents/organization/140162.pdf.

Excerpts below from Ms. Tauscher's testimony explain the agreement's significance and notable provisions. The full text of the testimony is available at www.state.gov/t/us/125782.htm.

* * * *

Let me say at the outset that the Administration recognizes the nonproliferation value of this unique Agreement. The UAE has made a principled decision that it will abide by the highest nonproliferation standards. The U.S.-UAE 123 Agreement recognizes these commitments and

* Editor's note: On January 15, 2009, President George W. Bush issued the determination required by § 123 of the Atomic Energy Act with respect to a proposed agreement for peaceful nuclear cooperation with the United Arab Emirates, but that agreement was not transmitted to Congress. See <http://georgewbush-whitehouse.archives.gov/news/releases/2009/01/20090115-4.html>. Instead, after President Obama took office, a modified text was signed on May 21, 2009, and transmitted to Congress on the same day.

achievements of the government of the United Arab Emirates and provides the basis to expand now our cooperation into areas of peaceful nuclear energy.

Consistent with the UAE's commitments to the highest nonproliferation standards, the proposed Agreement contains some unprecedented features for agreements of this type. For the first time in an agreement of this type, the UAE has voluntarily agreed to forgo enrichment and reprocessing. For the first time in a U.S. agreement for peaceful nuclear cooperation, the proposed Agreement provides that prior to U.S. licensing of exports of nuclear material, equipment, components, or technology pursuant to the Agreement, the UAE shall bring into force the Additional Protocol to its safeguards agreement with the IAEA. The Agreement also allows for exceptional circumstances, under which the United States may remove special fissionable material subject to the Agreement from the UAE either to the United States or to a third country if exceptional circumstances of concern from a nonproliferation standpoint so require.

The proposed Agreement has a term of 30 years and permits the transfer of nuclear material, equipment (including reactors), and components for civil nuclear research and civil nuclear power production subject to subsequent individual export licensing. It does not permit transfers of Restricted Data, sensitive nuclear technology, sensitive nuclear facilities, or major critical components of such facilities. It limits the special fissionable material that may be transferred under the Agreement to low enriched uranium except for small amounts of special fissionable material for use as samples, standards, detectors, targets or other purposes agreed by the Parties. If the Agreement is terminated, key nonproliferation conditions and controls will continue with respect to material, equipment, and components subject to the Agreement.

. . . [The UAE is] an example of a country that has concluded that indigenous fuel cycle capabilities are not needed to fully enjoy the benefits of civil nuclear energy.

* * * *

Once the proposed Agreement enters into force, it will establish the necessary legal framework for the United States and the UAE to engage in subsequent, individually-authorized forms of cooperation in the development of nuclear energy for peaceful purposes to assist the UAE in meeting its growing energy demand. In addition to being indicative of our strong partnership with the UAE, the proposed Agreement is a tangible expression of the United States' desire to cooperate with states in the Middle East, and elsewhere, that want to develop peaceful nuclear power in a manner consistent with the highest nonproliferation, safety and security standards.

* * * *

U.S. Prior Approval for Retransfers

The Agreed Minute to the proposed Agreement provides U.S. prior approval for retransfers by the UAE of irradiated nuclear material . . . to France and the United Kingdom, if consistent with their respective policies, laws, and regulations. Such retransfers would provide the UAE opportunities for management of its spent fuel, subject to specified conditions, including that prior agreement between the United States and the UAE is required for the transfer to the UAE of any special fissionable material recovered from any such reprocessing. Plutonium recovered from reprocessing could not be returned under the Agreement (with the exception of small quantities for the uses described above, but even then only with the further agreement of the Parties). The transferred material would also have to be held within the European Atomic Energy Community subject to the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States of America and the European Atomic Energy Community (EURATOM).

In view of the fact that this retransfer consent would constitute a subsequent arrangement under the Act if agreed to separately from the proposed Agreement, the Secretary of State and the Secretary of Energy have ensured that the advance approval provisions meet the applicable requirements of section 131 of the Atomic Energy Act. Specifically, they have concluded that U.S. advance approval for retransfer of nuclear material for reprocessing or storage contained in the Agreed Minute to the proposed Agreement is not inimical to the common defense and security. . . .

