

## Table of Contents

<b>CHAPTER 18</b> .....	<a href="#">540</a>
<b>Use of Force</b> .....	<a href="#">540</a>
<b>A. GENERAL</b> .....	<a href="#">540</a>
1. Use of Force Issues Related to Counterterrorism Efforts .....	<a href="#">540</a>
a. <i>President Obama’s speech at the National Defense University</i> .....	<a href="#">540</a>
b. <i>Attorney General Holder’s Letter to Congress</i> .....	<a href="#">546</a>
c. <i>Policy and Procedures for Use of Force in Counterterrorism Operations</i> .....	<a href="#">549</a>
2. Potential Use of Force in Syria .....	<a href="#">552</a>
3. Bilateral Agreements and Arrangements .....	<a href="#">554</a>
a. <i>Implementation of Strategic Framework Agreement with Iraq</i> .....	<a href="#">554</a>
b. <i>Protocol to the Guam International Agreement</i> .....	<a href="#">556</a>
4. International Humanitarian Law .....	<a href="#">556</a>
a. <i>Protection of civilians in armed conflict</i> .....	<a href="#">556</a>
b. <i>Applicability of international law to conflicts in cyberspace</i> .....	<a href="#">560</a>
c. <i>Private military and security companies</i> .....	<a href="#">563</a>
<b>B. CONVENTIONAL WEAPONS</b> .....	<a href="#">587</a>
1. General.....	<a href="#">587</a>
2. Lethal Autonomous Weapons Systems .....	<a href="#">589</a>
<b>C. DETAINEES</b> .....	<a href="#">590</a>
1. General.....	<a href="#">590</a>
a. <i>Presidential Statements on 2013 and 2014 National Defense Authorization Acts</i> .....	<a href="#">590</a>
b. <i>CAT Report</i> .....	<a href="#">592</a>
2. Transfers .....	<a href="#">608</a>
3. U.S. court decisions and proceedings .....	<a href="#">609</a>
a. <i>Detainees at Guantanamo: Habeas Litigation</i> .....	<a href="#">609</a>
(1) <i>Al Warafi v. Obama</i> .....	<a href="#">609</a>
(2) <i>Enteral feeding cases</i> .....	<a href="#">611</a>
(3) <i>Abdullah v. Obama</i> .....	<a href="#">616</a>
(4) <i>Hatim v. Obama</i> .....	<a href="#">619</a>
(5) <i>Ali v. Obama</i> .....	<a href="#">622</a>
b. <i>Former Detainees</i> .....	<a href="#">623</a>
(1) <i>Al Janko v. Gates</i> .....	<a href="#">623</a>
(2) <i>Hamad v. Gates</i> .....	<a href="#">625</a>

(3)    Allaithi v. Rumsfeld.....	<a href="#">626</a>
(4)    Former detainees challenging convictions after accepting plea agreements .....	<a href="#">628</a>
<i>c.    Scope of Military Detention Authority: Hedges v. Obama .....</i>	<a href="#">628</a>
4.    Criminal Prosecutions and Other Proceedings .....	<a href="#">633</a>
<i>a.    Al Bahlul v. United States.....</i>	<a href="#">633</a>
<i>b.    New Military Commission Charges .....</i>	<a href="#">638</a>
<i>c.    Periodic Review Process .....</i>	<a href="#">639</a>
<b>Cross References .....</b>	<a href="#">639</a>

## CHAPTER 18

### Use of Force

#### A. GENERAL

##### 1. Use of Force Issues Related to Counterterrorism Efforts

###### a. *President Obama's speech at the National Defense University*

On May 23, 2013, President Obama delivered remarks at the National Defense University at Fort McNair in Washington, D.C. His remarks addressing the use of force in countering terrorism, excerpted below, are available at [www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university](http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university).

---

\* \* \* \*

...[I]n an age when ideas and images can travel the globe in an instant, our response to terrorism can't depend on military or law enforcement alone. We need all elements of national power to win a battle of wills, a battle of ideas. So what I want to discuss here today is the components of such a comprehensive counterterrorism strategy.

First, we must finish the work of defeating al Qaeda and its associated forces.

In Afghanistan, we will complete our transition to Afghan responsibility for that country's security. Our troops will come home. Our combat mission will come to an end. And we will work with the Afghan government to train security forces, and sustain a counterterrorism force, which ensures that al Qaeda can never again establish a safe haven to launch attacks against us or our allies.

Beyond Afghanistan, we must define our effort not as a boundless "global war on terror," but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America. In many cases, this will involve partnerships with other countries. Already, thousands of Pakistani soldiers have lost their lives fighting extremists. In

Yemen, we are supporting security forces that have reclaimed territory from AQAP. In Somalia, we helped a coalition of African nations push al-Shabaab out of its strongholds. In Mali, we're providing military aid to French-led intervention to push back al Qaeda in the Maghreb, and help the people of Mali reclaim their future.

Much of our best counterterrorism cooperation results in the gathering and sharing of intelligence, the arrest and prosecution of terrorists. And that's how a Somali terrorist apprehended off the coast of Yemen is now in a prison in New York. That's how we worked with European allies to disrupt plots from Denmark to Germany to the United Kingdom. That's how intelligence collected with Saudi Arabia helped us stop a cargo plane from being blown up over the Atlantic. These partnerships work.

But despite our strong preference for the detention and prosecution of terrorists, sometimes this approach is foreclosed. Al Qaeda and its affiliates try to gain foothold in some of the most distant and unforgiving places on Earth. They take refuge in remote tribal regions. They hide in caves and walled compounds. They train in empty deserts and rugged mountains.

In some of these places—such as parts of Somalia and Yemen—the state only has the most tenuous reach into the territory. In other cases, the state lacks the capacity or will to take action. And it's also not possible for America to simply deploy a team of Special Forces to capture every terrorist. Even when such an approach may be possible, there are places where it would pose profound risks to our troops and local civilians—where a terrorist compound cannot be breached without triggering a firefight with surrounding tribal communities, for example, that pose no threat to us; times when putting U.S. boots on the ground may trigger a major international crisis.

To put it another way, our operation in Pakistan against Osama bin Laden cannot be the norm. The risks in that case were immense. The likelihood of capture, although that was our preference, was remote given the certainty that our folks would confront resistance. The fact that we did not find ourselves confronted with civilian casualties, or embroiled in an extended firefight, was a testament to the meticulous planning and professionalism of our Special Forces, but it also depended on some luck. And it was supported by massive infrastructure in Afghanistan.

And even then, the cost to our relationship with Pakistan—and the backlash among the Pakistani public over encroachment on their territory—was so severe that we are just now beginning to rebuild this important partnership.

So it is in this context that the United States has taken lethal, targeted action against al Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones.

As was true in previous armed conflicts, this new technology raises profound questions—about who is targeted, and why; about civilian casualties, and the risk of creating new enemies; about the legality of such strikes under U.S. and international law; about accountability and morality. So let me address these questions.

To begin with, our actions are effective. Don't take my word for it. In the intelligence gathered at bin Laden's compound, we found that he wrote, "We could lose the reserves to enemy's air strikes. We cannot fight air strikes with explosives." Other communications from al Qaeda operatives confirm this as well. Dozens of highly skilled al Qaeda commanders, trainers,

bomb makers and operatives have been taken off the battlefield. Plots have been disrupted that would have targeted international aviation, U.S. transit systems, European cities and our troops in Afghanistan. Simply put, these strikes have saved lives.

Moreover, America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war—a war waged proportionally, in last resort, and in self-defense.

And yet, as our fight enters a new phase, America's legitimate claim of self-defense cannot be the end of the discussion. To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance. For the same human progress that gives us the technology to strike half a world away also demands the discipline to constrain that power—or risk abusing it. And that's why, over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists—insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance that I signed yesterday.\*

In the Afghan war theater, we must—and will—continue to support our troops until the transition is complete at the end of 2014. And that means we will continue to take strikes against high value al Qaeda targets, but also against forces that are massing to support attacks on coalition forces. But by the end of 2014, we will no longer have the same need for force protection, and the progress we've made against core al Qaeda will reduce the need for unmanned strikes.

Beyond the Afghan theater, we only target al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute. America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.

America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.

Now, this last point is critical, because much of the criticism about drone strikes—both here at home and abroad—understandably centers on reports of civilian casualties. There's a wide gap between U.S. assessments of such casualties and nongovernmental reports. Nevertheless, it is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war. And for the families of those civilians, no words or legal construct can justify their loss. For me, and those in my chain of command, those deaths will haunt us as long as we live, just as we are haunted by the civilian casualties that have occurred throughout conventional fighting in Afghanistan and Iraq.

---

\* Editor's note: A White House Fact Sheet summarizing this Presidential Policy Guidance is discussed in section A.1.c., *infra*.

But as Commander-in-Chief, I must weigh these heartbreaking tragedies against the alternatives. To do nothing in the face of terrorist networks would invite far more civilian casualties—not just in our cities at home and our facilities abroad, but also in the very places like Sana'a and Kabul and Mogadishu where terrorists seek a foothold. Remember that the terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes. So doing nothing is not an option.

Where foreign governments cannot or will not effectively stop terrorism in their territory, the primary alternative to targeted lethal action would be the use of conventional military options. As I've already said, even small special operations carry enormous risks. Conventional airpower or missiles are far less precise than drones, and are likely to cause more civilian casualties and more local outrage. And invasions of these territories lead us to be viewed as occupying armies, unleash a torrent of unintended consequences, are difficult to contain, result in large numbers of civilian casualties and ultimately empower those who thrive on violent conflict.

So it is false to assert that putting boots on the ground is less likely to result in civilian deaths or less likely to create enemies in the Muslim world. The results would be more U.S. deaths, more Black Hawks down, more confrontations with local populations, and an inevitable mission creep in support of such raids that could easily escalate into new wars.

Yes, the conflict with al Qaeda, like all armed conflict, invites tragedy. But by narrowly targeting our action against those who want to kill us and not the people they hide among, we are choosing the course of action least likely to result in the loss of innocent life.

Our efforts must be measured against the history of putting American troops in distant lands among hostile populations. In Vietnam, hundreds of thousands of civilians died in a war where the boundaries of battle were blurred. In Iraq and Afghanistan, despite the extraordinary courage and discipline of our troops, thousands of civilians have been killed. So neither conventional military action nor waiting for attacks to occur offers moral safe harbor, and neither does a sole reliance on law enforcement in territories that have no functioning police or security services—and indeed, have no functioning law.

Now, this is not to say that the risks are not real. Any U.S. military action in foreign lands risks creating more enemies and impacts public opinion overseas. Moreover, our laws constrain the power of the President even during wartime, and I have taken an oath to defend the Constitution of the United States. The very precision of drone strikes and the necessary secrecy often involved in such actions can end up shielding our government from the public scrutiny that a troop deployment invites. It can also lead a President and his team to view drone strikes as a cure-all for terrorism.

And for this reason, I've insisted on strong oversight of all lethal action. After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. Let me repeat that: Not only did Congress authorize the use of force, it is briefed on every strike that America takes. Every strike. That includes the one instance when we targeted an American citizen—Anwar Awlaki, the chief of external operations for AQAP.

This week, I authorized the declassification of this action, and the deaths of three other Americans in drone strikes, to facilitate transparency and debate on this issue and to dismiss

some of the more outlandish claims that have been made. For the record, I do not believe it would be constitutional for the government to target and kill any U.S. citizen—with a drone, or with a shotgun—without due process, nor should any President deploy armed drones over U.S. soil.

But when a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States, nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team.

That's who Anwar Awlaki was—he was continuously trying to kill people. He helped oversee the 2010 plot to detonate explosive devices on two U.S.-bound cargo planes. He was involved in planning to blow up an airliner in 2009. When Farouk Abdulmutallab—the Christmas Day bomber—went to Yemen in 2009, Awlaki hosted him, approved his suicide operation, helped him tape a martyrdom video to be shown after the attack, and his last instructions were to blow up the airplane when it was over American soil. I would have detained and prosecuted Awlaki if we captured him before he carried out a plot, but we couldn't. And as President, I would have been derelict in my duty had I not authorized the strike that took him out.

Of course, the targeting of any American raises constitutional issues that are not present in other strikes—which is why my administration submitted information about Awlaki to the Department of Justice months before Awlaki was killed, and briefed the Congress before this strike as well. But the high threshold that we've set for taking lethal action applies to all potential terrorist targets, regardless of whether or not they are American citizens. This threshold respects the inherent dignity of every human life. Alongside the decision to put our men and women in uniform in harm's way, the decision to use force against individuals or groups—even against a sworn enemy of the United States—is the hardest thing I do as President. But these decisions must be made, given my responsibility to protect the American people.

Going forward, I've asked my administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress. Each option has virtues in theory, but poses difficulties in practice. For example, the establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority. Another idea that's been suggested—the establishment of an independent oversight board in the executive branch—avoids those problems, but may introduce a layer of bureaucracy into national security decision-making, without inspiring additional public confidence in the process. But despite these challenges, I look forward to actively engaging Congress to explore these and other options for increased oversight.

\* \* \* \*

... I intend to engage Congress about the existing Authorization to Use Military Force, or AUMF, to determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing.

The AUMF is now nearly 12 years old. The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to

the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states.

So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That's what history advises. That's what our democracy demands.

And that brings me to my final topic: the detention of terrorist suspects. I'm going to repeat one more time: As a matter of policy, the preference of the United States is to capture terrorist suspects. When we do detain a suspect, we interrogate them. And if the suspect can be prosecuted, we decide whether to try him in a civilian court or a military commission.

During the past decade, the vast majority of those detained by our military were captured on the battlefield. In Iraq, we turned over thousands of prisoners as we ended the war. In Afghanistan, we have transitioned detention facilities to the Afghans, as part of the process of restoring Afghan sovereignty. So we bring law of war detention to an end, and we are committed to prosecuting terrorists wherever we can.

The glaring exception to this time-tested approach is the detention center at Guantanamo Bay. The original premise for opening GTMO—that detainees would not be able to challenge their detention—was found unconstitutional five years ago. In the meantime, GTMO has become a symbol around the world for an America that flouts the rule of law. Our allies won't cooperate with us if they think a terrorist will end up at GTMO.

During a time of budget cuts, we spend \$150 million each year to imprison 166 people -- almost \$1 million per prisoner. And the Department of Defense estimates that we must spend another \$200 million to keep GTMO open at a time when we're cutting investments in education and research here at home, and when the Pentagon is struggling with sequester and budget cuts.

As President, I have tried to close GTMO. I transferred 67 detainees to other countries before Congress imposed restrictions to effectively prevent us from either transferring detainees to other countries or imprisoning them here in the United States.

These restrictions make no sense.

\* \* \* \*

Today, I once again call on Congress to lift the restrictions on detainee transfers from GTMO.

I have asked the Department of Defense to designate a site in the United States where we can hold military commissions. I'm appointing a new senior envoy at the State Department and Defense Department whose sole responsibility will be to achieve the transfer of detainees to third countries.

I am lifting the moratorium on detainee transfers to Yemen so we can review them on a case-by-case basis. To the greatest extent possible, we will transfer detainees who have been cleared to go to other countries.

\* \* \* \*

Now, even after we take these steps one issue will remain—just how to deal with those GTMO detainees who we know have participated in dangerous plots or attacks but who cannot be prosecuted, for example, because the evidence against them has been compromised or is inadmissible in a court of law. But once we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.

\* \* \* \*

We have prosecuted scores of terrorists in our courts. That includes Umar Farouk Abdulmutallab, who tried to blow up an airplane over Detroit; and Faisal Shahzad, who put a car bomb in Times Square. It's in a court of law that we will try Dzhokhar Tsarnaev, who is accused of bombing the Boston Marathon. Richard Reid, the shoe bomber, is, as we speak, serving a life sentence in a maximum security prison here in the United States. In sentencing Reid, Judge William Young told him, "The way we treat you... is the measure of our own liberties."

\* \* \* \*

**b. Attorney General Holder's Letter to Congress**

On May 22, 2013, U.S. Attorney General Eric Holder sent a letter to the chairman of the judiciary committee of the U.S. Senate and others in the U.S. Congress providing previously classified information about U.S. counterterrorism operations in which U.S. civilians were killed. The letter refers to the speech the Attorney General delivered in 2012 at Northwestern University, discussed in *Digest 2012* at 577-84. Excerpts from the Attorney General's May 22, 2013 letter appear below. The letter is available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

...[T]he President has directed me to disclose certain information that until now has been properly classified. You and other Members of your Committee have on numerous occasions expressed a particular interest in the Administration's use of lethal force against U.S. citizens. In light of this fact, I am writing to disclose to you certain information about the number of U.S. citizens who have been killed by U.S. counterterrorism operations outside of areas of active hostilities. Since 2009, the United States, in the conduct of U.S. counterterrorism operations against al-Qa'ida and its associated forces outside of areas of active hostilities, has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi. The United States is further aware of three other U.S. citizens who have been killed in such U.S. counterterrorism operations over that same time period: Samir Khan, 'Abd al-Rahman Anwar al-Aulaqi, and Jude Kenan Mohammed. These individuals were not specifically targeted by the United States.

As I noted in my speech at Northwestern, "it is an unfortunate but undeniable fact" that a "small number" of U.S. citizens "have decided to commit violent attacks against their

own country from abroad.” Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during the current conflict, it is clear and logical that United States citizenship alone does not make such individuals immune from being targeted. Rather, it means that the government must take special care and take into account all relevant constitutional considerations, the laws of war, and other law with respect to U.S. citizens—even those who are leading efforts to kill their fellow, innocent Americans. Such considerations allow for the use of lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa’ida or its associated forces, and who is actively engaged in planning to kill Americans, in the following circumstances: (1) the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; (2) capture is not feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.

These conditions should not come as a surprise: the Administration’s legal views on this weighty issue have been clear and consistent over time. The analysis in my speech at Northwestern University Law School is entirely consistent with not only the analysis found in the unclassified white paper the Department of Justice provided to your Committee soon after my speech, but also with the classified analysis the Department shared with other congressional committees in May 2011—months before the operation that resulted in the death of Anwar al-Aulaqi. The analysis in my speech is also entirely consistent with the classified legal advice on this issue the Department of Justice has shared with your Committee more recently. In short, the Administration has demonstrated its commitment to discussing with the Congress and the American people the circumstances in which it could lawfully use lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa’ida or its associated forces, and who is actively engaged in planning to kill Americans.

Anwar al-Aulaqi plainly satisfied all of the conditions I outlined in my speech at Northwestern. Let me be more specific. Al-Aulaqi was a senior operational leader of al-Qa’ida in the Arabian Peninsula (AQAP), the most dangerous regional affiliate of al-Qa’ida and a group that has committed numerous terrorist attacks overseas and attempted multiple times to conduct terrorist attacks against the U.S. homeland. And al-Aulaqi was not just a senior leader of AQAP—he was the group’s chief of external operations, intimately involved in detailed planning and putting in place plots against U.S. persons.

In this role, al-Aulaqi repeatedly made clear his intent to attack U.S. persons and his hope that these attacks would take American lives. For example, in a message to Muslims living in the United States, he noted that he had come “to the conclusion that *jihad* against America is binding upon myself just as it is binding upon every other able Muslim.” But it was not al-Aulaqi’s *words* that led the United States to act against him: they only served to demonstrate his intentions and state of mind, that he “pray[ed] that Allah [would] destro[y] America and all its allies.” Rather, it was al-Aulaqi’s actions—and, in particular, his direct personal involvement in the continued planning and execution of terrorist attacks against the U.S. homeland—that made him a lawful target and led the United States to take action.