* * * *

2. 1540 Committee

On September 30, 2009, the Security Council conducted a comprehensive review of the status of implementation of Resolution 1540 (2004). U.N. Doc. S/RES/1540. The Security Council acted pursuant to paragraph 8 of Resolution 1810 (2008), which requested the 1540 Committee to consider such a review and to report to the Council on its considerations by January 31, 2009. During the Security Council's review, Ambassador Alejandro D. Wolff, Deputy U.S. Permanent Representative to the United Nations, delivered a statement stressing the importance of full implementation of Resolution 1540. Ambassador Wolff's statement, excerpted below, is available at

<http://usun.state.gov/briefing/statements/2009/september/130100.htm>.

See also Ambassador Wolff's statement to the Security Council on November 13, 2009, available at

<http://usun.state.gov/briefing/statements/2009/131935.htm>.

* * * *

. . . Resolution 1540 was adopted to address the potential convergence of two serious threats: violent non-state actors and the spread of weapons of mass destruction. . . .

* * * *

The Security Council resolution that was adopted at the Summit level last week affirms the need for full implementation of Resolution 1540, welcomes the work that the 1540 Committee has done to date on funding mechanisms, and reinforces the Security Council's commitment to ensure effective and sustainable support for the Committee's activities, including capacity building. The United States is strongly committed to establishing a voluntary fund to help provide the technical support and expertise to support implementation of Resolution 1540. We will seek to make a meaningful contribution to such a trust fund once it is established, provided it contains effective transparency and accountability mechanisms. We are prepared to work with the 1540 Committee and others to make that happen.

* * * *

Full implementation is essential for a simple reason: proliferators seek out the weakest links, be they poorly secured materials, unguarded borders, or judicial systems too frail to prosecute perpetrators. In our interconnected world, a single gap in our common defense can threaten us all. So we urge all states to fully shoulder the responsibility of assessing and addressing areas where they might be vulnerable to proliferation-related activity.

UN member states have the sovereign responsibility to regulate their own national commerce; to inspect cargoes transiting their borders and territories; to maintain and oversee their own financial systems; and to monitor and control their own exports. But as states undertake these important functions, they must ensure that they are complying with the obligations established by Resolution 1540 as an operating standard.

* * * *

Mr. Chairman, our goal is to have this Comprehensive Review strengthen the resolution's tools and mechanisms—such as a voluntary trust fund—for building national capacity and international coordination to fighting proliferation, even as we recognize that a “one size fits all” approach to capacity-building will not suffice.

* * * *

We need to consider ways to make this Committee's work more inclusive and allow it to benefit from the input of others, even as we maintain the independence and distinctiveness of the nonproliferation treaties and regimes that mesh with Resolution 1540. . . .

* * * *

Let a better coordinated, better resourced 1540 Committee stand as a demonstration of our shared commitment to a safer and more secure world. . . .

3. Chemical and Biological Weapons

a. Chemical weapons

On October 13, 2009, Robert P. Mikulak, U.S. Representative to the Executive Council of the Organization for the Prohibition of Chemical Weapons (“OPCW”), addressed the OPCW Executive Council at its fifty-eighth session. Mr. Mikulak's statement, excerpted below, is available at www.state.gov/t/isn/rls/rm/130891.htm.

* * * *

. . . [T]he United States has now destroyed over 65 percent of its chemical weapons—almost two thirds. It is also worth noting that on October 6, the U.S. Army Chemical Materials Agency announced the safe destruction of its two millionth munition since entry-into-force of the Chemical Weapons Convention.

The Obama administration is fully committed to examine all possible options for accelerating Chemical Weapons destruction at the two non-incineration sites consistent with the Chemical Weapons Convention and its applicable safety, technical, and environmental

requirements. The United States understands our obligations under the Convention, and we are fully committed to meeting the Convention's objectives, including verified destruction of 100 percent of our stockpile as rapidly and as safely as possible. We are also committed to proactive disclosure of our Chemical Weapons destruction program, so that member states can evaluate our efforts for themselves.

Another of the obligations which we as member states agreed to fulfill when we joined the Convention is contained in Article VII of the Convention, which requires all member states to adopt the necessary measures to implement the Convention and for it to be fully enforced and effective within their territory.

Since the adoption of the Action Plan for Article VII in 2003, there has been a notable increase in the number of member states fully meeting their Article VII obligations, which we applaud. The work of the Technical Secretariat, as well as of member states, in providing encouragement, assistance and support to other member states has been an important factor in this increase. However, we realize that the work to fully implement Article VII is far from done, as evidenced in the Director-General's annual report on Article VII implementation before us this week. . . .

Rather than repeating decisions from previous years, this Council should provide fresh recommendations to address the current situation. These recommendations should include clear, constructive, and achievable measures to assist and encourage member states wherever they are in the process of implementing Article VII. The United States stands ready to provide support and assistance to any member states requiring it We call on other member states to do the same. We share a collective interest in seeing each member of this Organization enact and implement comprehensive legislation and regulations. Whenever another member state does so, another gap is closed and our collective security is enhanced.

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b. Biological weapons

On December 9, 2009, Ellen O. Tauscher, Under Secretary for Arms Control and International Security, addressed the Annual Meeting of the States Parties to the Biological Weapons Convention. In her statement, excerpted below, Ms. Tauscher called on states to join the United States in reinvigorating the Biological Weapons Convention. The full text of the U.S. statement is available at www.state.gov/t/us/133335.htm.

* * * *

When it comes to the proliferation of bio weapons and the risk of an attack, the world community faces a greater threat based on a new calculus. President Obama fully recognizes that a major biological weapons attack on one of the world's major cities could cause as much death and economic and psychological damage as a nuclear attack.

And while the United States remains concerned about state-sponsored biological warfare and proliferation, we are equally, if not MORE concerned, about an act of bioterrorism, due to the increased access to advances in the life sciences.

* * * *

That is why we in the United States are calling for all of you to join us in bolstering the Biological Weapons Convention, the premier forum for dealing with biological threats.

* * * *

. . . [W]e want to reinvigorate the Biological Weapons Convention as the premier forum for global outreach and coordination. The Biological Weapons Convention embodies the international community's determination to prevent the misuse of biological materials as weapons. But it takes the active efforts of its States Parties—individually, and collectively—to uphold these commitments that continue to bolster the BWC as a key international norm.

* * * *

. . . [L]et me reiterate that the Obama Administration's commitment to the Biological Weapons Convention is steadfast. The United States will continue to meet its Article One commitments not to develop, acquire, produce or possess biological weapons.

But I want to be clear and forthcoming and I hope this will not be a surprise to anyone. The Obama Administration will not seek to revive negotiations on a verification protocol to the Convention. We have carefully reviewed previous efforts to develop a verification protocol and have determined that a legally binding protocol would not achieve meaningful verification or greater security.

It is extraordinarily difficult to verify compliance. The ease with which a biological weapons program could be disguised within legitimate activities and the rapid advances in biological research make it very difficult to detect violations. We believe that a protocol would not be able to keep pace with the rapidly changing nature of the biological weapons threat.

Instead, we believe that confidence in BWC compliance should be promoted by enhanced transparency about activities and pursuing compliance diplomacy to address concerns.

* * * *

We want to develop a rigorous, comprehensive program of cooperation, information exchange, and coordination that builds on and modifies as necessary the existing Work Program approach.

As we look toward the 2011 Review Conference, the United States believes that a reinvigorated, comprehensive Work Program is the best way to strengthen the Convention. . . .

To highlight our three areas of emphasis in this area, let me provide a bit more detail about our goals.

First, we seek to promote confidence in effective treaty implementation:

A key consideration related to any treaty is the ongoing need to promote confidence in compliance. We believe that greater emphasis should be placed on voluntary measures to provide increased confidence. We must also increase participation in the existing Confidence-Building Measures. We should work together to review the Confidence Building Measures forms to assess their effectiveness and identify areas for improvement. States Parties, in conjunction with the Implementation Support Unit, should provide appropriate assistance to meet these goals.

* * * *

. . . [W]e must seek to make membership in the BWC universal. We will be looking to work with you on outreach efforts to countries that have not yet joined the Convention.

Second, we will seek to enhance cooperation through the BWC on natural and deliberate disease threats to complement the work being done by the World Health Organization and other international bodies. In order to implement our Article Ten commitments, it is critical that we work together to achieve, sustain and improve international capacity to detect, report, and respond to outbreaks of disease, whether deliberate, accidental or natural. This includes implementation of the World Health Organization's International Health Regulations.

Fundamentally, if we improve a country's ability to respond to natural outbreaks, we have improved their capability to deal with bioterrorism.

In this respect, the United States is dedicated to continuing our substantial assistance and we want to work closely with other BWC States Parties to enhance and coordinate these efforts—including through the G-8 Global Partnership, United Nations Security Council Resolution 1540 and other mechanisms.

The BWC should be fully utilized as a forum to inform States Parties of related bilateral and regional activities, to consult on new avenues of multilateral engagement, and to promote the support of the international community.

* * * *

As the final piece of our strategy to enhance this forum, we want to make the BWC the premier forum for discussion of the full range of biological threats—including bioterrorism and mutually agreeable steps States can take for risk management.