For example, when Umar Farouk Abdulmutallab—the individual who attempted to blow up an airplane bound for Detroit on Christmas Day 2009—went to Yemen in 2009, al-Aulaqi arranged an introduction via text message. Abdulmutallab told U.S. officials that he stayed at al-Aulaqi's house for three days, and then spent two weeks at an AQAP training camp. Al-Aulaqi planned a suicide operation for Abdulmutallab, helped Abdulmutallab draft a statement for a martyrdom video to be shown after the attack, and directed him to take down a U.S. airliner. Al-Aulaqi's last instructions were to blow up the airplane when it was over American soil. Al-Aulaqi also played a key role in the October 2010 plot to detonate explosive devices on two U.S.-bound cargo planes: he not only helped plan and oversee the plot, but was also directly involved in the details of its execution—to the point that he took part in the development and testing of the explosive devices that were placed on the planes. Moreover, information that remains classified to protect sensitive sources and methods evidences al-Aulaqi's involvement in the planning of numerous other plots against U.S. and Western interests and makes clear he was continuing to plot attacks when he was killed.

Based on this information, high-level U.S. government officials appropriately concluded that al-Aulaqi posed a continuing and imminent threat of violent attack against the United States. Before carrying out the operation that killed al-Aulaqi, senior officials also determined, based on a careful evaluation of the circumstances at the time, that it was not feasible to capture al-Aulaqi. In addition, senior officials determined that the operation would be conducted consistent with applicable law of war principles, including the cardinal principles of (1) necessity—the requirement that the target have definite military value; (2) distinction—the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted; (3) proportionality—the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated concrete and direct military advantage; and (4) humanity—a principle that requires us to use weapons that will not inflict unnecessary suffering. The operation was also undertaken consistent with Yemeni sovereignty.

While a substantial amount of information indicated that Anwar al-Aulaqi was a senior AQAP leader actively plotting to kill Americans, the decision that he was a lawful target was not taken lightly. The decision to use lethal force is one of the gravest that our government, at every level, can face. The operation to target Anwar al-Aulaqi was thus subjected to an exceptionally rigorous interagency legal review: not only did I and other Department of Justice lawyers conclude after a thorough and searching review that the operation was lawful, but so too did other departments and agencies within the U.S. government.

The decision to target Anwar al-Aulaqi was additionally subjected to extensive policy review at the highest levels of the U.S. Government, and senior U.S. officials also briefed the appropriate committees of Congress on the possibility of using lethal force against al-Aulaqi. Indeed, the Administration informed the relevant congressional oversight committees that it had approved the use of lethal force against al-Aulaqi in February 2010—well over a year before the operation in question—and the legal justification was subsequently explained in detail to those committees, well before action was taken against Aulqi. This extensive outreach is consistent with the Administration's strong and continuing commitment to

congressional oversight of our counterterrorism operations—oversight which ensures, as the President stated during his State of the Union address, that our actions are “consistent with our laws and system of checks and balances.”

The Supreme Court has long “made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578, 587 (1952). But the Court’s case law and longstanding practice and principle also make clear that the Constitution does not prohibit the Government it establishes from taking action to protect the American people from the threats posed by terrorists who hide in faraway countries and continually plan and launch plots against the U.S. homeland.

The decision to target Anwar al-Aulaqi was lawful, it was considered, and it was just.

This letter is only one of a number of steps the Administration will be taking to fulfill the President’s State of the Union commitment to engage with Congress and the American people on our counterterrorism efforts. This week the President approved and relevant congressional committees will be notified and briefed on a document that institutionalizes the Administration’s exacting standards and processes for reviewing and approving operations to capture or use lethal force against terrorist targets outside the United States and areas of active hostilities; these standards and processes are either already in place or are to be transitioned into place. While that document remains classified, it makes clear that a cornerstone of the Administration’s policy is one of the principles I noted in my speech at Northwestern: that lethal force should not be used when it is feasible to capture a terrorist suspect. For circumstances in which capture is feasible, the policy outlines standards and procedures to ensure that operations to take into custody a terrorist suspect are conducted in accordance with all applicable law, including the laws of war. When capture is not feasible, the policy provides that lethal force may be used only when a terrorist target poses a continuing, imminent threat to Americans, and when certain other preconditions, including a requirement that no other reasonable alternatives exist to effectively address the threat, are satisfied. And in all circumstances there must be a legal basis for using force against the target. Significantly, the President will soon be speaking publicly in greater detail about our counterterrorism operations and the legal and policy framework that governs those actions.

I recognize that even after the Administration makes unprecedented disclosures like those contained in this letter, some unanswered questions will remain. I assure you that the President and his national security team are mindful of this Administration’s pledge to public accountability for our counterterrorism efforts, and we will continue to give careful consideration to whether and how additional information may be declassified and disclosed to the American people without harming our national security.

\* \* \* \*

**c. *Policy and Procedures for Use of Force in Counterterrorism Operations***

As mentioned in President Obama’s speech discussed in section A.1.a., *supra*, the President signed Policy Guidance on May 22, 2013 that establishes a framework governing the use of force in counterterrorism operations outside the United States and

areas of active hostilities. The White House issued a fact sheet about the Policy Guidance, excerpted below and available in full at [www.whitehouse.gov/sites/default/files/uploads/2013.05.23\\_fact\\_sheet\\_on\\_ppg.pdf](http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf).

---

\* \* \* \*

Since his first day in office, President Obama has been clear that the United States will use all available tools of national power to protect the American people from the terrorist threat posed by al-Qa'ida and its associated forces. The President has also made clear that, in carrying on this fight, we will uphold our laws and values and will share as much information as possible with the American people and the Congress, consistent with our national security needs and the proper functioning of the Executive Branch. To these ends, the President has approved, and senior members of the Executive Branch have briefed to the Congress, written policy standards and procedures that formalize and strengthen the Administration's rigorous process for reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United States and outside areas of active hostilities. Additionally, the President has decided to share, in this document, certain key elements of these standards and procedures with the American people so that they can make informed judgments and hold the Executive Branch accountable.

This document provides information regarding counterterrorism policy standards and procedures that are either already in place or will be transitioned into place over time. As Administration officials have stated publicly on numerous occasions, we are continually working to refine, clarify, and strengthen our standards and processes for using force to keep the nation safe from the terrorist threat. One constant is our commitment to conducting counterterrorism operations lawfully. In addition, we consider the separate question of whether force should be used as a matter of policy. The most important policy consideration, particularly when the United States contemplates using lethal force, is whether our actions protect American lives.

#### **Preference for Capture**

The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots. Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with all applicable law and consistent with our obligations to other sovereign states.

#### **Standards for the Use of Lethal Force**

Any decision to use force abroad—even when our adversaries are terrorists dedicated to killing American citizens—is a significant one. Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. Lethal force will be used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. In particular, lethal force will be used outside areas of active hostilities only when the following preconditions are met:

*First*, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.

*Second*, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist does not pose such a threat, the United States will not use lethal force.

*Third*, the following criteria must be met before lethal action may be taken:

- 1) Near certainty that the terrorist target is present;
- 2) Near certainty that non-combatants<sup>[1]</sup> will not be injured or killed;
- 3) An assessment that capture is not feasible at the time of the operation;
- 4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
- 5) An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.

*Finally*, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally – and on the way in which the United States can use force. The United States respects national sovereignty and international law.

### **U.S. Government Coordination and Review**

Decisions to capture or otherwise use force against individual terrorists outside the United States and areas of active hostilities are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise and institutional roles. Senior national security officials—including the deputies and heads of key departments and agencies—will consider proposals to make sure that our policy standards are met, and attorneys—including the senior lawyers of key departments and agencies—will review and determine the legality of proposals.

These decisions will be informed by a broad analysis of an intended target’s current and past role in plots threatening U.S. persons; relevant intelligence information the individual could provide; and the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on U.S. foreign relations, and on U.S. intelligence collection. Such analysis will inform consideration of whether the individual meets both the legal and policy standards for the operation.

### **Other Key Elements**

**U.S. Persons.** If the United States considers an operation against a terrorist identified as a U.S. person, the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States.

---

<sup>[1]</sup> Non-combatants are individuals who may not be made the object of attack under applicable international law. The term “non-combatant” does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.

**Reservation of Authority.** These new standards and procedures do not limit the President's authority to take action in extraordinary circumstances when doing so is both lawful and necessary to protect the United States or its allies.

**Congressional Notification.** Since entering office, the President has made certain that the appropriate Members of Congress have been kept fully informed about our counterterrorism operations. Consistent with this strong and continuing commitment to congressional oversight, appropriate Members of the Congress will be regularly provided with updates identifying any individuals against whom lethal force has been approved. In addition, the appropriate committees of Congress will be notified whenever a counterterrorism operation covered by these standards and procedures has been conducted.

\* \* \* \*

## 2. Potential Use of Force in Syria

After the August 21, 2013 chemical weapons attack by the Syrian government against its own people, the Obama administration stated that it would consider using force to deter future chemical weapons attacks and to degrade Syria's chemical weapons program. On August 31, 2013, President Obama announced that he would seek congressional authorization for such a use of force in Syria. President Obama's statement is excerpted below and available at [www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria](http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria). Secretary Kerry's testimony before the Senate Foreign Relations Committee on September 3, 2013 in support of the authorization of the use of military force in Syria is available at [www.state.gov/secretary/remarks/2013/09/212603.htm](http://www.state.gov/secretary/remarks/2013/09/212603.htm). Secretary Kerry's testimony before the House Foreign Affairs Committee on September 4, 2013 is available at [www.state.gov/secretary/remarks/2013/09/213787.htm](http://www.state.gov/secretary/remarks/2013/09/213787.htm). As discussed in Chapter 19.F.1, Syria agreed to a proposed framework for eliminating its chemical weapons program in September and the U.S. did not take military action.

---

\* \* \* \*

Now, after careful deliberation, I have decided that the United States should take military action against Syrian regime targets. This would not be an open-ended intervention. We would not put boots on the ground. Instead, our action would be designed to be limited in duration and scope. But I'm confident we can hold the Assad regime accountable for their use of chemical weapons, deter this kind of behavior, and degrade their capacity to carry it out.

Our military has positioned assets in the region. The Chairman of the Joint Chiefs has informed me that we are prepared to strike whenever we choose. Moreover, the Chairman has indicated to me that our capacity to execute this mission is not time-sensitive; it will be effective tomorrow, or next week, or one month from now. And I'm prepared to give that order.

But having made my decision as Commander-in-Chief based on what I am convinced is our national security interests, I'm also mindful that I'm the President of the world's oldest constitutional democracy. I've long believed that our power is rooted not just in our military might, but in our example as a government of the people, by the people, and for the people. And that's why I've made a second decision: I will seek authorization for the use of force from the American people's representatives in Congress.

Over the last several days, we've heard from members of Congress who want their voices to be heard. I absolutely agree. So this morning, I spoke with all four congressional leaders, and they've agreed to schedule a debate and then a vote as soon as Congress comes back into session.

In the coming days, my administration stands ready to provide every member with the information they need to understand what happened in Syria and why it has such profound implications for America's national security. And all of us should be accountable as we move forward, and that can only be accomplished with a vote.

I'm confident in the case our government has made without waiting for U.N. inspectors. I'm comfortable going forward without the approval of a United Nations Security Council that, so far, has been completely paralyzed and unwilling to hold Assad accountable. As a consequence, many people have advised against taking this decision to Congress, and undoubtedly, they were impacted by what we saw happen in the United Kingdom this week when the Parliament of our closest ally failed to pass a resolution with a similar goal, even as the Prime Minister supported taking action.

Yet, while I believe I have the authority to carry out this military action without specific congressional authorization, I know that the country will be stronger if we take this course, and our actions will be even more effective. ...

A country faces few decisions as grave as using military force, even when that force is limited. I respect the views of those who call for caution, particularly as our country emerges from a time of war that I was elected in part to end. But if we really do want to turn away from taking appropriate action in the face of such an unspeakable outrage, then we must acknowledge the costs of doing nothing.

Here's my question for every member of Congress and every member of the global community: What message will we send if a dictator can gas hundreds of children to death in plain sight and pay no price? What's the purpose of the international system that we've built if a prohibition on the use of chemical weapons that has been agreed to by the governments of 98 percent of the world's people and approved overwhelmingly by the Congress of the United States is not enforced?

Make no mistake—this has implications beyond chemical warfare. If we won't enforce accountability in the face of this heinous act, what does it say about our resolve to stand up to others who flout fundamental international rules? To governments who would choose to build nuclear arms? To terrorist who would spread biological weapons? To armies who carry out genocide?

We cannot raise our children in a world where we will not follow through on the things we say, the accords we sign, the values that define us.

So just as I will take this case to Congress, I will also deliver this message to the world. While the U.N. investigation has some time to report on its findings, we will insist that an atrocity committed with chemical weapons is not simply investigated, it must be confronted.

\* \* \* \*

But we are the United States of America, and we cannot and must not turn a blind eye to what happened in Damascus. Out of the ashes of world war, we built an international order and enforced the rules that gave it meaning. And we did so because we believe that the rights of individuals to live in peace and dignity depend on the responsibilities of nations. We aren't perfect, but this nation more than any other has been willing to meet those responsibilities.

\* \* \* \*

### **3. Bilateral Agreements and Arrangements**

#### ***a. Implementation of Strategic Framework Agreement with Iraq***

On August 15, 2013, the U.S.-Iraqi Political and Diplomatic Joint Coordination Committee ("PDJCC") held its fourth meeting in Washington, D.C., where it discussed developments in the U.S.-Iraq bilateral and strategic relationship and implementation of the 2008 U.S.-Iraqi Strategic Framework Agreement ("SFA"). For background on the SFA, see *Digest 2008* at 859-62. A joint statement issued by the participants at the conclusion of that meeting is excerpted below, and available at [www.state.gov/r/pa/prs/ps/2013/08/213169.htm](http://www.state.gov/r/pa/prs/ps/2013/08/213169.htm). The State Department also issued a fact sheet on the implementation of the SFA, available at [www.state.gov/r/pa/prs/ps/2013/08/213170.htm](http://www.state.gov/r/pa/prs/ps/2013/08/213170.htm). The meeting was also preceded by a background brief with a senior administration official, available at [www.state.gov/r/pa/prs/ps/2013/08/213182.htm](http://www.state.gov/r/pa/prs/ps/2013/08/213182.htm).

---

\* \* \* \*

The Governments of the Republic of Iraq and the United States of America reaffirmed their strategic partnership during a meeting of the Political and Diplomatic Joint Coordination Committee (JCC) on August 15, in Washington, DC.

This meeting, held at the Department of State, was co-chaired by Secretary Kerry and Iraqi Foreign Minister Hoshyar Zebari. This is the fourth meeting of the Political and Diplomatic JCC since it was established by the 2008 Strategic Framework Agreement (SFA) to strengthen the U.S.-Iraq bilateral and strategic partnership.

The United States offered its full support for Iraq's efforts to strengthen ties within the region. Since the last meeting of this JCC, Iraq and Kuwait made impressive strides before the United Nations, resumed commercial flights between Kuwait City and Baghdad, and completed maintenance of the border pillars along their shared border. The United States was proud to support these diplomatic achievements, which required difficult decisions on both the Iraqi and Kuwaiti sides and have contributed to regional peace and stability.

The United States further reiterated its strong support for Iraq's efforts to increase and deepen dialogue with other regional partners, and emphasized the importance of working together to bolster moderate forces and isolate extremists in the region. The United States also congratulated Iraq on the strong participation by Iraqi Security Forces in joint regional military exercises, such as the recently completed Eager Lion exercise in Jordan. The United States further affirmed its strong commitment to help the Government of Iraq defeat al Qaeda and other terrorist groups that continue to threaten Iraq and the entire Middle East region.

During the meeting, the delegations discussed international efforts to address the ongoing crisis in Syria and explored areas of potential cooperation, particularly on humanitarian issues and consultation on border security to prevent the infiltration of terrorist groups into Iraq. Both sides affirmed their commitment to a Syrian-led political transition leading to a pluralistic political system representing the will of the Syrian people. The United States emphasized the importance of providing refuge and services to those fleeing the violence in Syria. The Iraqi side further reiterated its commitment to deter the transit of weapons through its territory and welcomed in this regard the recent notification to the U.S. Congress of the potential Iraqi purchase of an integrated air defense system to fully protect its sovereign airspace.

Both delegations emphasized their commitment to close and ongoing security cooperation, noting in this regard the Memorandum of Understanding on security cooperation signed at the Defense and Security JCC in December 2012, the inaugural U.S.-Iraq Joint Military Committee (JMC) hosted by U.S. Central Command in June 2013, and the more than \$14 billion in equipment, services, and training purchased by Iraq for its military and security forces through the Foreign Military Sales program. Both delegations pledged to enhance this cooperation in pursuit of their joint interests in denying terrorists a safe haven anywhere within Iraqi territory.

The United States noted the provincial elections held in Iraq earlier this year and discussed Iraq's plans for national elections scheduled for 2014. The United States pledged to assist Iraqi implementation of this next essential step in the development of Iraq's democracy, noting its commitment under the SFA to Iraq's democratic development.

The delegations also discussed President Obama's decision to extend extraordinary protections for the Development Fund for Iraq and emphasized the close partnership that exists between Iraq and the United States on macro-economic issues. The Iraqi side affirmed its commitment to resolve outstanding claims over the coming months to set the conditions for those extraordinary protections to expire in 2014. The two sides also discussed the issue of energy diplomacy and the importance to Iraq and to the global economy of ensuring a steady and redundant supply of energy resources to global markets. This topic will be addressed in further detail at the next Energy JCC to be held pursuant to the Strategic Framework Agreement later this year.

The United States praised the Government of Iraq in passing anti-trafficking legislation and pledged its continued support for the Government of Iraq's efforts to combat trafficking in persons as well as security for all Iraqis.

The United States and the Republic of Iraq committed to continue discussions of these issues through working groups and to convene the next Political and Diplomatic JCC in Baghdad.

\* \* \* \*

**b. *Protocol to the Guam International Agreement***

On October 3, 2013, Secretaries Kerry and Hagel and their Japanese counterparts signed a Protocol to amend the Guam International Agreement (“GIA”) between the United States and Japan, which originally entered into force in 2009. In the original GIA, Japan agreed to contribute up to \$2.8 billion (in U.S. fiscal year 2008 dollars) in cash for facilities and infrastructure on Guam to support the move of 8,000 Marines and their dependents from Okinawa to Guam. The GIA also linked the construction of facilities on Guam to Japanese actions to complete the Futenma Replacement Facility (“FRF”) on Okinawa. Following changes to plans for the realignment of U.S. troops announced in 2012, the United States and Japan agreed to amend the GIA to delink Guam relocation from progress on the FRF, to update the financial figures and certain logistical details, and to address Japan’s funding for the construction of training ranges in Guam and the Commonwealth of the Northern Mariana Islands. The Protocol is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

**4. International Humanitarian Law**

**a. *Protection of civilians in armed conflict***

On February 12, 2013, U.S. Permanent Representative to the UN Susan E. Rice delivered remarks at a Security Council debate on the protection of civilians in armed conflict. Her remarks are excerpted below and available at <http://usun.state.gov/briefing/statements/204513.htm>.

---

\* \* \* \*

Protecting civilians in armed conflict is a fundamental responsibility of the international community and a core function the UN Security Council in carrying out its charge to safeguard international peace and security. The United States knows that its security is diminished when masses of civilians are slaughtered, refugees flee across borders to escape brutal attacks, and murderers wreak havoc on regional stability and livelihoods. Regrettably, history has taught us that our pursuit of a world where states do not systematically slaughter civilians will not arrive without concerted and coordinated action.

And so, nearly a year ago, President Obama announced at the U.S. Holocaust Memorial Museum new actions the United States is taking to implement his landmark policy directive on atrocity prevention. Under the President’s leadership, my government has implemented unprecedented steps to enhance our capabilities and structures for preventing heinous crimes against civilians, from strengthening our early warning and preventive diplomacy to sanctioning perpetrators and pressing for accountability. Our new Atrocities Prevention Board, a committee of senior officials from across the U.S. government, is overseeing this critical work and ensuring

that we are focused on emerging situations of concern. But while national action is necessary, it is not sufficient. International, collective action is required, and we look forward to strengthening our cooperation with the United Nations and member states to that end.

Few are more likely to be the victims of mass atrocities than civilians caught in armed conflict. Time and again—and all too often—the world bears witness to the horror of mass killings, sexual violence and gross human rights abuses of innocents in conflict. Therefore, protecting civilians in armed conflict must remain a top priority of this Council and the United Nations as a whole. Though we must never relent in this effort, we are encouraged that the United Nations has made strides in enhancing UN tools to protect civilians. We commend the Secretariat's efforts to help UN field missions develop operational guidance and mission-wide strategies to implement their civilian protection mandates. The recently-released UN study entitled *Protection of Civilians: Coordination Mechanisms in UN Peacekeeping Missions* highlights several mechanisms for executing protection of civilians mandates successfully. Simple but practical tools—many focused on internal procedures and mission structure—enable mission focal points to integrate mission activities in support of protection mandates. The UN Mission in South Sudan, for example, produced an integrated strategy that led to an innovative early warning system and County Support Bases that enable better protection of rural populations.

Mission-wide strategies depend on missions really understanding the threats and violence civilians face in their area of operation. When peacekeepers know their local environments well, they are better able to protect civilians. Such detailed knowledge requires active and sustained engagement with local populations. We encourage UN missions with protection mandates to assess in their reports and briefings to this Council the threats and vulnerabilities facing civilians in their area of operation. We also urge mission-wide strategies to anticipate and outline steps to counter any escalation in violence against civilians that could culminate in mass atrocities. UN missions should proactively explain their role in protecting civilians to local communities.

Beyond a sophisticated understanding of their areas of operation, peacekeepers need strong training in civilian protection. The United States invests significantly in peacekeeper training, and we urge all peacekeeping training centers to adopt the UN's innovative training guidance on protection of civilians. Such training should be standardized and required for every peacekeeper.

For all that UN peacekeepers and field missions can do, let us not forget that national governments always bear primary responsibility for protecting their own populations. In some countries, governments are manifestly failing in this responsibility, often because of insufficient capacity or will to address the problem. In some countries, moreover, governments condone and even perpetrate atrocities against their own people. Through our statements, resolutions and diplomacy, this Council must continue pressing governments to fulfill their obligations.

In this regard, I want to highlight the horrific attacks by the Syrian regime on the Syrian people, including the widely reported targeting of hospitals and health centers and the use of ballistic missiles against civilian populations. The carnage unleashed by Asad merits universal indignation and strong action from this Council. When the people of Libya were on the verge of being slaughtered by a brutal dictator, this Council acted, prevented a massacre, and saved countless lives. This should remind us that for civilians in conflict, Security Council action can mean the difference between life and death.

In the 2005 World Summit Outcome Document and in UN Security Council resolution 1674, all UN Member States accepted a shared responsibility to protect populations from genocide, ethnic cleansing, crimes against humanity, and war crimes. While we continue to elaborate application of this principle, when governments manifestly fail to protect their civilians, the international community must not dither but rather act decisively to assume its responsibility collectively to protect.

Another fundamental but often overlooked principle of protecting civilians is ensuring humanitarian access. No UN Member State, nor any non-state actor, should ever prevent timely, full, and unimpeded humanitarian access to populations in need of assistance. Yet the Government of Sudan has refused for now a year and a half to permit the safe and unhindered provision of international humanitarian assistance to address the acute humanitarian emergency in Southern Kordofan and Blue Nile states, particularly the SPLM-North controlled areas, which is largely of Khartoum's making. Since 2011, more than 214,000 refugees have crossed into Ethiopia and South Sudan and 695,000 have been displaced within the Two Areas. This is appalling and unacceptable. In this and other such situations, we commend the service and dedication of the humanitarian workers who help the world's most vulnerable at great risk to themselves. Attacks against humanitarian workers are deplorable and should be condemned wherever committed.

Mr. President, we fully support the Secretary-General's call for this Council to be more active in addressing violations of international law and to strengthen accountability. The United States strongly rejects impunity and supports efforts to hold accountable violators of international humanitarian and human rights law. Our longstanding support of international tribunals and efforts to document ongoing atrocities in such places as Syria reflect this commitment. Recent events, including the conviction of Charles Taylor by the Special Court for Sierra Leone and the International Criminal Court's judgment against Thomas Lubanga Dyilo of the Democratic Republic of the Congo, show us that accountability for those who commit atrocities and justice for their victims is possible. Yet, too many perpetrators remain free. This Council needs the facts and strong reporting to help bring to justice the perpetrators of crimes against civilians.

President Obama has declared that preventing mass atrocities is a core national security interest and a core moral responsibility of the United States. The protection of civilians is a fundamental element of the Security Council's obligation to ensure international peace and security. It is clear that we must keep our attention focused squarely on the practical steps we can take to enhance the protection of civilians in armed conflict and redouble our efforts to ensure that this Council is not sitting on the sidelines when civilian populations are in grave danger.

\* \* \* \*

On August 19, 2013, U.S. Deputy Permanent Representative to the UN Rosemary DiCarlo addressed a Security Council open debate on the protection of civilians in armed conflict. Her remarks, excerpted below, are available in full at <http://usun.state.gov/briefing/statements/213271.htm>.

---

\* \* \* \*

Madam President we see the horrific consequences when access to those in need is blocked, as in Syria; when the government's armed forces and armed rebel groups traumatize civilian populations, as in the Democratic Republic of the Congo; and when impunity prevails and the perpetrators of atrocities are not held accountable, as in the Central African Republic. These devastating situations are particularly acute when community leaders—journalists, activists, religious figures, and scholars—are targeted for the critical work they do to sound the alarm, protect the vulnerable, and foster peace and reconciliation.

Today's discussion is of great importance to the United States. We have made protection of civilians a priority, and, indeed, President Obama has made it clear that for the United States the deterrence of genocide and atrocities is "a core national security interest and core moral responsibility." Too often warring parties fall short or blatantly disregard their obligations altogether. In truly appalling cases, including ongoing tragedies, as in Syria and in Sudan, parties to armed conflict deliberately target civilians. It is clear we must strengthen our commitment in the three key areas that Argentina has rightly highlighted for this debate: enhancing compliance with international humanitarian law; improving humanitarian access to areas in conflict; and ensuring effective accountability mechanisms for suspected war crimes.

Madam President, despite a strong body of international humanitarian law dedicated to protecting civilian populations in armed conflict, the Secretary General notes that most victims in recent armed conflicts have been civilians. In Syria, over 100,000 people have tragically lost their lives. Among these are innocent civilians including women and children who should have been safe from violence. We need to use the tools at hand to improve compliance with IHL to prevent the loss of innocent lives. In the context of this Council work, this means supporting and advancing the tools we have, including the Children and Armed Conflict Action Plans and the "naming and shaming" of perpetrators of sexual violence. It also means supporting the work of organizations like the ICRC, which helps promote IHL compliance and respect for legal and moral norms. And for each of our governments, it means raising awareness—especially through military training—about IHL and supporting the work of internal accountability mechanisms in our own governments and in the governments of other countries to which we offer assistance. This is why the international community's military training work, including in countries like Afghanistan, is a critical component of fostering international peace and security while also ensuring the protection of civilians.

Humanitarian access is critical to protecting civilians. Timely, full, and unimpeded humanitarian access to populations in need of assistance must make the top priority for everyone. This is as true in Syria as it is in Sudan, where millions of vulnerable civilians lack access to food, water, shelter, and medicine. In addition to access, personnel engaged in humanitarian activities should be free from targeting and attack. As we have heard today, attacks against humanitarian personnel have continued unabated around the world. Attacks like the one on the UN compound in Mogadishu in June prevent humanitarian agencies from undertaking their life-saving work and should be condemned wherever and whenever committed.

Finally, without accountability, the cycles of violence continue. The United States strongly rejects impunity and supports the international community's efforts to foster stability and sustainable peace through justice. In this regard, we have worked with national authorities to

strengthen domestic judicial systems in conflict through post-conflict situations, including by funding military justice efforts in the eastern DRC, where rebel groups and the military have used rape as a weapon of war, among other atrocities. We have also strongly supported international justice mechanisms and endorse efforts to expose and document human rights abuses, including through international tribunals and commissions. In Syria, the United States is helping Syrians prepare for accountability by supporting the documentation of violations committed by all sides of the conflict and bolstering the capacity of civil society organizations to build the foundations for lasting peace. In addition, we cooperate with the International Criminal Court on its current cases consistent with U.S. law and policy, including through the recent expansion of our Rewards for Justice Program to include foreign nationals indicted by international criminal tribunals including the ICC.

Madam President, as we have seen from Syria and Sudan to the Sahel and the Great Lakes, failure to protect civilians threatens regional stability as conflicts escalate and populations stream across borders. Protecting civilians is the primary responsibility of states, but it is clear that the international community must keep our attention focused sharply on the practical steps we can take to improve the protection of civilians in armed conflict and we must redouble our efforts to ensure that this Council is not sitting on the sidelines when civilian populations are in grave danger.

\* \* \* \*

**b. *Applicability of international law to conflicts in cyberspace***

On June 7, 2013, the State Department issued a press statement on the consensus achieved by the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security. The press statement is excerpted below and available in full at [www.state.gov/r/pa/prs/ps/2013/06/210418.htm](http://www.state.gov/r/pa/prs/ps/2013/06/210418.htm). The report of the Group of Governmental Experts is U.N. Doc. A/68/98.

---

\* \* \* \*

Through these discussions, the United States sought to achieve common understanding on cyber issues of critical national and international significance, particularly: the need to promote international stability, transparency and confidence in cyberspace; that existing international law should guide state behavior with regard to the use of cyberspace; and how the international community can help build the cybersecurity capacity of less-developed states. Our delegation leaves New York confident that the consensus report issued by the Group makes substantial progress on all these issues.

The Group agreed that confidence building measures, such as high-level communication and timely information sharing, can enhance trust and assurance among states and help reduce the risk of conflict by increasing predictability and reducing misperception. The Group agreed on the vital importance of capacity building to enhance global cooperation in securing cyberspace.

The Group reaffirmed the importance of an open and accessible cyberspace, as it enables economic and social development. And, the Group agreed that the combination of all these efforts support a more secure cyberspace.

Furthermore, the Group affirmed that international law, especially the UN Charter, applies in cyberspace.

All UN member states share a common commitment to the pursuit of peace. We are all parties to the UN Charter, which seeks to prevent war of all kinds. We also subscribe to the Geneva Conventions and the Law of Armed Conflict, which are aimed at minimizing civilian suffering when armed conflict occurs. These norms are a cornerstone of international relations and are particularly important for cyberspace, where state-on-state activities are becoming more prevalent.

The United States is pleased to join consensus to affirm the applicability of international law to cyberspace. With that clear affirmation, this consensus report sends a strong signal: states must act in cyberspace under the established international rules and principles that have guided their actions for decades—in peacetime and during conflict.

The United States looks forward to future dialogue on these issues with the international community.

\* \* \* \*

On June 17, 2013, the White House released the Joint Statement by the Presidents of the United States of America and the Russian Federation on a New Field of Cooperation in Confidence Building. The Joint Statement appears below and is available at [www.whitehouse.gov/the-press-office/2013/06/17/joint-statement-on-a-new-field-of-cooperation-in-confidence-building](http://www.whitehouse.gov/the-press-office/2013/06/17/joint-statement-on-a-new-field-of-cooperation-in-confidence-building).

---

\* \* \* \*

We, the Presidents of the United States of America and the Russian Federation, recognize the unprecedented progress in the use of Information and Communications Technologies (ICTs), the new capacity they create for the economies and societies of our countries, and the increasing interdependence of the modern world.

We recognize that threats to or in the use of ICTs include political-military and criminal threats, as well as threats of a terrorist nature, and are some of the most serious national and international security challenges we face in the 21st Century. We affirm the importance of cooperation between the United States of America and the Russian Federation for the purpose of enhancing bilateral understanding in this area. We view this cooperation as essential to safeguarding the security of our countries, and to achieving security and reliability in the use of ICTs that are essential to innovation and global interoperability.

Demonstrating our commitment to promoting international peace and security, today we affirm the completion of landmark steps designed to strengthen relations, increase transparency, and build confidence between our two nations:

- To create a mechanism for information sharing in order to better protect critical information systems, we have established a communication channel and information sharing arrangements between our computer emergency response teams;
- To facilitate the exchange of urgent communications that can reduce the risk of misperception, escalation and conflict, we have authorized the use of the direct communications link between our Nuclear Risk Reduction Centers for this purpose;
- Finally, we have directed officials in the White House and the Kremlin to establish a direct communication link between high-level officials to manage potentially dangerous situations arising from events that may carry security threats to or in the use of ICTs.

We have decided to create (in the framework of the U.S.-Russia Bilateral Presidential Commission) a bilateral working group on issues of threats to or in the use of ICTs in the context of international security that is to meet on a regular basis to consult on issues of mutual interest and concern. This working group is to assess emerging threats, elaborate, propose and coordinate concrete joint measures to address such threats as well as strengthen confidence. This group should be created within the next month and should immediately start its practical activities.

These steps are necessary in order to meet our national and broader international interests. They are important practical measures which can help to further the advancement of norms of peaceful and just interstate conduct with respect to the use of ICTs. To further deepen our relationship, relevant agencies of our countries plan to continue their regular dialogue and to identify additional areas for mutually-beneficial cooperation in combating threats to or in the use of ICTs.

\* \* \* \*

The White House also issued a fact sheet on June 17, 2013 regarding the confidence building measures relating to security in cyberspace undertaken with Russia. The fact sheet is excerpted below and available at [www.whitehouse.gov/the-press-office/2013/06/17/fact-sheet-us-russian-cooperation-information-and-communications-technol](http://www.whitehouse.gov/the-press-office/2013/06/17/fact-sheet-us-russian-cooperation-information-and-communications-technol).

---

\* \* \* \*

The United States and the Russian Federation have also concluded a range of steps designed to increase transparency and reduce the possibility that a misunderstood cyber incident could create instability or a crisis in our bilateral relationship. Taken together, they represent important progress by our two nations to build confidence and strengthen our relations in cyberspace; expand our shared understanding of threats appearing to emanate from each other's territory; and prevent unnecessary escalation of ICT security incidents.

*Links between Computer Emergency Response Teams*

To facilitate the regular exchange of practical technical information on cybersecurity risks to critical systems, we are arranging for the sharing of threat indicators between the U.S. Computer Emergency Readiness Team (US-CERT), located in the Department of Homeland Security, and its counterpart in Russia. On a continuing basis, these two authorities will

exchange technical information about malware or other malicious indicators, appearing to originate from each other's territory, to aid in proactive mitigation of threats. This kind of exchange helps expand the volume of technical cybersecurity information available to our countries, improving our ability to protect our critical networks.

*Exchange of Notifications through the Nuclear Risk Reduction Centers*

To prevent crises, the United States and Russia also recognize the need for secure and reliable lines of communication to make formal inquiries about cybersecurity incidents of national concern. In this spirit, we have decided to use the longstanding Nuclear Risk Reduction Center (NRRC) links established in 1987 between the United States and the former Soviet Union to build confidence between our two nations through information exchange, employing their around-the-clock staffing at the Department of State in Washington, D.C., and the Ministry of Defense in Moscow. As part of the expanded NRRC role in bilateral and multilateral security and confidence building arrangements, this new use of the system allows us to quickly and reliably make inquiries of one another's competent authorities to reduce the possibility of misperception and escalation from ICT security incidents.

*White House-Kremlin Direct Communications Line*

Finally, the White House and the Kremlin have authorized a direct secure voice communications line between the U.S. Cybersecurity Coordinator and the Russian Deputy Secretary of the Security Council, should there be a need to directly manage a crisis situation arising from an ICT security incident. This direct line will be seamlessly integrated into the existing Direct Secure Communication System ("hotline") that both governments already maintain, ensuring that our leaders are prepared to manage the full range of national security crises we face internationally.

These confidence-building measures supplement an earlier exchange of White Papers between our two countries. Both our militaries are actively examining the implications of ICTs for their planning and operations. As we work to create predictability and understanding in the political-military environment, both the U.S. and Russian militaries have shared unclassified ICT strategies and other relevant studies with one another. These kinds of exchanges are important to ensuring that as we develop defense policy in this dynamic domain, we do so with a full understanding of one another's perspectives.

\* \* \* \*

**c. *Private military and security companies***

On September 19, 2013, U.S. Ambassador to the UN in Geneva Betty King delivered remarks at the launch of the International Code of Conduct for Private Security Service Providers ("ICoC") Association. For background on the new association, including the Articles of Association, see [www.icoc-psp.org](http://www.icoc-psp.org). For additional background on the ICoC process, see *Digest 2010* at 740-42. Ambassador King's remarks are excerpted below and available at <http://geneva.usmission.gov/2013/09/19/icoc/>.

---

\* \* \* \*

Let me start by thanking our hosts and acknowledging the critical role that the Swiss Government has played in this initiative since its inception. As most of you know, together with the ICRC, the Swiss co-facilitated the process that led to the development of the Montreux Document on private military and security companies in 2008. And when private security companies expressed an interest in developing sector-specific guidance based on the Montreux Document, the Swiss agreed to sponsor the process that eventually resulted in 2010 in the ICoC. Since then, the Swiss have facilitated the work of the multi-stakeholder Temporary Steering Committee (TSC), including through the support of the Geneva Center for the Democratic Control of Armed Forces (DCAF). Most recently, the Swiss government generously committed to providing over one million dollars of in-kind assistance to the Association over the next two years. Without their consistent and far-sighted support, this initiative would not be where it is today.

\* \* \* \*

In addition to the countless hours that our team of experts from the Departments of State and Defense has already dedicated to this initiative, today I am pleased to announce that the United States looks forward to providing, subject to the availability of funds, a package of in-kind and financial support for the initiative along the lines of that provided by other governments. Beginning next year, the U.S. government intends to provide staff support for the certification function of the Association. In addition, we intend to provide grant funds for the Association to use in carrying out its monitoring function. This is in addition to the time, energy, and funding that our colleagues in the Defense Department have invested over the last few years in fostering the development, under the auspices of the American National Standards Institute, of the PSC 1 and 2 management and conformity assessment standards, which are based on the Code. Finally, aware of the influence we have and the role we play as a client and regulator in this sector, we have committed to using our contracting processes to support this process. For instance, the Defense Department currently requires conformance with the PSC 1 standard for its private security contracts and the Department of State has committed to requiring conformance with the same, as well as membership in the ICoC Association, as a condition for bidding on its next Worldwide Protective Services contract.