The BWC should provide an international forum for advancing the dialogue on pathogen security and laboratory biosafety practices, and for promoting legislation, guidelines and standards through cooperation and partnership.

We must work here to develop international standards and practices for these important elements that advance our mutual security. . . .

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4. START

On April 1, 2009, President Obama and Dmitriy A. Medvedev, President of the Russian Federation, issued a Joint Statement on their agreement to begin negotiations on a new agreement to replace the Treaty on the Reduction and Limitation of Strategic Offensive Arms ("START Treaty"). The Joint Statement, which is provided below, is also available at Daily Comp. Pres. Docs., 2009 DCPD No. 00209, p. 1.

The President of the United States of America, Barack Obama, and the President of the Russian Federation, Dmitriy A. Medvedev, noted that the Treaty on the Reduction and Limitation of Strategic Offensive Arms (START Treaty), which expires in December 2009, has completely fulfilled its intended purpose and that the maximum levels for strategic offensive arms recorded in the Treaty were reached long ago. They have therefore decided to move further along the path of

reducing and limiting strategic offensive arms in accordance with U.S. and Russian obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons.

The Presidents decided to begin bilateral intergovernmental negotiations to work out a new, comprehensive, legally binding agreement on reducing and limiting strategic offensive arms to replace the START Treaty. The United States and the Russian Federation intend to conclude this agreement before the Treaty expires in December. In this connection, they instructed their delegations at the negotiations to proceed on basis of the following:

- The subject of the new agreement will be the reduction and limitation of strategic offensive arms;
- In the future agreement the Parties will seek to record levels of reductions in strategic offensive arms that will be lower than those in the 2002 Moscow Treaty on Strategic Offensive Reductions, which is currently in effect;
- The new agreement will mutually enhance the security of the Parties and predictability and stability in strategic offensive forces, and will include effective verification measures drawn from the experience of the Parties in implementing the START Treaty.

They directed their negotiators to report on progress achieved in working out the new agreement by July 2009.

On July 6, 2009, President Obama and President Medvedev signed a Joint Understanding that outlined the elements for inclusion in the new START treaty. The Joint Understanding, excerpted below, is available at Daily Comp. Pres. Docs., 2009 DCPD No. 00547, pp. 1-2.*

The President of the United States of America and the President of the Russian Federation have . . . directed that the new treaty contain, *inter alia*, the following elements:

1. A provision to the effect that each Party will reduce and limit its strategic offensive arms so that seven years after entry into force of the treaty and thereafter, the limits will be in the range of 500–1100 for strategic delivery vehicles, and in the range of 1500–1675 for their associated warheads. The specific numbers to be recorded in the treaty for these limits will be agreed through further negotiations.
2. Provisions for calculating these limits.
3. Provisions on definitions, data exchanges, notifications, eliminations, inspections and verification procedures, as well as confidence building and transparency measures, as adapted, simplified, and made less costly, as appropriate, in comparison to the START Treaty.
4. A provision to the effect that each Party will determine for itself the composition and structure of its strategic offensive arms.

* Editor's note: On April 8, 2010, President Obama and President Medvedev signed the New START Treaty and its Protocol. President Obama transmitted the New START Treaty to the Senate for its advice and consent to ratification on May 13, 2010. S. Treaty Doc. No. 111-5 (2010). *Digest 2010* will discuss relevant aspects of the new treaty and protocol, which are available at www.state.gov/documents/organization/140035.pdf and www.state.gov/documents/organization/140047.pdf.

5. A provision on the interrelationship of strategic offensive and strategic defensive arms.
6. A provision on the impact of intercontinental ballistic missiles and submarine-launched ballistic missiles in a non-nuclear configuration on strategic stability.
7. A provision on basing strategic offensive arms exclusively on the national territory of each Party.
8. Establishment of an implementation body to resolve questions related to treaty implementation.
9. A provision to the effect that the treaty will not apply to existing patterns of cooperation in the area of strategic offensive arms between a Party and a third state.
10. A duration of the treaty of ten years, unless it is superseded before that time by a subsequent treaty on the reduction of strategic offensive arms.

* * * *

The United States and Russia had not concluded their negotiations on the new treaty by December 4, 2009, when the START treaty expired. President Obama and President Medvedev issued a Joint Statement on that date, which provided:

Recognizing our mutual determination to support strategic stability between the United States of America and the Russian Federation, we express our commitment, as a matter of principle, to continue to work together in the spirit of the START Treaty following its expiration, as well as our firm intention to ensure that a new treaty on strategic arms enter into force at the earliest possible date.