We support this initiative because we recognize the important role that private security providers play in complex environments. While it is undeniably the role of governments to provide security within their jurisdictions, private security providers support those efforts in contexts where state capacity is limited. It is precisely in these complex environments—areas of weak or non-existent state capacity—that private security providers can facilitate vital efforts that are central to our foreign policy and security objectives. Although private security companies help safeguard U.S. government facilities and personnel, the bulk of their work is devoted to the critical tasks of protecting humanitarian organizations delivering essential food, water, and medicine; development organizations providing support for strategic sectors; and critical private sector investments. However, it is in these same complex environments that private security company activity, if not properly managed, can most easily contribute to further destabilization and adverse human rights impacts.

We have supported this initiative and will continue to do so because we believe it can play an important role in improving the standards for, and conduct of, private security companies operating in complex environments. This is imperative because, while we do our best to ensure responsible conduct by those PSCs which we contract and supervise, misconduct by other PSCs can sour public perceptions and undermine the positive impact of all PSCs. The United States believes that the principle method for regulating this sector must be through responsible, domestic legislation and regulation. That said, we also believe that multistakeholder initiatives like the ICoC, can and do play an important role in raising industry standards and encouraging the development of effective regulations by facilitating shared learning, monitoring performance, identifying best practices, and facilitating the resolution of complaints.

This association, together with the ongoing development of international standards, will breathe life into the Code by creating an effective and independent governance mechanism that will promote respect for and adherence to the human rights principles and the law of armed conflict set forth in the Code. We see this as an important sector-specific development in-line and consistent with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Through the adoption and implementation of standards based on the Code, companies are required to develop systems and policies to ensure proper due diligence, impact assessment, and grievance mechanisms. That is the starting point. Beyond that, the companies that become members of this Association are also committing to on-going reporting to, and monitoring by, the Association, as well as its facilitation of the resolution of complaints. These are meaningful commitments that can produce real results, and the companies that join this Association—especially those that have been involved in its development and committed to joining it from the start—should be commended for their leadership. The civil society organizations that have become founding members also deserve recognition for their willingness to participate in and lend their expertise to a process designed to build trust and constructive engagement among stakeholders that don't always see eye-to-eye.

In closing, the United States is honored to be a founding member of this initiative. There is much that remains to be done, and the soon-to-be introduced individuals who will make up the first Board of Directors all deserve our support... and probably our prayers! Though the challenges may be daunting, we should be proud of and motivated by the fantastic work that has been done to date. The United States will continue to work constructively to build on that success and ensure that this initiative demonstrates the potential of dedicated, well-intentioned companies, states, and non-governmental organizations to work together to effect meaningful change on the ground.

\* \* \* \*

In December, the United States participated in the Montreux+5 conference, commemorating the five-year anniversary of the adoption of the Montreux Document, which addresses international legal issues related to operations of private military and security companies ("PMSCs") during armed conflict. See *Digest 2010* at 740-42 regarding U.S. endorsement of principles articulated in the Montreux Document. Prior to the conference, the United States submitted a response to a questionnaire regarding its compliance with the international legal obligations and best practices contained in

the Montreux Document. Excerpts from the U.S. submission follow. The submission in its entirety is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

**1. Provide examples, if any, of how you have determined which services may or may not be contracted out to PMSCs. If you have done so, please specify what and how services are limited, and how you take into account factors such as whether those services could cause PMSC personnel to become involved in direct participation in hostilities. Please indicate by what means you do this (e.g., national legislation, regulation, policy, etc.). [GP 1, 24, 53]**

As a matter of U.S. law and policy, an “inherently governmental function” (IG function) cannot be contracted out. The Federal Activities Inventory Reform (FAIR) Act of 1998 defines an IG function as “a function so intimately related to the public interest as to require performance by Federal Government employees.” A number of U.S. statutory, regulatory, and agency provisions provide additional guidance regarding what constitutes an IG function and designate specific functions as IG or commercial.

Under policy guidance applicable to all executive branch departments and agencies, ... IG functions that may not be contracted out include the command of military forces, combat, security operations performed in direct support of combat as part of a larger integrated armed force, security that entails augmenting or reinforcing others that have become engaged in combat, and security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat. Where the U.S. military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat.

Department of Defense Instruction 1100.22, *Policies and Procedures for Workforce Mix*, April 12, 2010, defines combat operations and provides further guidance on when the provision of security services would be IG. The instruction defines combat operations as the deliberate destructive and/or disruptive action against the armed forces or other military objectives of another sovereign government or against other armed actors on behalf of the United States. This entails the authority to plan, prepare, and execute operations to actively seek out, close with, and destroy a hostile force or other military objective by means of, among other things, the employment of firepower and other destructive and disruptive capabilities. These functions may not be performed by contractor personnel.

Security provided for the protection of resources (people, information, equipment, supplies, facilities, etc.) and operations in uncontrolled, unpredictable, unstable, high risk, or hostile environments inside or outside the United States entail a wide range of capabilities, some of which are IG and others of which are commercial. Security is IG if it is performed in environments where there is such a high likelihood of hostile fire, bombings, or biological or chemical attacks by groups using sophisticated weapons and devices that, in the judgment of the military commander, the situation could evolve into combat. Security performed in such high-risk environments is designated for military performance, and private security contracts are not a force structure substitute for these requirements.

Security is also IG if, in the commander's judgment, decisions on the appropriate course of action would require substantial discretion, the outcome of which could significantly affect U.S. objectives with regard to the life, liberty, or property of private persons, a military mission, or international relations. Such actions typically require high-risk, on-the-spot judgments regarding the appropriate level of force, the acceptable level of collateral damage, and whether the target is friend or foe in situations pivotal to U.S. interests. This type of security requires command decisions, military training, and operational control, and it is reserved for military personnel. Combatant Commander Orders implement these instructions and forbid private security contractors (PSCs) from taking a direct part in combat operations, combat-like operations, offensive operations, quick reaction force missions, cordon and search operations, or other uniquely military functions.

PSCs under the Department of State's Worldwide Protective Services (WPS) contract do not perform IG functions, as the security services they provide are solely protective and defensive in nature. The WPS contract provides the State Department with movement security, specialized emergency services, and guard services for U.S. diplomatic missions overseas. Although not all WPS task orders are carried out in areas of armed conflict, the provisions and practices under the WPS contract are cited herein to demonstrate how the legal obligations and good practices set forth in the Montreux Document are being implemented where WPS contractors are providing services in areas of armed conflict.

**2. Indicate if you require PMSCs to obtain an authorization to provide any one or more private military and security services. This may include whether PMSCs and/or individuals are required to obtain licenses. [GP 25, 26, 54]**

Pursuant to the Arms Export Control Act (AECA), as implemented through the International Trade in Arms Regulations (ITAR) (available at: [http://pmdtc.state.gov/regulations\\_laws/itar\\_official.html](http://pmdtc.state.gov/regulations_laws/itar_official.html)), the United States controls the export and import of defense articles, including technology, and defense services. Any person wishing to export these items must register with the Department of State prior to exporting any item. A license or other authorization is required for the export of "defense articles," which includes weapons, other military material, and items or technology with specific military applications. Further, a license or other authorization is required for the export of "defense services," which is defined as the furnishing of assistance, including training to foreign persons whether in the United States or abroad in the development, design, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of a defense article. Accordingly, the export of the training in the maintenance and operation of weapons systems and advice to, or training of, local forces and security personnel, as described in the definition of PMSCs in paragraph nine of the Preface of the Montreux Document, constitute a "defense service" under ITAR. Specific weapons, material, technology, and defense services covered by ITAR are found on the United States Munitions List (USML) and set forth in Part 121 of the ITAR.

\* \* \* \*

**4. Provide details of procedures for the authorization and/or selection and contracting of PMSCs and their personnel [GP 2, 28, 57]. Please include details of how you ensure adequate resources are applied to this function [GP 3, 27, 58] and examples of how such procedures are transparent and supervised. [GP 4, 29, 59]**

The U.S. Government has extensive experience in selecting and contracting for private security services. The Federal acquisition process is governed by the Federal Acquisition Regulations (FAR) found at Title 48 of the Code of Federal Regulations (CFR). The FAR provides standardized contract clauses, and Requests for Proposals (RFPs) indicate the elements upon which contract award decisions will be based.

The Defense Federal Acquisition Regulation Supplement (DFARS) and the Department of State Acquisition Regulation (DOSAR) provide acquisition procedures specific to the Departments of Defense and State, respectively. In addition, procedures for soliciting and awarding contracts in armed conflict and comparable situations can be found in the Defense Contingency Contracting (DCC) Handbook, available at:

<http://www.acq.osd.mil/dpap/ccap/cc/jcchb/index.html>. Solicitations for contracts are publicly available and can be accessed through a number of sources, including:

<https://www.fbo.gov/index?cck=1&au=&ck=>> and [http://www.defense.gov/landing/contract\\_resources.aspx](http://www.defense.gov/landing/contract_resources.aspx). Contract awards are published on a publicly available website at: <http://www.defense.gov/Contracts/default.aspx>.

DFARS Part 225.74 addresses the requirements for contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States. The supporting Procedures, Guidance, and Information (PGI) 225-7401(a) requires potential DoD contractors to be informed that they must be in compliance with ANSI/ASIS PSC.1-2012, American National Standard, *Management System for Quality of Private Security Operations—Requirements with Guidance* (hereafter “the PSC Standard”). Successful offerors will include evidence that the company is in compliance with that standard.

The Department of State anticipates that conformance with the PSC Standard will be a requirement in the bidding process for the successor WPS contract, which provides the Department with movement security, specialized emergency services, and guard services for U.S. diplomatic missions overseas. The Department also plans to make membership in the International Code of Conduct Association (ICoCA) a requirement in the bidding process for the successor WPS contract, so long as the process moves forward as expected and the association attracts significant industry participation.

The Department of Defense has more than 20,000 warranted Contracting Officers (COs) and more than twice as many trained and certified Contracting Officer’s Representatives (CORs) to assist in the selection and contracting of DoD contracted support, including services provided by PSCs and other services as described in paragraph 9(a) of the Preface to the Montreux Document. Duties and performance expectations of CORs can be found in the Defense Contingency Contracting Officer Representative (COR) Handbook, available at: <http://www.acq.osd.mil/dpap/ccap/cc/corhb/index.html>.

**5. To what degree have you sought to harmonize any authorization system with those of other States. [GP 56]**

The United States has worked closely with other Contracting States and Home States to secure wide acceptance of the PSC Standard. The United Kingdom has adopted the PSC

Standard for use in its overseas contracts for private security services, and the International Organization for Standardization has accepted the PSC Standard for development as an international standard. The Department of Defense also provides staff and faculty assistance for international education and outreach on PMSC-related issues.

The United States has actively participated in other international harmonization efforts, such as the ICoC and the establishment of the ICoCA. The United States is also a founding member of the Advisory Forum of Montreux Document Participants. The forum will provide an informal venue for Montreux Document participating states to share information to promote the implementation of the legal obligations and good practices set forth in the Montreux Document.

**6. Provide details on criteria that have been adopted that include quality indicators to ensure respect of relevant national law, international humanitarian law and human rights law. Indicate how you have ensured that such criteria are then fulfilled by the PMSC. [GP 5, 30] If relevant, please indicate if lowest price is not the only criterion for the selection of PMSCs. [GP 5]**

Through contracting requirements and rigorous oversight, the Departments of Defense and State have implemented measures to help ensure the high quality performance of government-contracted PSCs in conformance with applicable national and international laws. COs within the Departments of Defense and State provide contract management and oversight of government contracts, including those for PSC services, to ensure compliance with applicable contract requirements and standards. The CO possesses the sole authority to enter into or modify a contract on behalf of the U.S. Government. The CO may delegate authority to a COR and other government contract administration personnel to assist in the administration of the contract or task order.

The Security Branch, within the Department of State's Office of Acquisitions Management, administers and oversees all PSC contracts utilizing consistent best practices in accordance with the FAR. The specific duties and authorities of Department of State contract administration personnel are detailed in the delegation letter issued by the CO. Contract administration personnel must be familiar with the base contract and any task orders for which they are responsible and must maintain official written records to document contractor performance. These records are used to substantiate contractor performance assessments documented in periodic reports by the COR to the CO.

Lowest price is not the only criterion for the selection of PMSCs. In both Departments, contracts and task orders under existing contracts are negotiated and awarded on a "best value" basis when the expected outcome of the acquisition in the Government's estimation provides the greatest overall benefit in response to the requirement. 48 CFR 15.302, *Contracting by Negotiation*, provides that "[t]he objective of source selection is to select the proposal that represents the best value." By contrast, lowest price technically acceptable (LPTA) source selection is appropriate when the expectation is that best value will result from selection of the technically acceptable proposal with the lowest evaluated price.

One means of determining minimal technically acceptable performance is through the use of performance standards. Using this process, the emphasis that cost is given in an evaluation of proposals will not carry significant weight if the offeror cannot demonstrate the ability to meet applicable performance standards. As noted above, PGI 225.7401(a) requires DoD acquisitions involving the performance of security services, as defined in 48 CFR 252.225-7039, in areas of

combat operations, contingency operations, or other military operations or exercises, to incorporate, and require compliance with, the PSC Standard. The Department of State anticipates requiring Contractors to demonstrate conformance with the PSC Standard in order to bid on the successor WPS contract. The PSC Standard provides quality indicators for the performance of PSC-related services, and is supported by ANSI/ASIS PSC.2-2012, *Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations*, and ANSI/ASIS PSC.3-2013, *Maturity Model for the Phased Implementation of a Quality Assurance Management System for Private Security Service Providers*, which provides requirements and guidance for assessing a contractor's conformity with the PSC Standard.

The Defense Contract Auditing Agency (DCAA) audits contractor performance on all Department of Defense contracts, as well as the Department of State's WPS task orders, and the Defense Contract Management Agency and the State Department's Office of Acquisitions Management assess contractor performance on DoD contracts and the WPS contract, respectively. Contractor performance is also subject to audit by Special Inspector Generals and the Offices of Inspector General (OIG) at the Departments of Defense and State.

**7. Describe how the following elements, if any, are considered in authorization or selection procedures and criteria. Please also indicate to what degree they are included in terms of contract with, or terms of authorization of, PMSCs or their personnel [GP 14, 39, 40, 67]:**

Section 862 of the National Defense Authorization Act of 2008 (Public Law 110-181), as amended ["Section 862"], mandated that the Secretary of Defense, in coordination with the Secretary of State, prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions in designated areas of combat operations, including certain contingency operations and other significant military operations as appropriately designated (hereinafter "designated areas"). The final rule, entitled *Private Security Contractors (PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations* (32 CFR 159), implements this statutory requirement. Section 862 also required revision of the FAR to require contractors to comply with the policies established in 32 CFR 159. The FAR was revised accordingly by adding sections 25.302 through 25.302-6 to subpart 25.3. 48 CFR 25.302-6 requires all covered contracts to include the clause contained at 52.225-26, *Contractors Performing Private Security Functions Outside the United States*, which, in turn, requires PSCs under covered contracts to ensure that their personnel comply with the policies set forth in 32 CFR 159. In addition, the WPS contract incorporates the requirements of 48 CFR 52.225-19, *Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States*.

During the acquisition process, PSCs are evaluated on their ability to comply with these regulations and the solicitation requirements, which address elements (a)-(h), below. Offerors whose proposals do not meet these requirements are deemed technically unacceptable or nonresponsible and are ineligible for contract award.

**a. past conduct [GP 6, 32, 60].**

48 CFR 25.302-6 requires contracts for private security functions in designated areas to specify that "the Contractor's failure to comply with the requirements of this clause [the clause at 48 CFR 52.225-26] will be included in appropriate databases of past performance and considered in any responsibility determination or evaluation of past performance." The database used to

track this information is the Contractor Performance Assessment Reporting System (CPARS). Reports in CPARS assess contractor performance and provide a record, both positive and negative, of the contractor during a specified period of time. Each assessment is based upon objective facts and supported by program and contract management data, such as cost performance reports, customer comments, quality reviews, technical interchange meetings, financial solvency assessments, construction/production management reviews, contractor operations reviews, functional performance evaluations, and earned contract incentives. Past performance documented in CPARS is used to evaluate contractor proposals for future contracts in support of contingency operations with the U.S. Government, anywhere in the world.

The Department of State requires prospective contractors to submit for review prior to award three past performance references from prior clients. In addition, in both Departments, the CO uses the periodic reports, as well as the recommendations in the annual performance review, to support the decision to exercise another option year or terminate the contract. The Department retains all incident reports, terminations, and dismissals of PSC personnel and tracks eligibility for employment under the contract.

**b. financial and economic capacity [GP 7, 33, 61].**

48 CFR 9.104-1 requires a prospective contractor to demonstrate adequate financial resources (or the ability to obtain the resources) needed to perform the contract work. The CO is required to review evidence of economic capacity when considering contract award.

The Department of State reviews prospective contractors' Dun and Bradstreet reports prior to award to validate financial and economic capacity. In addition, the Department requires prospective contractors to submit three years of audited financial performance data, including income statements, balance sheets, and cash-flow statements for consideration and evaluation prior to award.

Defense Base Act (DBA) insurance is required under all DoD contracts for services to be performed outside the United States, as well as under the Department of State's WPS contract. In addition, 48 CFR 52.228-5 and 428.310 require Federal contractors, at their own expense, to provide and maintain during the entire performance of the contract, at least the kinds and minimum amounts of insurance required in the schedule or elsewhere in the contract.

**c. possession of required registration, licenses or authorizations (if relevant) [GP 8].**

32 CFR 159.6 requires PSCs to develop procedures to ensure that their personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of their contract and host country law. 48 CFR 52.225-26 implements 32 CFR 159 by requiring PSCs under covered contracts to ensure that their personnel performing private security functions under the contract comply with any instructions for authorizing and accounting for weapons to be used by those personnel and for registering and identifying armored vehicles, helicopters, and other military vehicles operated by those personnel.

The WPS contract provides that armed contractor personnel are subject to host country laws regarding the licensure, carrying, and proper use of firearms. The contractor is responsible for ensuring that all armed contractor personnel are properly licensed in accordance with local law for the duration of time such personnel are in-country and must maintain all permits, licenses, and appointments required for work under the contract.

**d. personnel and property records [GP 9, 34, 62].**

Section 862 and 48 CFR 52.225-26 require PSCs under covered contracts to ensure that their personnel performing private security functions under the contract comply with any instructions for: registering, processing, accounting for, and keeping appropriate records of personnel performing private security functions; authorizing and accounting for weapons to be used by personnel performing private security functions; and registering and identifying armored vehicles, helicopters, and other military vehicles operated by contractors performing private security functions. The Departments of Defense and State use the Synchronized Pre-deployment Operations Tracking (SPOT) system to enter this information and maintain situational awareness.

**e. training [GP 10, 35, 63].**

Section 862 and 32 CFR 159 require the development of procedures to implement pre-deployment training requirements for personnel performing private security functions in designated areas, including, but not limited to, the identification of resources and assistance available to PSC personnel, country information and cultural training, guidance on working with host country nationals and military personnel, rules on the use of force and graduated force procedures, and requirements and procedures for direction, control and the maintenance of communications with regard to the movement and coordination of PSCs and PSC personnel, including specifying interoperability requirements. 48 CFR 52.225-26 implements 32 CFR 159 by requiring PSCs under covered contracts to ensure that their personnel performing private security functions under the contract understand their obligation to comply with qualification and training requirements, as well as any instructions related to weapons, equipment, force protection, security, health, safety, or relations and interaction with locals, and rules on the use of force.

Department of Defense contracts include 48 CFR 252.225-7040, which additionally requires all contractors accompanying the U.S. Armed Forces to receive pre-deployment training on applicable provisions of the laws of war and any other applicable treaties and international agreements. Section 9.3 of the PSC Standard includes requirements for training PSC personnel in measures against bribery, corruption, and in handling complaints by the local population. As cited elsewhere in this response, conformance with the PSC Standard is mandatory in all DoD contracts for security functions performed overseas.

Under the WPS contract, PSCs must successfully complete all required pre-deployment training before beginning work on any WPS contract or task order. Proof of successful training completion must be kept on file by the contractor and provided to the Department at any time upon request. WPS pre-deployment training includes familiarization with the Department of State, operating in a contingency environment, and cultural familiarization with the area of deployment, as well as labor category-specific firearms and operational training. The State Department's Bureau of Diplomatic Security (DS) performs periodic program management reviews (PMRs) of contractor training and training facilities (domestic and overseas) to ensure compliance with program, contract, and task order requirements.

**f. lawful acquisition and use of equipment, in particular weapons [GP 11, 36, 64].**

... Section 862 requires contractors and all employees of the contractor or of any subcontractor, who are responsible for performing private security functions under such contract, to comply with applicable laws and regulations of the United States and the host country, and applicable treaties and international agreements. 48 CFR 52.225-26 provides the specific

contract clauses requiring PSCs under covered contracts to ensure that their personnel performing private security functions under the contract are briefed on, and understand their obligation to comply with, applicable laws and regulations of the United States and the host country, applicable treaties and international agreements, and any instructions issued by the applicable commander or relevant Chief of Mission (COM) related to weapons and equipment. Similarly, 48 CFR 252.225-7040(d) requires DoD-contracted PSCs to comply with, and to ensure that their personnel authorized to accompany U.S. Armed Forces deployed outside the United States are familiar with and comply with, all applicable U.S., host country, and third country laws; provisions of the law of war, and any other applicable treaties and international agreements; U.S. regulations, directives, instructions, policies, and procedures; and orders, directives, and instructions issued by the Combatant Commander. These encompass laws, regulations, and directives applicable to the acquisition and use of weapons and other equipment.

Combatant Commander Orders specify weapons authorization policies, including types of weapons, ammunition, and procurement. These orders typically provide restrictions regarding weapons and ammunition types that exceed those permitted by the law of the host nation. For example, Combatant Commander Orders typically prohibit the use of anything other than full-jacketed ball ammunition, even where other types of ammunition would be allowable for civilian personal defense under host nation law. Lawful acquisition of weapons is also required by Section 9.2.5 of the PSC Standard.

All WPS Contractors utilize government furnished vehicles and weapons when deployed, and all equipment utilized by WPS PSCs must be approved in advance by DS.

**g. internal organization and regulation and accountability [GP 12, 37, 65].**

Title 48 CFR 9-103(a) requires that purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only. To be determined responsible, 48 CFR 9.104-1 provides that a contractor must “have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors).”

- With regard to GP 12 a), 32 CFR 159.6 requires that all requests for permission to arm PSC personnel include documentation of individual training, covering weapons familiarization and qualification, rules for the use of force (RUFs), limits on the use of force, including whether defense of others is consistent with host nation Status of Forces Agreements (SOFAs) or local law, the distinction between the rules of engagement applicable to military forces and the prescribed RUFs that control the use of weapons by civilians, and the Law of Armed Conflict. These requirements also exist in the PSC Standard. Specifically, requirements for company policies promoting compliance with international humanitarian law, human rights law, and RUFs are set forth in sections 9.5.1 and 9.5.2. Implementing guidance for these sections is provided in sections A.2, on Human Rights and International Law; A.9.5.1, on Respect for Human Rights; and A.9.5.3, on RUFs and Use of Force Training.

- With regard to GP 12 b), 48 CFR 52.225-26 requires PSCs under covered contracts to ensure that their personnel performing private security functions under the contract comply with directives in the contract for specified incident reporting and cooperate with any government-authorized investigations of incidents reported. The WPS contract requires that contractors

notify the government of all serious incidents and incidents involving misconduct. For DoD contracts, complaints and grievance mechanisms are set forth in Section 9.4.3 of the PSC Standard, with implementing guidance provided in A.9.5.10. Whistleblower protections are covered in Section 9.4.4, with additional guidance in A.9.4.3. Incident monitoring, reporting, and internal investigations are covered in Section 9.5.6, with implementing guidance in A.9.5.10.

**h. welfare of personnel [GP 13, 38, 66].**

In 2003, the Trafficking Victims Protection Act (TVPA) was amended (Pub. L. 108-193) to require that Federal government contracts with private entities include a provision authorizing the government to terminate the contract, or take other remedial action, without penalty, if the contractor or subcontractor engages in severe forms of trafficking in persons, procuring commercial sex acts, and using forced labor during the performance of the contract. This requirement has been implemented in all Federal government contracts through 48 CFR 22.1700, which provides that all Federal government contracts shall prohibit contractors, subcontractors, and their employees from engaging in such activities. The scope of these prohibited activities was expanded by Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts (Sept. 25, 2012) and by 2013 amendments to the TVPA contained in Title XVII of the National Defense Authorization Act, Pub. L. 112-239, the End Trafficking in Government Contracting Act (ETGCA) to also address the unscrupulous recruitment practices widely known to facilitate human trafficking. Although their provisions are not identical, the Executive Order and ETGCA authorize termination and other remedial action for activities that directly support or promote trafficking in persons, such as using fraud to recruit employees, confiscating employee identity or immigration documents, and charging employees recruitment fees that can lead to debt bondage. Among other things, they both also require contractors to apply new, tailored compliance measures for larger contracts performed overseas to prevent such activities from occurring, to ensure their subcontractors do the same, and also to certify that such plans and procedures are in place prior to being awarded the contract. The process of incorporating these more extensive and precise restrictions into the FAR is underway; proposed amendments have been published for public comment in the Federal Register (78 F.R. 59317 (Sept. 26, 2013)) but are not yet in effect.

Consistent with GPs 13 and 66, 48 CFR 252.222-7002 requires DoD contractors working overseas to comply with all local laws, regulations, and labor union agreements governing work hours. These requirements are implemented through specific contract language, including Joint Theater Support Contracting Command (JTSCC) Special Clause 952.222-0001, *Prohibition Against Human Trafficking, Inhumane Living Conditions, and Withholding of Employee Passports*, which is included in PSC contracts in Iraq and Afghanistan. This clause requires contractors to provide all employees with a signed copy of their employment contract, in English as well as the employee's native language, defining the terms of employment or compensation.

- Pay. The proposed amendments to the FAR include a provision for all Federal government contracts allowing the government to terminate the contract, without penalty, if the contractor or subcontractor charges recruited employees recruitment fees.
- Section 9.2.1 of the PSC Standard also addresses adequate compensation, providing that “[p]ersonnel shall be provided with adequate pay and remuneration arrangements,

including insurance, commensurate to their responsibilities.” Additional guidance implementing this requirement is found in A.9.2.1.

- **Safety.** Under the TVPA and implementing regulation 48 CFR 22.1700, all Federal government contracts include a provision allowing the government to terminate the contract, without penalty, if the contractor or subcontractor engages in trafficking in persons, the procurement of a commercial sex act, or the use of forced labor in the performance of the contract. Under the proposed amendments to the FAR, arranging or providing housing that fails to meet host country housing and safety standards would be an act allowing for such termination. In addition, JTSCC Special Clause 952.222-0001 requires DoD contractors to provide adequate living conditions (sanitation, health, safety, living space) for their employees and specifies what those conditions are. The clause further requires contracting officers and their representatives to conduct random checks to ensure that contractors and subcontractors at all tiers are adhering to the TVPA. Under the WPS contract, CORs and Government Technical Monitors (GTMs) conduct regular Trafficking in Persons (TIP) inspections, as well as inspections of meal services and health and welfare inspections of PSC personnel living quarters and common areas.

- **Travel docs.** 18 U.S.C. §§ 1592 prohibits knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person, to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person’s liberty to move or travel, in order to maintain the labor or services of that person. This prohibition is included in Federal government contracts pursuant to 48 CFR 52.222-50, *Combating Trafficking in Persons*. Under the proposed amendments to the FAR, all Federal government contracts will include a provision allowing the government to terminate the contract, without penalty, if the contractor or subcontractor destroys, conceals, removes, confiscates, or otherwise denies an employee access to his/her identity or immigration documents. In addition, JTSCC Special Clause 952.222-0001 provides specific contract language requiring contractors to hold employee passports and other identification documents discussed above for the shortest period of time reasonable for administrative processing purposes.

- **Unlawful discrimination.** Unless otherwise exempted, 48 CFR 22.810(e) specifies that Federal contracts must include a clause stating that the contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. Also, the contractor shall take affirmative steps to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. The contractor shall also take positive action to ensure that employees are aware of these non-discrimination requirements and the means to process complaints.

GP 13 and all subordinate elements are also required under the PSC Standard, sections 9.2.1 and A.9.2.1.

**8. To what extent is the conduct of any subcontracted PMSC required to be in conformity with relevant law? Please include requirements relating to liability and any notification required. [GP 15, 31]**

The requirement under 32 CFR 159 and 48 CFR 52.225-26 to conform to relevant law ... applies to subcontractors providing private security services. Specifically, section 52.225-26 requires PSCs to include the requirements of that clause in all subcontracts to be performed in

the designated areas. Section 52.225-26 further provides that the duty of the PSC to comply with the requirements of the clause shall not be reduced or diminished by the failure of a higher- or lower-tier contractor or subcontractor to comply with the clause requirements or by a failure of the contracting activity to provide required oversight. As noted above, 48 CFR 252.225-7040(d) and clauses of PSC contracts specify that the contractor shall comply with, and shall ensure that its personnel authorized to accompany U.S. Armed Forces deployed outside the United States are familiar with and comply with all applicable U.S., host country, and third country national laws; provisions of the law of war, as well as any other applicable treaties and international agreements; U.S. regulations, directives, instructions, policies, and procedures; and orders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals.

**9. Do you use financial or pricing mechanisms as a way to promote compliance? These may include requiring a PMSC to post a financial bond against non-compliance. [GP 17, 41]**

Section 862 requires that the failure of a contractor under a covered contract to comply with the requirements of the regulations governing private security contractors as implemented in contract clauses in an award fee contract shall be considered in any evaluation of contract performance by the contractor for the relevant award fee period. Such failure may be a basis for reducing or denying award fees for such period, or for recovering all or part of award fees previously paid for such period. In the case of a failure to comply that is severe, prolonged, or repeated, such failure will be referred to the suspension or debarment official for the appropriate agency and may be a basis for suspension or debarment of the contractor. In addition, standard contract clauses in the FAR provide for possible remediation measures, including, but not limited to, the withholding of payment, reduction of award fees, and reimbursement of U.S. Government expenses. The WPS contract does not require contractors to post bonds but contains financial incentives for compliance.

\* \* \* \*

**11. Please describe any rules/limitations on the use of force and firearms. For example, these may include use of force “only when necessary and proportionate in self-defence or defence of third persons”, and “immediately reporting to competent authorities” after force is used. [GP18, 43]**

Department of Defense Directive 5210.56, *Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities*, April 1, 2011, provides specific guidance for the use of force and firearms by DoD military and DoD civilians and DoD contractor personnel. This Directive is supplemented and implemented by combatant commander orders (or fragmentary orders (FRAGOs)), violations of which may subject a person to punitive or administrative action. These orders apply the requirements found in DoDD 5210.56, tailoring them for the specific terms of the contract and the political, legal, and operational context of the area in which the contract is being performed. These FRAGO's include, but are not limited to, specific procedures for requesting arming authorization, the types of weapons authorized, training requirements, registration requirements for personnel and weapons, procedures for incident reporting, as well as specific RUFs. These FRAGOs direct the

use of weapons consistent with the civilian status of PSC personnel and exclude PSC personnel from participating in combat operations. 48 CFR 252.225-7039, *Contractors Performing Private Security Functions*, requires DoD contractor personnel performing private security functions to follow the RUFs issued by the applicable Combatant Commander.

Additionally, 48 CFR 252.225-7040, *Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States*, is included in DoD contracts for PSC services and states that the contractor shall ensure that the contractor and all contractor personnel performing security functions under the contract comply with any orders, directives, and instructions to contractors performing private security functions that are identified in the contract. Contractor personnel are only authorized to use deadly force in self-defense and when such force reasonably appears necessary to execute their security mission to protect assets/persons consistent with the regulations and orders cited above. The clause also provides that, unless immune from host nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces can subject such personnel to U.S. or host nation prosecution and civil liability.

Title 48 CFR 252.225-7039 also implements requirements in Section 862 by requiring DoD contractors to report incidents in which: a weapon is discharged by PSC personnel; personnel performing private security functions are attacked, killed, or injured; persons are killed or injured or property is destroyed as a result of conduct by contractor personnel; a weapon is discharged against personnel performing private security functions or personnel performing such functions believe a weapon was so discharged; or specific active, non-lethal countermeasures are employed by PSC personnel in response to a perceived, immediate threat.

WPS contractors and their personnel are required to abide by the applicable mission firearms policy, the prescribed RUFs and the Deadly Force Policy in the WPS base contract, and Department policy guidance. In the event of a conflict, the mission firearms policy takes precedence. The WPS contract incorporates 48 CFR 52.225-19, which states that contractor personnel are authorized to use deadly force only in self-defense or when the use of such force reasonably appears necessary to execute their security mission to protect assets/persons, consistent with the terms and conditions contained in the contract or with their job description and terms of employment.

**12. Please provide information on any rules in place regulating the possession of weapons by PMSCs and their personnel. [GP 44, 55]**

GP 44 does not apply to the United States, as the United States is not a Territorial State as defined in the Montreux Document.

GP 55, the requirement to have appropriate rules on the accountability, export, and return of weapons and ammunition by PMSCs, is controlled pursuant to the Arms Export Control Act (AECA), as implemented by the International Trade in Arms Regulation (ITAR). The specific requirements for the export or import of weapons and ammunition are described in the answer to question 2, above. Accountability of such weapons and ammunition is maintained through end-use monitoring pursuant to section 40A of the AECA and non-transfer and use assurances required under section 123.9 of the ITAR. For certain defense articles, a separate non-transfer and end-use certificate must be signed by the license applicant, foreign consignee, and foreign

end-user that stipulates the defense article will not be re-exported, resold, or otherwise disposed of without the prior written approval of the Department of State.

In addition, 32 CFR 159 provides that PSC personnel under covered contracts may be armed only upon obtaining the appropriate authorization. Requests for such authorization must include, among other things, documentation of individual training covering weapons familiarization and qualification, RUFs, limits on the use of force, the distinction between the rules of engagement and the prescribed RUFs, and the Law of Armed Conflict, as well as written verification that PSC personnel are not prohibited under U.S. law from possessing firearms. Such requests must also include written acknowledgment by the PSC and its personnel that: (i) potential civil and criminal liability exists under U.S. and local law or host nation SOFAs for the use of weapons; (ii) proof of authorization to be armed must be carried by each PSC personnel; (iii) PSC personnel may possess only U.S. Government-issued and/or -approved weapons and ammunition for which they have been qualified according to specified standards; (iv) PSC personnel were briefed and understand limitations on the use of force; (v) authorization to possess weapons and ammunition may be revoked for non-compliance with established RUFs; and (vi) PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed.

**13. To what degree are personnel of a PMSC, including all means of their transport, required to be personally identifiable whenever they are carrying-out activities under a contract? [GP 16, 45]**

The WPS contract incorporates 48 CFR 52.225-19, *Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States*, which prohibits covered PSC personnel from wearing military clothing unless specifically authorized by the Combatant Commander. If authorized to wear military clothing, PSC personnel must wear distinctive patches, armbands, nametags, or headgear, in order to be distinguishable from military personnel, consistent with force protection measures. WPS contractors in uniform (i.e., static guards) wear distinctive patches identifying their company, while plain clothes contractors wear such patches if directed by the RSO. All WPS contractor personnel are required to carry personal identification cards, providing the individual's name, the labor categories they are authorized to fill, and the retest dates of any firearms qualifications and physical fitness testing.

Similarly, 48 CFR 252.225-7039 requires DoD PSC personnel to have issued to them and carry with them Personal Identity Verification credentials described in 48 CFR 52.204-19, *Personnel Identity Verification of Contractor Personnel*. FRAGOs routinely specify uniforms and markings for PSC personnel and vehicles, tailored for the specific requirements of the area in which the PSCs are operating. In Afghanistan, these orders require all armed contractors to use uniforms and markings, which clearly distinguish PSC personnel from military or police forces, consistent with the regulations issued by the Afghan Government and approved by the appropriate DoD CO. The PSC Standard, Section 9.2.1.1, also provides that PSCs shall use uniforms and markings to identify their personnel and means of transportation.

**14. Please indicate to what degree contracts with PMSCs provide for the following:****a. the ability to terminate the contract for failure to comply with contractual provisions.**

All Federal government contracts may be terminated in whole or in part for default if a contractor fails to perform any provision of a contract. 48 CFR 49.4. In contracts for private security functions outside the United States, 48 CFR 25.302-5 and 252.225-7039(c)(4) further specify that if the performance failures are significant, severe, prolonged, or repeated, the CO shall refer the matter to the appropriate suspension and debarment official.

**b. specifying the weapons required.**

48 CFR 252.225-7040(j) specifies that any requests from the contractor that its personnel in the designated operational area be authorized to carry weapons shall be made through the contracting officer's Combatant Commander, who will determine whether to authorize in-theater contractor personnel to carry weapons and what weapons and ammunition, in accordance with DoDI 3020-41. These determinations are detailed in FRAGOs addressing the arming of DoD civilians and contractor personnel and are specified in contract clauses where contractor personnel are authorized to carry weapons. JTSCC clause 5152.225-5900 is current for such contracts in Afghanistan.

Under the WPS contract, PSC personnel may use only Department of State issued or approved handguns, holsters, support weapons, magazines, optics, other vision enhancement devices, or ammunition, with specific weapon training and qualification requirements established based on the role of the individual and specific carry authority granted by the RSO and any applicable host country authority. Specific weapons requirements are listed in task orders only when they deviate from the weapons requirements in the base contract.

**c. that PMSCs obtain appropriate authorizations from the Territorial State.**

32 CFR 159 provides for the development of procedures for PSC verification that their personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of the contract and host country law. 48 CFR 52.225-26 and 252.225-7039(b)(2) implement 32 CFR 159 by requiring covered PSCs to ensure that they and all of their personnel responsible for performing private security functions under the contract are briefed on, and understand their obligation to comply with, applicable laws and regulations of the host country.

The PSC Standard, section A.10.2, provides that contractors should be able to demonstrate compliance with legal requirements, including applicable permits or licenses. Specific requirements to obtain and maintain current business licenses and licenses to operate as a PSC are contained in standard clauses in DoD contracts for these services. Similarly, the WPS contract requires each contractor to have a valid operating license and to operate in accordance with all host country laws.

**d. that appropriate reparation be provided for those harmed by misconduct. [GP 14]**

32 CFR 159 provides that all requests to arm PSC personnel shall include a written acknowledgment by the PSC and its personnel that potential civil and criminal liability exists under U.S. and local law or host nation SOFAs for the use of weapons. That section also notes that the written acknowledgment does not limit civil and criminal liability to conduct arising from the use of weapons. ...