Daily Comp. Pres. Docs., 2009 DCPD No. 00971, p. 1.

Separately, the two countries issued another Joint Statement, which discussed the contributions of Belarus, Kazakhstan, and Ukraine to the START Treaty's successful implementation. Excerpted below, the Joint Statement is available at

www.state.gov/r/pa/prs/ps/2009/dec/133204.htm.

* * * *

The value of the START Treaty was greatly enhanced when the Republic of Belarus, the Republic of Kazakhstan, and Ukraine removed all nuclear weapons from their territories and acceded to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) as non-nuclear-weapon states. The actions of these states have enhanced the NPT regime, had a beneficial impact on international security and strategic stability, and created favorable conditions for further steps to reduce nuclear arsenals.

* * * *

The fulfillment by these states of their obligations under the Protocol to the START Treaty of May 23, 1992, (Lisbon Protocol) and their accession to the NPT as non-nuclear-weapon states, strengthened their security, which was reflected, inter alia, in the Budapest Memoranda of December 5, 1994. In this connection, the United States of America and the Russian Federation confirm that the assurances recorded in the Budapest Memoranda will remain in effect after December 4, 2009.

5. UN Resolution on Arms Trade Treaty

On October 14, 2009, Secretary of State Clinton announced the U.S. commitment to work actively to support efforts to negotiate a multilateral arms trade treaty. Secretary Clinton's statement, which is set forth below, is also available at www.state.gov/secretary/rm/2009a/10/130573.htm. See also the statement of Ambassador Donald A. Mahley, in the conventional weapons segment of the First Committee's General Debate on October 19, 2009, available at <http://usun.state.gov/briefing/statements/2009/130803.htm>.

Conventional arms transfers are a crucial national security concern for the United States, and we have always supported effective action to control the international transfer of arms.

The United States is prepared to work hard for a strong international standard in this area by seizing the opportunity presented by the Conference on the Arms Trade Treaty at the United Nations. As long as that Conference operates under the rule of consensus decision-making needed to ensure that all countries can be held to standards that will actually improve the global situation by denying arms to those who would abuse them, the United States will actively support the negotiations. Consensus is needed to ensure the widest possible support for the Treaty and to avoid loopholes in the Treaty that can be exploited by those wishing to export arms irresponsibly.

On a national basis, the United States has in place an extensive and rigorous system of controls that most agree is the "gold standard" of export controls for arms transfers. On a bilateral basis, the United States regularly engages other states to raise their standards and to prohibit the transfer or transshipment of capabilities to rogue states, terrorist groups, and groups seeking to unsettle regions. Multilaterally, we have consistently supported high international standards, and the Arms Trade Treaty initiative presents us with the opportunity to promote the same high standards for the entire international community that the United States and other responsible arms exporters already have in place to ensure that weaponry is transferred for legitimate purposes.

The United States is committed to actively pursuing a strong and robust treaty that contains the highest possible, legally binding standards for the international transfer of conventional weapons. We look forward to this negotiation as the continuation of the process that began in the UN with the 2008 UN Group of Governmental Experts on the ATT and continued with the 2009 UN Open-Ended Working Group on ATT.

6. Defense Trade Cooperation Treaties

On December 10, 2009, Andrew J. Shapiro, Assistant Secretary of State for Political–Military Affairs, and James A. Baker, Associate Deputy Attorney General, testified before the Senate Committee on Foreign Relations in support of advice and consent to ratification of defense trade cooperation treaties with the United Kingdom and Australia. See <http://foreign.senate.gov/testimony/2009/ShapiroTestimony091210a.pdf> and <http://foreign.senate.gov/testimony/2009/BakerTestimony091210a.pdf>. The treaties were transmitted to the Senate in 2007. S. Treaty Doc. Nos. 110–7 and 110–10 (2007); see *Digest 2007* at 996–1000. Action in the Senate remained pending at the end of 2009.

7. Arms Embargoes and Related Issues

a. Program of action to prevent and interdict weapons smuggling

On March 13, 2009, the United States joined Canada, Denmark, France, Germany, Italy, the Netherlands, Norway, and the United Kingdom in agreeing upon a program of action aiming to create a framework for international cooperation to prevent and interdict weapons smuggling into the Gaza Strip. Excerpts follow from the program of action, which is not legally binding under international law and described potential areas for cooperation states might pursue within their existing authorities, such as information and intelligence sharing, diplomatic engagement, and military and law enforcement activities. The full text of the program of action is available at www.state.gov/s/l/c8183.htm.