**15. Provide details of how you provide for criminal jurisdiction in your national legislation over crimes under national and international law committed by PMSCs and their personnel. This may include details on if you have considered establishing corporate criminal responsibility and/or jurisdiction over serious crimes committed abroad. [GP 19, 49, 71]**

In recent years, the United States has amended both its Federal criminal code and its Uniform Code of Military Justice (UCMJ) to provide greater accountability for civilian employees, contractors, and other civilians supporting and accompanying our armed forces outside the United States who have engaged in criminal misconduct. Under U.S. law, criminal jurisdiction is limited to the territory of the United States absent a provision in a statute that explicitly or implicitly makes it extraterritorial in scope.

The Special Maritime and Territorial Jurisdiction Act (SMTJ) provides jurisdiction for U.S. courts wherever “American citizens and property need protection, yet no other government effectively safeguards those interests.” In 2001, the SMTJ was expanded to provide jurisdiction over certain listed offenses committed by or against a U.S. national on certain physical spaces in a foreign State.

The Military Extraterritorial Jurisdiction Act (MEJA) provides criminal jurisdiction over PSCs to the extent their employment relates to supporting the mission of the Department of Defense overseas. MEJA provides jurisdiction over these individuals if they commit an offense outside the United States that would be punishable if committed within the SMTJ of the United States, as defined in 18 U.S.C. § 7. A number of sections in the U.S. criminal code declare certain conduct, such as murder and other felonies, to be a crime if committed within the SMTJ of the United States.

The War Crimes Act (18 U.S.C. § 2441) provides criminal jurisdiction over conduct overseas that is determined to constitute a war crime when committed by or against a U.S. national or U.S. military member. The Federal Torture Statute (18 U.S.C. § 2340-2340B) provides criminal jurisdiction over U.S. nationals who commit torture anywhere in the world.

Finally, PSC personnel may be subject to the jurisdiction of the UCMJ (10 U.S.C. §§ 801-946). Under the UCMJ, a person serving with or accompanying the U.S. Armed Forces in the field during a declared war or contingency operation may be disciplined for a criminal offense, including by referral of charges to a General Court-Martial. PSC personnel may be ordered into confinement or placed under conditions that restrict movement in the area of operations or administratively attached to a military command pending resolution of a criminal investigation.

The Executive Branch has also supported legislation, introduced during the 112th Congress, which would clarify and expand extraterritorial jurisdiction over Federal contractor personnel operating overseas by providing analogue jurisdiction to MEJA for serious overseas crimes committed by personnel who are not currently covered by MEJA. The Executive Branch continues to support such legislation, and efforts are ongoing to secure its reintroduction in Congress and eventual enactment into law.

**16. Provide details of how you provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel. This may include contractual sanctions, referral to competent investigative authorities, providing for civil liability and otherwise requiring PMSCs, or their clients to provide reparation to those harmed by PMSCs. [GP 20, 50, 72]**

The U.S. Government is fully committed to ensuring that PSCs respect applicable national and international laws and are held accountable when they engage in misconduct. Contractual sanctions and civil liability, in U.S. courts and abroad, exist to ensure that PSCs are held accountable for such misconduct. 48 CFR 52.225-26 and 252.225-7039(c) provide that, in addition to other remedies available to the Government, the CO may direct the contractor, at its own expense, to remove and replace any contractor personnel who fail to comply with or violate applicable requirements of the contract. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of the contract, including termination for default.

Furthermore, PSCs are typically subject to civil litigation in the courts of the territorial State in which they operate. It is not the practice of the United States to accredit as members of the diplomatic mission PSC personnel or to grant such requests submitted by other countries for such personnel working in the United States. Most U.S. Government security contractors operating around the world are not immune from the laws of the host government and may be subject to host government civil jurisdiction.

Finally, those harmed by PSCs may have a number of avenues available for pursuing remedies under U.S. law. For example, the common law of the individual States of the United States may provide for tort liability in certain circumstances. Other cases have been brought under various Federal statutes. In some cases, a cause of action may be available under the Alien Tort Statute (ATS), pursuant to which U.S. Federal courts may hear civil actions by an alien for tort only, committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350; *see also Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (2013). PSCs that engage in fraud on a U.S. Government contract can also be held accountable by whistleblowers through qui tam actions under the False Claims Act.

**17. In addition to the criminal and non-criminal mechanisms referred to above, do you have other administrative and other monitoring mechanisms to ensure proper execution of the contract and/or accountability of the PMSC and their personnel for improper conduct? [GP 21]**

As introduced in the response to question 4, above, contracts for private military companies and private security companies are subject to oversight and monitoring through several different means and levels of accountability. Each contract is managed by a warranted CO, who is assisted by CORs responsible for the day-to-day monitoring of the contract and contractor performance. Private security contracts are required to have a COR and a Deputy COR to provide periodic and specified reports to the CO.

The *DoD Standard for Certification of Contracting Officer's Representatives (CORs) for Service Acquisitions* defines minimum COR competencies, experience, and training based on the nature and complexity of the requirement and contract performance risk. COR reports feed the CPARS system, as required by law (described above). The WPS contract has an overall COR for

the base contract, a dedicated CONUS and OCONUS COR for each task order, and GTMs for most task orders, as well as GTMs for specific operational areas of concern, such as logistics.

Serious incident reports are required by 32 CFR 159 and 48 CFR 52.225-26 and 252.225-7039. A serious incident involving a DoD contractor is reviewed by responsible officers and, as appropriate, may be the cause for initiation of a Commander's Inquiry under the Rules for Court Martial, Article 303. Similarly, DS may initiate an investigation in the case of an incident involving firearms or violations of U.S. or international law by a WPS contractor. Allegations of misconduct are subject to investigation by military law enforcement agencies, in the case of DoD contractors, and by DS in the case of WPS contractors. Under the WPS contract, PSC personnel may be removed from the task order for incidents of misconduct or other breaches of the standards of conduct contained in the WPS contract and may be deemed ineligible to work on other WPS task orders.

\* \* \* \*

## **21. Provide details of how you support other States in their efforts to establish effective monitoring of PMSCs. [GP 70]**

Where the U.S. Government has used private military companies and private security companies in areas of armed conflict, it has worked with other concerned governments to enable a common perspective on the use of PMSCs to enhance the stability of conflict and post-conflict regions. Most notable is the U.S. Government's early and consistent support of the Montreux Document initiative, the ICoC, and the ICoCA. A partial list of other examples includes:

- Establishment of the Private Security Company Association of Iraq (PSCAI), which enabled Iraq's Ministry of Interior to access a single point of contact for exchange of information and interaction with PSCs operating in its territory. The PSCAI was disestablished on December 31, 2011.
- Establishment of the Contractor Operations Center in Iraq, which maintained situational awareness of PSCs operating in Iraq and a central repository for incident reports and complaints. Information was shared with the Government of Iraq and included the presence of Liaison officers from Iraq in the operations center. This center was closed in January 2012 with the end of military operations, with residual functions transitioned to the Office of Security Cooperation – Iraq.
- Establishment of Task Force Spotlight in Afghanistan to address issues relating to the compliance of PSCs with U.S. and Afghan regulatory requirements. Work was quickly expanded to assist in implementation of Presidential Decree (PD) 62, which initiated the transition of all PSCs to the Afghan Public Protection Force (APPF). (The APPF is a state-owned enterprise that provides security services to domestic and international customers on a pay-for-service basis.) PD62 provides that diplomatic entities may continue to utilize private security. This work included biometric registration of all PSC personnel in Afghanistan and assistance in screening/vetting of PSC and APPF personnel.
- Continued assistance to the Afghan Government in its efforts to meet its Territorial and Home State responsibilities for oversight and regulation of PSCs. In addition to the biometric enrollment mentioned above, this includes:

- Developing and executing an eight-step vetting process, which meets all requirements of GPs 32 and 60. Noteworthy is the inclusion of references from Tribal Elders attesting to, and guaranteeing, the good conduct and background of PSC and APPF personnel.
- Assisting the Afghan Government with the introduction of transparent licensing regimes to ensure better supervision and accountability so that only PSCs and other contractors likely to respect international humanitarian law and human rights law, through appropriate training, internal procedures, and supervision, can provide services in areas of armed conflict. (GP 25, 26, 30, 63)
- Increasing accountability of superiors of PSC personnel, including government officials and PSC managers consistent with Legal Obligation 27.
- Establishing standardized criteria for PSC personnel training in relevant Afghan law, including law of armed conflict and applicable human rights law consistent with GP 35 and 63.

**22. In negotiating with other States agreements which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel (e.g. Status of Forces agreements). Please provide details on how you take into consideration the impact of the agreement on the compliance with national laws and regulations, and how you address the issue of jurisdiction and immunities. [GP 22, 51]**

...The U.S. Government is fully committed to ensuring that U.S. contractors who are accused of committing crimes abroad are investigated and, when warranted, fully prosecuted. It is not the common practice of the United States to seek immunity from host government criminal jurisdiction for PSCs contracting with the U.S. Government. Most PSCs operating around the world under contract with the U.S. Government are subject to the criminal jurisdiction of the host government.

In any event, PSCs and other contractors operating under contract with the U.S. Government are instructed to follow the laws of the host government. There are also means to prosecute contractor personnel in U.S. courts when they are not held accountable under the host government's legal system for criminal activity, including the Military Extraterritorial Jurisdiction Act (MEJA), which provides for U.S. jurisdiction over contractors if they are working abroad on a Department of Defense contract or a contract of any other Federal agency to the extent that their employment relates to supporting the mission of the Department of Defense.

**23. Please provide details of your cooperation with the investigating or regulatory authorities of other States in matters of common concern regarding PMSCs. [GP 23, 52, 73]**

Currently, our work with the Government of Afghanistan provides the best example of such activities. The authorities currently being worked in Afghanistan involve the establishment and the assessment aspects of the APPF and the transition away from the use of PSCs. In August 2010, President Karzai issued PD62, directing dissolution of PSCs and expansion of the APPF. Shortly after PD62 was released, the Government of Afghanistan requested NATO assistance with the stand-up of the APPF. The International Security Assistance Force (ISAF), Ministry of Interior (MoI), and U.S. Embassy Kabul conducted a six-month assessment completed in September 2011 that baselined the status of the APPF's capability to conduct two core functions: execute business functions and generate/employ a force. Based on this assessment, ISAF formed a Joint Planning Team (JPT) to create a deliberate plan to build the APPF's capacity to manage the transition from the use of PSCs. The result of this plan was the September 2011 creation of

the APPF Advisory Group (AAG) assigned to NATO Training Mission – Afghanistan (NTM-A/CSTC). From the time the AAG was created, the AAG has conducted assessments every 3-6 months. The focus of these efforts is to complete the establishment of the APPF and to provide another security pillar in Afghanistan. The AAG is currently overseeing the transition of security for ISAF bases and convoys to the APPF.

**24. Please list any other measures you have in place for overseeing and/or contracting with PMSCs, and briefly describe how they are implemented or enforced.**

The U.S. Government has several oversight, policy, and contracting offices and bureaus that are, or have been, dedicated to evaluating the U.S. Government's use of PSCs and our broader national interests in this area. These include:

- The Government Accountability Office: Independent, nonpartisan U.S. agency within the legislative branch that investigates how the Federal government spends money and provides advice on ways to make government more efficient and effective. The GAO has published reports on the U.S. Government's use of PSCs.
- Commission on Wartime Contracting: Independent, bipartisan commission established by Congress to study wartime contracting in Iraq and Afghanistan. The Commission issued a publically available final report to Congress in August 2011, which included recommendations to Congress on the use of PSCs.
- Department of State Bureau of Diplomatic Security: The Department bureau that manages the oversight of, and provides operational guidance to, PSCs providing security at U.S. diplomatic and consular facilities abroad.
- Contractor Operations Center: This center operated in Iraq from 2004 through 2012 to maintain situational awareness of PSCs operating in Iraq, including their licensing, movements, incident responses, and incident reporting.
- Armed Contractor Oversight Directorates: Directors in Iraq and Afghanistan responsible for monitoring PSCs under DoD contracts and for processing arming authorization requests, maintaining PSC personnel census data, verifying the accuracy of PSC information in the SPOT database, and conducting or coordinating biometric enrollment of PSC personnel.
- Contingency Contractor Standards and Compliance: Department of Defense office responsible for maintaining, developing, and promoting policy and operational guidance for all armed contractors operating in support of U.S. operations in armed conflict and similar environments. Works closely with the Director, Defense Procurement and Acquisition Policy, the Office of the Assistant Secretary of the Army for Procurement, and the Defense Acquisition Regulations Council to provide current and effective contracting procedures, policies, and regulations that implement U.S. national policy regarding PSCs and PMCs.

\* \* \* \*

Joshua Dorosin, Assistant Legal Adviser at the Department of State, delivered remarks for the United States on December 11, 2013 at the opening of the Montreux+5 Conference. Mr. Dorosin's remarks follow.

\* \* \* \*

Thank you Mr. Chairman. I would like to begin by thanking the Government of Switzerland and the International Committee of the Red Cross for providing this forum for States and International Organizations to share their experiences utilizing, and regulating, private military and security companies. As we all know, it was the Swiss Government and the ICRC that co-facilitated the process culminating in the successful completion of the Montreux Document five years ago. Thanks to their continued leadership, we now have this opportunity to learn from our collective experience, and to identify ways to further promote respect for international humanitarian law, and human rights law, in the provision of private military and security services in areas of armed conflict. And thanks also to Geneva Center for Democratic Forces for preparing its thought-provoking study, which helpfully frames this week's discussions.

The United States is pleased to have been one of the 17 initial participating States of the Montreux Document—and is proud of our record of promoting respect for the legal principles reflected in the Montreux Document and the implementation of the good practices identified therein. I will summarize a few of the recent developments in the United States, but I would note that we have submitted a response to the Swiss/ICRC questionnaire, which is posted on the U.S. Mission website at <http://geneva.usmission.gov/>.

Private military and security contractors have continued to play a critical role in supporting U.S. military and diplomatic operations around the world, and also play a critical role in supporting the operations of many of the governments and international organizations represented here today. At the same time, the United States recognizes that their role must be limited and carried out in accordance with the principles reflected in the Montreux Document, and that their activities must be subject to standards of professionalism and accountability.

To that end, under U.S. law, contractors are prohibited from engaging in combat operations or in situations where it is determined that there is significant potential for their security operations to evolve into combat. As importantly, the United States has been a strong supporter of the development of the PSC.1 Standard adopted by the American National Standards Institute. Currently, all Department of Defense contractors accompanying U.S. Armed Forces deployed outside the United States must demonstrate that they are in compliance with PSC.1 and an equally strong supporter of the ICoC process and establishment of the new ICoC Association. All bidders for the successor to the Department of State's Worldwide Protective Services contract will likewise have to demonstrate that they are in conformance with that standard.

To briefly summarize what we have done to-date, we have ensured that:

- **Contract Requirements and Oversight:** Private military and security companies that contract with the U.S. Government are subject to rigorous contract requirements and oversight measures.
- **Selection of PMSCs:** During the selection process, these contractors are evaluated on their ability to comply with applicable federal regulations and solicitation requirements, meant to promote the responsible provision of security services in areas of armed conflict. This evaluation includes an assessment of the contractor's past performance, its financial resources available to perform the contract, and its ability to meet requirements pertaining to weapons authorizations, accounting for equipment and personnel, and pre-deployment training.

- **Training of PMSCs:** We require contractors to ensure that their personnel receive pre-deployment training covering cultural familiarization with the area of deployment and guidance on working with host country nationals and military personnel. And they are required to ensure that their personnel are briefed on, and understand their obligation to comply with, applicable national and international law. In addition, contract personnel may be authorized to carry weapons only upon a showing of individual training and qualification, including training on weapons familiarization, the prescribed Rules on the Use of Force, and the Law of Armed Conflict.

- **Oversight of PMSCs:** Once deployed, contractors providing security services in areas of armed conflict are subject to multiple means of oversight and monitoring. These means include the placement of a U.S. Government employee in embassy convoys, the increased use of technology, such as video and audio recording and biometric tracking of contract personnel, and enhanced reporting of serious incidents, including use-of-force incidents. In addition, the United States has been dedicated to the establishment of an oversight mechanism under the International Code of Conduct for Private Security Service Providers and believes that the recently-established ICoCA can play an important role in improving the standards for, and the conduct of, private security companies.

- **Accountability for PMSCs:** These enhanced contracting practices and oversight mechanisms are all meant to promote responsible conduct by the companies we contract and supervise. When they engage in misconduct, however, the United States remains committed to ensuring that these companies and their personnel are held accountable. This can happen both at home and in the state where misconduct occurred. It is not the common practice of the United States to seek immunity from host government criminal jurisdiction for PSCs contracting with the U.S. Government and, in any event, PSCs and other contractors operating under contract with the U.S. Government are instructed to follow the laws of the host government.

- In addition, in recent years, the United States has amended both its federal criminal code and its Uniform Code of Military Justice to provide greater accountability for contractors supporting and accompanying our armed forces outside the United States. The Department of Justice continues to pursue accountability for those responsible for the 2008 shooting in Nisour Square in Iraq, and in October of this year filed a new indictment against four former Blackwater guards involved in the shooting under the Military Extraterritorial Jurisdiction Act, or MEJA. The Executive Branch continues to support the passage of new legislation in the form of the Civilian Extraterritorial Jurisdiction Act, or CEJA, to clarify and expand extraterritorial jurisdiction over contractor personnel overseas.

- Finally, we have filed briefs in the course of litigation to influence the development of the law in a manner that recognizes that one of the government's interests is providing an appropriate remedy to victims. For example, the U.S. Government amicus brief in *Al Shimari and Al-Quraishi* argued against preemption of state tort law claims in those cases to the extent that they involve conduct by civilian contractors that, in the circumstances associated with the instances of abuse at Abu Ghraib in 2004, constitutes torture as defined in federal criminal law.

**Closing/Looking Forward:** To build on these successes to-date, the United States looks forward to engaging in a constructive dialogue with all participants this week. We are pleased to welcome the Government of the Czech Republic, the Organization for Security and Cooperation in Europe, and NATO as the newest Montreux Document participants. We hope that engagement among Montreux Document participants is something that can continue in the years to come as we all strive to do better to bring the principles of the Document home, and to that end we hope to use our time this week to explore ways to establish a more regular dialogue among Montreux Document participants and to encourage Montreux participants to become more actively engaged in the ICoC process. Through our shared learning, we are confident that we can continue to improve our practices and our ability effectively to promote respect for the international legal principles and best practices reflected in the Montreux Document in all aspects of PMSC operations.

\* \* \* \*

## **B. CONVENTIONAL WEAPONS**

### **1. General**

See Chapter 19.J. for discussion of the conclusion of the Arms Trade Treaty in 2013. On October 29, 2013, Christopher Buck, Alternate Representative for the U.S. delegation to the UN General Assembly's First Committee, addressed the First Committee's thematic discussion on conventional weapons. Mr. Buck's statement follows and is available at <http://usun.state.gov/briefing/statements/216006.htm>.

---

\* \* \* \*

Thank you, Mr. Chairman. In the interest of time, I will address several separate issues in this statement relating to the Arms Trade Treaty, the UN Register of Conventional Arms, conventional weapons destruction, small arms and light weapons, man-portable air defense systems, and the Convention on Certain Conventional Weapons.

Let me start with the Arms Trade Treaty. The United States is proud to have signed the ATT on September 25 because we know from decades of effort that any time that we work cooperatively to address the illicit international trade in conventional weapons, we make the world a safer place. This Treaty is a significant step in that effort.

The ATT helps lift countries up to the highest standards of export and import control for conventional weapons. It requires countries that join it to create and enforce the kind of strict national export controls that the United States already has in place. This Treaty strengthens countries' national security, builds global security, and advances important humanitarian goals

without undermining the legitimate international trade in conventional arms which allows each country to provide for its own defense.

The United States looks forward to the early entry into force of the Treaty, and we call on those countries that have not signed it to consider doing so as soon as possible. We also need signatory States to be ready to implement the Treaty's obligations once they ratify it. The United States looks forward to working with other countries on implementing this Treaty to ensure that it lives up to all of our expectations.

Mr. Chairman, my country was pleased to have participated in the 2013 UN Group of Governmental Experts that reviewed the continuing operation of the UN Register. Unfortunately, the GGE was unable to bring an end to its now 13-year discussion of small arms and light weapons by agreeing to expand the Register to including SA/LW. This means that the 2013 GGE repeated the failure of the 2009 GGE to address the security concerns of the states that traditionally do not report to the Register by expanding it to include the weapons that are of most concern to them. We hope that the next GGE will correct this shortcoming and reinforce the Register's role as a global transparency and confidence-building measure.

Now let me turn to conventional weapons destruction. The United States continues its strong support for eliminating aging, surplus, loosely-secured, or otherwise at-risk conventional weapons and munitions, as well as explosive remnants of war. Since 1993, we have provided more than \$2.1 billion in aid to over 90 countries for conventional weapons destruction programs, including clearance of landmines and unexploded munitions and destruction of excess small arms and light weapons and munitions. We have assisted 15 affected states to become mine-impact free. Since 2001, we have helped to destroy more than 1.6 million excess or poorly secured weapons and over 90,000 tons of munitions around the world.

Mr. Chairman, the United States welcomes the adoption by the UN Security Council of its first standalone resolution on the illicit trade in small arms and light weapons, and thanks Australia for its leadership on the matter. The illicit transfer, destabilizing accumulation, and misuse of small arms and light weapons in many regions of the world pose a threat to international security, and the resolution laid out a variety of measures that should be taken by all Member States to reduce the risk that deadly weapons may fall into the wrong hands. The United States also continues to urge fellow Member States to fully implement the 2001 UN Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects and the 2005 International Tracing Instrument. Much more needs to be done by the international community to ensure full implementation of existing commitments in these instruments, and we look forward to discussing these issues at the Biennial Meeting of States in June 2014.

In addition to supporting the above mentioned programs to destroy excess small arms and light weapons, the United States provides a wide variety of assistance to combat the illicit trafficking of conventional weapons, helping states improve their export control practices and providing technical assistance for physical security and stockpile management of at-risk conventional arms and munitions.

Mr. Chairman, in the hands of terrorists, insurgents, or criminals, Man-Portable Air Defense Systems—also known as shoulder-fired anti-aircraft missiles—pose a serious threat to global passenger air travel, the commercial aviation industry, and military aircraft around the world. In recognition of the risk of diversion and potential use by terrorists, insurgents, and

criminals, the United States has established strict export controls over the transfer of all MANPADS. The U.S. Government transfers only on a government-to-government basis through the Foreign Military Sales system. Since 2003, the United States has cooperated with countries around the globe to destroy over 33,000 excess, loosely-secured, illicitly held, or otherwise at-risk MANPADS missiles, and thousands more launchers, in 38 countries.

Mr. Chairman, the United States is a High Contracting Party to the Convention on Certain Conventional Weapons and all of its five Protocols. The United States attaches importance to the CCW as an instrument that has been able to bring together states with diverse national security concerns.

We look forward to the annual meetings of High Contracting Parties in November and to establishing a program of work for 2014 that will allow CCW States to continue supporting the universalization of the CCW and the implementation of all its Protocols. During this past year, questions have arisen regarding the development and use of lethal fully autonomous weapons in forums such as the Human Rights Council. As the United States delegation to the Human Rights Council stated, we welcome discussion among states of the legal, policy, and technological implications associated with lethal fully autonomous weapons in an appropriate forum that has a primary focus on international humanitarian law issues, if the mandate is right. The United States believes the CCW is that forum. CCW High Contracting Parties include a broad range of States, including those that have incorporated or are considering incorporating automated and autonomous capabilities in weapon systems. The CCW can bring together those with technical, military, and international humanitarian law expertise, ensuring that all aspects of the issue can be considered. Accordingly, we support an informal, exploratory discussion of lethal fully autonomous weapons and are engaged with our fellow CCW High Contracting Parties in formulating an appropriate mandate that will facilitate these discussions.

\* \* \* \*

## **2. Lethal Autonomous Weapons Systems**

During the 23rd session of the UN Human Rights Council, the U.S. delegation expressed its view that “lethal autonomous weapons may present important legal, policy, and ethical issues” but that these issues “go beyond the Human Rights Council’s core expertise.” The U.S. delegation therefore urged that discussion of lethal autonomous weapons systems “take place in an appropriate forum that has a primary focus on international humanitarian law issues, with the participation of States that have incorporated or are considering incorporating automated and autonomous capabilities in weapon systems.”

At the meeting of High Contracting Parties to the Convention on Certain Conventional Weapons, the U.S. delegation stated that it supported discussion of lethal autonomous weapons systems in that forum. The U.S. delegation’s opening statement at the Meeting of the High Contracting Parties, delivered on November 14, 2013 by Michael W. Meier, is available at

<https://geneva.usmission.gov/2013/11/15/u-s-opening-statement-at-the-meeting-of-parties-to-the-ccw/>.

Ultimately, the High Contracting Parties decided to convene in 2014 “a four-day informal Meeting of Experts . . . to discuss the questions related to emerging technologies in the area of lethal autonomous weapons systems.”

## C. DETAINEES

### 1. General

#### a. *Presidential Statements on 2013 and 2014 National Defense Authorization Acts*

On January 2, 2013, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2013. Pub. Law No. 112–239. The President issued a signing statement expressing concerns about several provisions in the legislation, which he signed because of its overall benefits to the U.S. military. Daily Comp. Pres. Docs. 2013 DCPD No. 00004, pp. 1-3. In particular, the legislation contains several provisions relating to detainees. Excerpts from the President’s signing statement relating to detainees appear below.

---

\* \* \* \*

Several provisions in the bill also raise constitutional concerns. Section 1025 places limits on the military’s authority to transfer third country nationals currently held at the detention facility in Parwan, Afghanistan. That facility is located within the territory of a foreign sovereign in the midst of an armed conflict. Decisions regarding the disposition of detainees captured on foreign battlefields have traditionally been based upon the judgment of experienced military commanders and national security professionals without unwarranted interference by Members of Congress. Section 1025 threatens to upend that tradition, and could interfere with my ability as Commander in Chief to make time-sensitive determinations about the appropriate disposition of detainees in an active area of hostilities. Under certain circumstances, the section could violate constitutional separation of powers principles. If section 1025 operates in a manner that violates constitutional separation of powers principles, my Administration will implement it to avoid the constitutional conflict.

Sections 1022, 1027 and 1028 continue unwise funding restrictions that curtail options available to the executive branch. Section 1027 renews the bar against using appropriated funds for fiscal year 2012 to transfer Guantanamo detainees into the United States for any purpose. I continue to oppose this provision, which substitutes the Congress’s blanket political determination for careful and fact-based determinations, made by counterterrorism and law enforcement professionals, of when and where to prosecute Guantanamo detainees. For decades, Republican and Democratic administrations have successfully prosecuted hundreds of terrorists in Federal court. Those prosecutions are a legitimate, effective, and powerful tool in our efforts

to protect the Nation, and in certain cases may be the only legally available process for trying detainees. Removing that tool from the executive branch undermines our national security. Moreover, this provision would, under certain circumstances, violate constitutional separation of powers principles.

Section 1028 fundamentally maintains the unwarranted restrictions on the executive branch's authority to transfer detainees to a foreign country. This provision hinders the Executive's ability to carry out its military, national security, and foreign relations activities and would, under certain circumstances, violate constitutional separation of powers principles. The executive branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers. The Congress designed these sections, and has here renewed them once more, in order to foreclose my ability to shut down the Guantanamo Bay detention facility. I continue to believe that operating the facility weakens our national security by wasting resources, damaging our relationships with key allies, and strengthening our enemies. My Administration will interpret these provisions as consistent with existing and future determinations by the agencies of the Executive responsible for detainee transfers. And, in the event that these statutory restrictions operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.

\* \* \* \*

On December 26, 2013, the President signed into law the National Defense Authorization Act for Fiscal Year 2014. Pub. Law. No. 113-66. President Obama's signing statement again expressed concerns about provisions in the law relating to detainees. Daily Comp. Pres. Docs. 2013 DCPD No. 00876, pp. 1-2 (Dec. 26, 2013). Excerpts follow from the President's signing statement.

---

\* \* \* \*

For the past several years, the Congress has enacted unwarranted and burdensome restrictions that have impeded my ability to transfer detainees from Guantanamo. Earlier this year I again called upon the Congress to lift these restrictions and, in this bill, the Congress has taken a positive step in that direction. Section 1035 of this Act gives the Administration additional flexibility to transfer detainees abroad by easing rigid restrictions that have hindered negotiations with foreign countries and interfered with executive branch determinations about how and where to transfer detainees. Section 1035 does not, however, eliminate all of the unwarranted limitations on foreign transfers and, in certain circumstances, would violate constitutional separation of powers principles. The executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers. Of course, even in the absence of any statutory restrictions, my Administration would transfer a detainee only if the threat the detainee may pose can be sufficiently mitigated and only when consistent with our humane treatment policy. Section 1035

nevertheless represents an improvement over current law and is a welcome step toward closing the facility.

In contrast, sections 1033 and 1034 continue unwise funding restrictions that curtail options available to the executive branch. Section 1033 renews the bar against using appropriated funds to construct or modify any facility in the United States, its territories, or possessions to house any Guantanamo detainee in the custody or under the control of the Department of Defense unless authorized by the Congress. Section 1034 renews the bar against using appropriated funds to transfer Guantanamo detainees into the United States for any purpose. I oppose these provisions, as I have in years past, and will continue to work with the Congress to remove these restrictions. The executive branch must have the authority to determine when and where to prosecute Guantanamo detainees, based on the facts and circumstances of each case and our national security interests. For decades, Republican and Democratic administrations have successfully prosecuted hundreds of terrorists in Federal court. Those prosecutions are a legitimate, effective, and powerful tool in our efforts to protect the Nation. Removing that tool from the executive branch does not serve our national security interests. Moreover, section 1034 would, under certain circumstances, violate constitutional separation of powers principles.

The detention facility at Guantanamo continues to impose significant costs on the American people. I am encouraged that this Act provides the Executive greater flexibility to transfer Guantanamo detainees abroad, and look forward to working with the Congress to take the additional steps needed to close the facility. In the event that the restrictions on the transfer of Guantanamo detainees in sections 1034 and 1035 operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.

\* \* \* \*

**b. CAT Report**

As discussed in Chapter 6, the United States submitted its third, fourth, and fifth periodic reports to the United Nations Committee Against Torture on August 12, 2013. Several of the questions addressed in the report relate to detainees. Relevant portions are excerpted below. The full text of the report is available at [www.state.gov/j/drl/rls/213055.htm](http://www.state.gov/j/drl/rls/213055.htm).

---

\* \* \* \*

**4. In light of the Committee's previous concluding observations (para. 16) and the replies provided in the State party's comments under the follow-up procedure (CAT/C/USA/CO/2/Add.1, para. 3), please provide:**

**(a) Information on steps taken by the State party to ensure that it registers all persons it detains in any territory under its jurisdiction, including in all areas under its de facto effective control. ...**

**Response to issues raised in Question 4(a).**

15. Noting paragraph 6 of this Report, although there is no unified national policy governing the registry of all persons detained by the United States, relevant individual federal, state, and local authorities, including military authorities, maintain appropriate records on persons detained by them. Although the United States notes that the Convention has no provision requiring the registration of detainees, such records would generally include the information mentioned in the Committee's recommendation.

16. DoD keeps detailed information regarding every individual it detains, to serve as both an aid in ensuring appropriate care and custody and as an appropriate oversight mechanism of the conditions of detention. It also assigns internment serial numbers to all detainees interned by the United States in connection with armed conflict as soon as practicable and in all cases within 14 days of capture, and grants the International Committee of the Red Cross (ICRC) access to such detainees, consistent with DoD regulations and policies. Pursuant to DoD Directive 2310.01E (The DoD Detainee Program), the ICRC is made aware of and has access to all U.S. law of war detention facilities and all persons detained by the United States in situations of armed conflict. This is consistent with President Obama's Executive Order (E.O.) 13491 on Ensuring Lawful Interrogations, issued on January 22, 2009, requiring that all agencies of the U.S. government provide the ICRC with such notification of and access to any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. government, consistent with DoD regulations and policies.

17. Within the United States, the U.S. and state constitutions and other laws provide comprehensive safeguards to ensure that persons under detention are protected and provided due process. Under such laws, all persons detained are booked when they are taken into custody. Generally, booking information includes the name, physical description, charges, bond information, and emergency contact information for the detainee. Such bookings are public information and are often published in local newspapers. Pre-trial detention is governed by constitutional and statutory standards, and approved and supervised by independent judicial officers who are available to address allegations of mistreatment.

\* \* \* \*

**5. Please provide information on:**

**(a) Whether the State party has adopted a policy that ensures that no one is detained in any secret detention facility ...**

**(b) The legal safeguards provided to the detainees and the manner in which they are treated.**

**(c) Steps taken to address the reports of detainees held incommunicado and without the protection of domestic or international law ...**

**Response to issues raised in Question 5(a).**

23. In September 2006 former President Bush acknowledged that in addition to individuals then held at the U.S. Naval Station Guantanamo Bay (Guantanamo), “a small number of suspected terrorist leaders and operatives captured during the war [were] held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency.” He then announced that 14 individuals were being transferred from Central Intelligence Agency (CIA) custody to DoD custody at Guantanamo. The CIA’s overseas detention and interrogation program was described in detail in a 2004 CIA Inspector General Special Review, which has been publicly released in redacted form, and was further discussed in DOJ Office of Legal Counsel memoranda from 2002 and 2005 that were publicly released in 2009.

24. On his second full day in office, January 22, 2009, President Obama issued three executive orders concerning lawful interrogations, the military detention facility at Guantanamo, and detention policy options. E.O. 13491, Ensuring Lawful Interrogations, instructed the CIA to close as expeditiously as possible any detention facilities it operated. As noted in the answer to Question 4, it requires that all agencies of the U.S. government provide the ICRC with timely access to any individual detained by the United States in any armed conflict, consistent with DoD regulations and policies.

25. Consistent with E.O. 13491, the CIA does not operate any detention facilities. The United States does not have and has never had a detention facility on Diego Garcia.

26. The United States does not operate any secret detention facilities. In some contexts, the United States operates battlefield transit and screening facilities, the locations of which are often classified for reasons of military necessity. All such facilities are operated consistent with applicable U.S. law and policy and international law, including Common Article 3 of the Geneva Conventions, the Detainee Treatment Act of 2005, and DoD Directive 2310.01E. The ICRC and relevant host governments are informed about these facilities, and the ICRC has access to all individuals interned by the United States in the context of armed conflict, consistent with DoD policy.

**Response to issues raised in Question 5(b).**

27. Pursuant to E.O. 13491, all U.S. detention facilities in the context of armed conflict are operated consistent with obligations under U.S. domestic and international law and policy. E.O. 13491 directs that individuals detained in any armed conflict shall in all circumstances be treated humanely, consistent with U.S. domestic law, treaty obligations and U.S. policy, 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 U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the United States; and that such

individuals shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual on Human Intelligence Collector Operations, FM 2-22.3 (Army Field Manual), without prejudice to authorized non-coercive techniques of federal law enforcement agencies.

28. In March 2011 the United States confirmed its support for Additional Protocol II and for Article 75 of Additional Protocol I to the 1949 Geneva Conventions. A March 7, 2011 White House press release explained the significance of this announcement:

- Because of the vital importance of the rule of law to the effectiveness and legitimacy of our national security policy, the Administration is announcing our support for two important components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions. Additional Protocol II, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts, was originally submitted to the Senate for approval by President Reagan in 1987. The Administration urges the Senate to act as soon as practicable on this Protocol, to which 165 States are party. An extensive interagency review concluded that U.S. military practice is already consistent with the Protocol's provisions. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

- Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported.

- Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.

29. The full text of the White House fact sheet is available at [www.whitehouse.gov/sites/default/files/Fact Sheet -- Guantanamo and Detainee Policy.pdf](http://www.whitehouse.gov/sites/default/files/Fact_Sheet_-_Guantanamo_and_Detainee_Policy.pdf).

30. Additionally, in E.O. 13567, issued March 7, 2011, President Obama established a new periodic status review process for detainees at Guantanamo, as discussed in response to Question 8(c). ...

**Response to issues raised in Question 5(c).**

31. As stated above, E.O. 13491 requires that all agencies of the U.S. government provide the ICRC with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. government, consistent with DoD regulations and policies. Partnering with the ICRC, DoD has greatly expanded the contact detainees have with their families while in detention. Detainees are given the opportunity to send and receive letters, facilitated by the

ICRC, and many of them are able to talk to their families via phone or video teleconference. DoD provides the ICRC ongoing access to individuals detained in armed conflict throughout the duration of their detention.

32. All detainees held by DoD are treated in a manner consistent with U.S. obligations under international and domestic law. Upon arrival in any DoD detention facility, all detainees receive medical screening and any necessary medical treatment. The medical care detainees receive throughout their time in U.S. custody is generally comparable to that which is available to U.S. personnel serving in the same location.

33. The extensive U.S. procedural protections, including rigorous review procedures afforded to law of war detainees in its custody in Afghanistan, as well as litigation establishing that U.S. constitutional habeas corpus jurisdiction does not extend to aliens held in law of war detention in the Bagram detention facility in Afghanistan, are discussed in the 2011 ICCPR Report ¶¶ 520 and 216, incorporated herein by reference. Further, control of the detention facility was transferred to Afghanistan on March 25, 2013, at which time the United States also transferred custody of all Afghan detainees in the facility to Afghan authorities. The facility was renamed the Afghan National Detention Facility-Parwan (ANDF-P).

34. As discussed further in response to Question 8(c), U.S. constitutional habeas corpus jurisdiction has been held to extend to those detained outside the United States in some situations.

\* \* \* \*

#### **8. Please provide updated information on practical steps taken to close down Guantánamo Bay. ...**

40. The President has repeatedly reaffirmed his commitment to close the Guantanamo detention facility. In his May 23, 2013 speech at the National Defense University, he outlined a series of steps that have been or will be taken to reach this goal, including calling on Congress to lift the restrictions on detainee transfers from Guantanamo; asking DoD to designate a site in the United States where military commissions can be held; appointing new senior envoys at DOS and DoD who will be responsible for negotiating the transfer of detainees; and lifting the moratorium on detainee transfers to Yemen. A fact sheet summarizing the President's speech is available at [www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism](http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism).

41. The United States derives its domestic authority to detain the individuals at Guantanamo from the 2001 Authorization for Use of Military Force (AUMF), as informed by the laws of war, and as such may detain, *inter alia*, "persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or coalition partners." Such detention is permitted by the law of war until the cessation of hostilities covered by the AUMF.