Participating governments seek to enhance efforts to prevent and interdict the illicit trafficking of arms, ammunition and weapons components to Gaza and within their jurisdiction to prevent the facilitation of such transfers. The Governments confirm their commitment to support efforts of regional states through activities farther afield. The Governments reaffirm that the international community has a responsibility to support prevention and interdiction efforts and that such efforts may involve a broad range of tools to include diplomatic, military, intelligence, and law enforcement components. These efforts build upon UNSCR 1860 and the principles and obligations pursuant to transfers of arms or related materials established in relevant UNSCRs including 1747. They recognize that these efforts include measures to prevent, disrupt, delay, stop, or seize illicit transfers of arms, ammunition and weapons components and offer a range of roles for members of the international community, taking into account counter-terrorism and non-proliferation conventions and regimes. Participation in this effort does not obligate states to take any specific action. Cooperative actions may involve only some of the participants.

Participating governments will support, in conformity with international and domestic law, and given national capabilities, a range of actions

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b. Lebanon: Implementation of Security Council Resolutions 1559 and 1701

During a Security Council debate on the Middle East on July 27, 2009, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, stressed the need for full implementation of Security Council Resolutions 1559 (2004) and 1701 (2006). U.N. Docs. S/RES/1559 and S/RES/1701. Ambassador Wolff’s statement, excerpted below, is available at <http://usun.state.gov/briefing/statements/2009/july/126549.htm>. *Digest 2005* provides background on Resolution 1559 at 931–33; *Digest 2006* provides background on Resolution 1701 at 1034–41.

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Mr. President, events in Lebanon over the past several weeks have underscored the importance of full implementation of Security Council Resolutions 1559 and 1701. Implementing these resolutions is the only sure path to protect Lebanon’s sovereignty, stability, and independence. As the Council heard last week, on July 14, a series of explosions shook a house in the village of Khirbat Salim, well south of the Litani River. Initial findings point to a large quantity of arms and ammunition being stored there, in serious violation of Resolution 1701, with all evidence pointing to Hizballah.

The Khirbat Salim events clearly demonstrate the urgent need to bring arms in Lebanon under legitimate control of the state—and the need for the international community to remain fully committed to supporting UNIFIL and its mission. [Editor’s note: *See* Chapter 17.B.5. for discussion of UNIFIL.] We are deeply concerned about the threat that such weapons pose to the civilian populations in both Israel and Lebanon. By Hizballah’s own admission, it is continuing to rearm. This is a dangerous development, which represents a severe violation of a core objective of Resolution 1701, since it was Hizballah that launched the 2006 war that neither Israel nor Lebanon sought.

We join the Secretary-General in calling on Hizballah to disarm and transform itself into a solely political party. We also call for UNIFIL and the Lebanese government to act energetically to follow up on information about Hizballah’s weapons stocks, and call for a full and unimpeded investigation into the explosion of the weapons cache at Khirbat Salim.

Resolving this situation would reassure the Government of Israel that its northern border and citizens are secure. Until it has such assurances, Israel has said that it will persist with its reconnaissance over-flights of Lebanon. While we recognize those over-flights also as violations of the Blue Line, we understand Israel’s justification for them: simply put we have not ensured that Lebanon has secured its borders in order to prevent the entry of illegal arms or related materiel. In short, Hizballah has intentionally perpetuated the threats that lead to these Blue Line violations.

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c. Darfur: Implementation of Security Council Resolution 1591

On December 15, 2009, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, condemned continued violence in Darfur and continued violations of the arms embargo established by Security Council Resolution 1591. U.N. Doc. S/RES/1591. Ambassador Rice stated:

The United States condemns the blatant disregard for the arms embargo by all parties to the conflict, the continued sexual and gender based violence, and the sustained aerial bombings by the Government of Sudan, as reported by the 1591 Sanctions Committee.

Political progress, stability in Darfur, and UNAMID's effectiveness are undermined by consistent violations of the arms embargo, increased cross border attacks, recruitment of child soldiers, and the use of militarized civilian vehicles. . . .

See <http://usun.state.gov/briefing/statements/2009/133608.htm>.

Cross References

Freedom of navigation incidents in international waters, **Chapter 12.A.5.**

Outer space arms control, **Chapter 12.B.**

Nonproliferation-related sanctions and export controls, **Chapter 16.A.1. and B.5.**