42. On January 22, 2009, President Obama issued E.O. 13492, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities," calling for the closure of the Guantanamo facility. As the President explained, he knew when he

ordered Guantanamo closed that the process would be “difficult and complex.” This remains true today. But, consistent with its policies and its values, the United States continues to work through these challenging issues in order to close the facility.

43. Pursuant to E.O. 13492, the United States established a Guantanamo Review Task Force (Task Force) to carry out the review of the status of all detainees then held at Guantanamo. The Task Force, comprised of representatives of DOJ, DoD, DOS and DHS, and of the Office of the Director of National Intelligence and the Joint Chiefs of Staff, painstakingly considered all relevant information in the possession of the U.S. government about each Guantanamo detainee to assess whether it was possible to transfer each individual detained at Guantanamo to his home country or to a third country; or whether he should be referred for prosecution or continue to be held pursuant to the AUMF, as informed by the laws of war. E.O. 13492 and subsequent developments are discussed below.

\* \* \* \*

### Article 3

**In light of the Committee’s previous concluding observations (para. 20), please provide updated information on:**

**(a) ...the non-refoulement guarantee .... Please provide information on steps taken to establish adequate judicial mechanisms to challenge all refoulement decisions.**

**(b) Whether the State party has ceased the “rendition” of suspects....**

**(c) Steps taken to ensure that the State party conducts investigations into all allegations of violation of article 3 of the Convention. ...**

**Response to issues raised in Question 10(a).**

66. ...United States policy is not to transfer any person to a country where it is more likely than not that the person will be tortured or, in appropriate cases, where the person has a well-founded fear of persecution based on a protected ground and would not be disqualified from persecution protection on criminal or security-related grounds. Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277 (FARRA) provides that “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” In application, the “substantial grounds” standard equates to the “more likely than not” standard. The clear statement in the FARRA informs U.S. treatment of detainees in its custody, and others subject to transfer by the United States.

67. In E.O. 13491, President Obama ordered the establishment of the Special Task Force in part “to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.” The Special Task Force considered seven types of transfers conducted by the U.S. government: extradition, removals pursuant to immigration proceedings, transfers pursuant to the Geneva Conventions, transfers from Guantanamo, military transfers within or

from Afghanistan, military transfers within or from Iraq, and transfers pursuant to intelligence authorities. The work of the Special Task Force was informed, *inter alia*, by the record in past cases. Recommendations made by the Special Task Force in August 2009, were accepted by the President. The Special Task Force was terminated upon the completion of its duties.

68. The United States maintains extensive mechanisms to ensure that all transfers are conducted in a manner consistent with its non-refoulement commitment, as discussed in response to Questions 8(a) and 11. In its Initial Report ¶¶ 156-177, 2005 CAT Report ¶¶ 32-43, and 2006 Response to List of Issues pp. 27-32, 39-43 and 46, the United States provided detailed information on the implementation of Article 3 in the immigration removal and extradition contexts. *See, e.g.*, DHS regulations for the implementation of Article 3 in the immigration removal context, 8 C.F.R. 208.16-208.18, and DOS regulations implementing Article 3 in the extradition context, 22 C.F.R. 95.1-95.4. U.S. implementation of Article 3 of the Convention in the immigration and extradition context is discussed further in the 2011 ICCPR Report ¶¶ 282-287 and ¶¶ 558-559, incorporated herein by reference.

69. As addressed elsewhere in this submission, the United States conducts a thorough, case-by-case analysis of each potential transfer to a foreign government of third country nationals detained in situations of armed conflict and may secure diplomatic assurances from the country of proposed transfer, as well as post-transfer monitoring of the detainee. This thorough and rigorous process ensures that any transfers are consistent with the U.S. non-refoulement commitment.

70. The United States also takes measures to ensure that law of war detainees who are transferred to a host government are treated humanely. ...

**Response to issues raised in Question 10(b).**

71. The United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured. The Special Task Force established in E.O. 13491 issued a set of recommendations to ensure that U.S. transfer practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture, and the President accepted those recommendations. The U.S. government is in the process of implementing those recommendations.

**Response to issues raised in Question 10(c).**

72. The United States is firm in its commitment not to transfer any person to a country where it is more likely than not that the person will be tortured, as discussed further in response to Questions 8 and 11. Assignment of responsibility within the U.S. government for investigating alleged violations of this law and policy necessarily depends on the specific facts and circumstances of the allegations. If criminal violations of federal law are suspected, DOJ may investigate. In other cases, the Inspector General's office or another component of the agency involved may investigate.

\* \* \* \*

75. The United States is not aware of any cases in which humane treatment assurances have not been honored in the case of an individual transferred from the United States or Guantanamo since the Special Task Force report was issued in August 2009.

**11. Please provide detailed information on:**

- (a) The procedures in place for obtaining “diplomatic assurances” ...
- (b) Steps taken to establish a judicial mechanism for reviewing, in last instance, the sufficiency and appropriateness of diplomatic assurances in any applicable case. ...
- (c) Steps taken to guarantee effective post-return monitoring arrangements.
- (d) All cases since 11 September 2001 where diplomatic assurances have been provided. ...

**Response to issues raised in Question 11(a).**

76. For the United States, the critical determination in the context of any transfer of an individual to a foreign country is whether it is more likely than not that the person would be tortured. U.S. consideration and use of assurances from foreign governments regarding the treatment of people who may be transferred to foreign countries, where such assurances are relevant, factor into this determination.

77. As noted, in August 2009 the Special Task Force made recommendations to the President with respect to all scenarios in which the United States transfers or facilitates the transfer of a person from one country to another or from U.S. custody to the custody of another country. The Special Task Force recommendations were accepted by the President. Several recommendations were aimed at clarifying and strengthening U.S. procedures for obtaining and evaluating diplomatic assurances from receiving countries for those transfers in which such assurances are obtained. These included a recommendation that the Secretary of State be involved in evaluating all diplomatic assurances, and a recommendation that the Inspectors General of the Departments of State, Defense, and Homeland Security prepare annually a coordinated report on all transfers involving diplomatic assurances conducted by each of their agencies. ... The United States has been implementing the Special Task Force recommendations across the range of government transfers.

\* \* \* \*

**Response to issues raised in Question 11(b).**

79. A judicial mechanism is generally not available to review diplomatic assurances regarding humane treatment. That said, the United States maintains robust procedures to review the sufficiency and appropriateness of humane treatment assurances, which are different in nature from formal judicial review but effective in ensuring compliance with applicable law and policy. The Executive Branch, and in particular DOS, 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. DOS has used these tools in the past to facilitate transfers in a responsible manner that comports with the obligations and policies described herein.

\* \* \* \*

**Response to issues raised in Question 11(c).**

82. Consistent with the recommendations of the Special Task Force established under E.O. 13491, in general, the U.S. government will seek the foreign government’s agreement to

allow consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government, by non-governmental entities, or in some circumstances U.S. government officials, in the country concerned to monitor the condition of an individual returned to that country. In the past several years, the United States has established monitoring regimes in particular cases. In appropriate situations, the United States has raised concerns regarding both treatment and the process under which prosecutions have been pursued post-transfer when concerns have been brought to its attention, whether from U.S. government information, monitoring by non-governmental organizations, or other sources. The United States has also taken other measures, such as training guard forces in anticipation of transfers, and has suspended transfers, where appropriate.

**Response to issues raised in Question 11(d).**

83. As discussed above, diplomatic assurances have been sought and obtained from foreign governments in an extremely small number of immigration and extradition cases, sometimes as a prudential matter. In an effort to maintain the ability to manage the delicate negotiations needed to obtain assurances, the United States does not as a general matter publicly release the names of countries from which it has secured assurances.

84. In the law of war detention context, the U.S. government has in many cases obtained humane treatment assurances along with security-related assurances. As explained in the response to Question 11(b), the United States is not in a position to provide further detail on such cases, but U.S. practices in this area are fully consistent with U.S. humane treatment commitments. ...

85. In instances in which the United States transfers an individual subject to diplomatic assurances, it would pursue any credible report of conduct contrary to those assurances and take appropriate action if it had reason to believe that those assurances would not be, or had not been, honored. The United States takes seriously past practice by foreign governments. In an instance in which specific concerns about the treatment an individual may receive in a particular country cannot be resolved satisfactorily, the United States would seek alternative arrangements. The United States has declined to transfer based on prior failure to comply with humane treatment commitments.

**12. Please provide updated information on the security agreement reached between the State Party and Iraq on the transfer of detainees ...**

86. Consistent with its terms, the Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of their Activities During Their Temporary Presence in Iraq (Security Agreement) expired on December 31, 2011. All detainees in U.S. physical custody were released or transferred to the Ministry of Justice of the Government of Iraq prior to the expiration of the agreement. The U.S. government sought and received assurances from the Government of Iraq that Iraq was committed to treating detainees in accordance with its Constitution and its international human rights obligations, including the CAT.

87. During the period in which the United States was involved in holding detainees in Iraq on behalf of the Iraqi government, the U.S. Supreme Court held that habeas corpus jurisdiction could not be exercised to enjoin the United States from transferring a U.S. citizen to the custody of Iraq, a foreign sovereign, for criminal trial where the individuals were detained within its territory on behalf of that sovereign pending their criminal prosecution, and where the

U.S. government had a firm policy not to transfer individuals if they were more likely than not to face torture. Munaf v. Geren, 553 U.S. 674 (2008). Nevertheless, the United States took appropriate action, before and after the Security Agreement went into effect, to mitigate the risk that any transferred detainees would be subject to torture.

88. As part of this effort, DOS has implemented extensive training and assistance programs for Iraqi prisons. Since 2003, more than 15,000 Iraqi correctional officers have received training through DOS programs. The United States has also helped the Iraqis establish their own training and auditing programs to promote and protect human rights, and has provided improved facilities and ongoing partnering. Although all U.S. forces have now withdrawn from Iraq, the United States continues its partnership with Iraq through DOS programs such as these, as well as through regular bilateral dialogue regarding detention and treatment issues.

\* \* \* \*

**14. Please indicate what are the purposes of the agreements the State party is signing with countries not to transfer its citizens to the International Criminal Court ....**

90. The United States has signed agreements with over 100 States of the type described above that apply to United States persons. In general, States concluding the agreements agree to surrender or transfer such persons to the International Criminal Court only with the consent of the State concerned. To date there have not been any requests for such consent under these agreements. For its part, the United States is fully committed to investigating and prosecuting, where appropriate, acts that amount to war crimes, crimes against humanity, and genocide alleged to have been committed by its officials, employees, military personnel or other nationals. Indeed, the agreements contain language specifically underscoring this intention, and reaffirming the importance of bringing to justice those who commit war crimes, crimes against humanity, and genocide, and this would include any such crimes that are covered by the CAT.

\* \* \* \*

**Article 10**

**16. Please include information on steps taken to:**

**(a) Ensure that education and training of all law enforcement or military personnel is conducted on a regular basis...**

**(b) Ensure specific training for all medical personnel dealing with detainees ....**

**(c) Develop and implement a methodology to evaluate the implementation of its training/educational programmes ....**

**Response to issues raised in Question 16(a).**

94. DoD intelligence interrogations are conducted only by properly trained and certified personnel. Training includes instruction on applicable law and policy; lawful interrogation methods and techniques; the humane treatment of detainees and how to identify signs of torture and/or cruel, inhuman or degrading treatment; and the procedures for the reporting of alleged violations. Routine refresher training is provided on a recurring basis. Refresher training is also provided by Combatant Commanders to all interrogators when they are assigned to conduct operations in a specific theater.

\* \* \* \*

96. The Federal Bureau of Investigation (FBI) uses a non-coercive rapport-based approach to interrogation, and FBI policy specifically prohibits the use of force, threats, or promises in the course of an interrogation. Although the FBI instructs its agents on the elements of effective interrogation, it does not define a particular set of techniques for its agents to use. All FBI Special Agents receive extensive training on interview and interrogation during their new agents training classes in Quantico, Virginia. Training is conducted in the classroom and through practical exercises. FBI personnel may attend additional interrogation training after basic training.

\* \* \* \*

**Response to issues raised in Question 16(b).**

101. The United States recognizes the important role the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) can play in international efforts to promote the effective investigation and documentation of torture and other ill-treatment. U.S. agencies involved with detainees are aware of the need to recognize and document such evidence as part of the effort to bring to justice those who violate the law. Medical personnel associated with such agencies who treat detainees are trained to detect signs of abuse or neglect and are required to report any such signs to appropriate supervising authorities if misconduct is suspected.

**Response to issues raised in Question 16(c).**

102. In an on-going effort to lessen the likelihood of abusive treatment, the Army Inspector General conducts an in-depth biennial inspection of all aspects of detention operations. The inspection team includes intelligence professionals who look specifically at interrogation operations. In addition, all combatant commanders who have detention responsibilities conduct semi-annual detention operations assessments, which are also supported by intelligence professionals who carefully examine interrogation operations. Both the biennial and semi-annual assessments provide DoD with the ability to ascertain the effectiveness of its training protocols. Any lessons learned, noted shortfalls, or recommendations are provided to training institutions to ensure they receive appropriate feedback on the results of their training curriculum.

**17. Please indicate steps taken to ensure that acts of health personnel are in full conformity with principle No. 2 of the Principles of Medical Ethics relevant to the Role of Health Personnel ....**

\* \* \* \*

105. U.S. practice is consistent with principle No. 2 of the non-binding Principles of Medical Ethics relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition on torture under U.S. law is absolute and, as provided in the Detainee Treatment Act of 2005, no individual in the custody or under the physical control of the U.S. government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading

treatment or punishment. Provisions applicable to BOP medical staff are delineated in Program Statement 6010.02 Health Services Administration. The policy reaffirms the agency's position that all inmates have value as human beings, deserve medically necessary health care, and should be treated with a focus on compassionate care. Medical staff who deviate from the standards of care are addressed through administrative discipline, professional license referrals, and personal liability in the federal courts. All staff members are provided training concerning the use of force against inmates upon employment with the agency, and in refresher classes provided annually. Medical staff are part of this training, and also receive training on several areas concerning standards of care on a frequent basis. Medical staff are subject to the same provisions concerning this matter as other BOP staff. Program Statement 3420.09, Standards of Employee Conduct, states, "An employee may not use brutality, physical violence, or intimidation towards inmates, or use of any force beyond that which is reasonably necessary to subdue an inmate." Program Statement 5566.06, Use of Force, authorizes staff to use force only as a last resort, and limits the amount of force used to only that which is necessary to gain control of an inmate, protect human safety, prevent serious property damage, and to ensure security and good order. The Bureau's policies concerning interrogation are available at [www.bop.gov](http://www.bop.gov).

106. DoD Instruction 2310.08E (Medical Program Support for Detainee Operations) Section 1.3, issued on June 6, 2006, "[r]eaffirms the responsibility of health care personnel to protect and treat, in the context of a professional treatment relationship and established principles of medical practice, all detainees in the control of the Armed Forces during military operations. This includes enemy prisoners of war, retained personnel, civilian internees, and other detainees." Section 4.1 of the instruction goes on to establish basic principles for healthcare personnel, among which are included the duty to uphold humane treatment and ensure that no individual in U.S. custody is subject to cruel, inhuman, or degrading treatment or punishment (in accordance with U.S. law); and the "duty to protect detainees' physical and mental health and provide treatment for disease . . . guided by professional judgments and standards similar to those applied to personnel of the U.S. Armed Forces." Paragraph 4.1.3 states "Health care personnel shall not be involved in any professional provider-patient treatment relationship with detainees the purpose of which is not solely to evaluate, protect, or improve their physical and mental health." Paragraph 4.1.5 states "Health care personnel shall not certify, or participate in the certification of, the fitness of detainees for any form of treatment or punishment that is not in accordance with applicable law, or participate in any way in the administration of any such treatment or punishment." Paragraph 4.5 establishes reportable incident requirements related to observed or suspected violation of applicable standards for treatment of detainees. In addition, section 4.6 establishes a requirement that "health care personnel involved in the treatment of detainees or other detainee matters receive appropriate training on applicable policies and procedures regarding the care and treatment of detainees." With regard to the role of health personnel in interrogations, behavioral science consultants (BSCs) are the only medical personnel who may provide advice concerning interrogations of detainees and they may do so only when the interrogations are fully in accordance with applicable law and properly issued interrogation instructions. BSCs are not involved in the medical treatment of detainees and do not access medical records.

**Article 11**

**18. ... please describe steps taken to ensure that interrogation rules, instructions or methods do not derogate from the principle of absolute prohibition of torture.**

**Furthermore, please:**

**(a) Provide updated information on the content of the Army Field Manual on Interrogation and its conformity with the Convention;**

**(b) Clarify if the standard for interrogation set in the manual is binding on all components of the State party, including intelligence agencies and private contractors who act on their behalf;**

...

107. As discussed in response to Questions 5 and 6, in E.O. 13491, Ensuring Lawful Interrogations, President Obama directed that individuals detained in any armed conflict shall in all circumstances be treated humanely, and shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual, without prejudice to the use by federal law enforcement agencies of authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises. The manual explicitly prohibits threats, coercion, physical abuse, and “waterboarding.” The executive order also revoked previous executive directives, orders, and regulations to the extent inconsistent with that order.

108. Actions prohibited by the Army Field Manual with respect to intelligence interrogations include, but are not limited to: forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee or using duct tape over the eyes; applying beatings, electronic shock, burns, or other forms of physical pain; “waterboarding”; using military working dogs; inducing hypothermia or heat injury; conducting mock executions; and depriving the detainee of necessary food, water, or medical care. The Army Field Manual also provides guidance to be used while formulating interrogation plans for approval. It states: “In attempting to determine if a contemplated approach or technique should be considered prohibited . . . consider these two tests before submitting the plan for approval:

- If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?

- Could your conduct in carrying out the proposed technique violate a law or regulation? Keep in mind that even if you personally would not consider your actions to constitute abuse, the law may be more restrictive.

If you answer yes to either of these tests, the contemplated action should not be conducted.”

**Response to issues raised in Question 18(a).**

109. The Army Field Manual was promulgated on September 6, 2006 and supersedes all previous versions of the manual. It lists the 18 Congressionally-approved interrogation approaches and the one Congressionally-approved interrogation technique (separation) that may be used with detainees, including the restrictions and limitations on their use discussed above.

110. Interrogations undertaken in compliance with the Army Field Manual are consistent with U.S. domestic and international law obligations. For example, the Army Field Manual states that “[a]ll captured or detained personnel, regardless of status, shall be treated humanely, and in

accordance with the Detainee Treatment Act of 2005 and DoD Directive 2310.1E . . . and no person in the custody or under the control of DoD, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment, in accordance with and as defined in U.S. law.” The Army Field Manual is available at [www.fas.org/irp/doddir/army/fm2-22-3.pdf](http://www.fas.org/irp/doddir/army/fm2-22-3.pdf).

**Response to issues raised in Question 18(b).**

111. The United States confirms that the interrogation approaches and techniques in the Army Field Manual are binding on the U.S. military, as well as all federal government agencies, including the intelligence agencies, with respect to individuals in U.S. custody or under U.S. effective control in any armed conflict, without prejudice to authorized non-coercive techniques of federal law enforcement agencies. This requirement was established in E.O. 13491, and the Special Task Force created by that E.O. specifically affirmed that the Army Field Manual provides appropriate guidance on interrogation for military interrogators and determined that no additional or different guidance was necessary for other agencies. The Special Task Force explained that its conclusions rested on its unanimous assessment, including that of the Intelligence Community, that the practices and techniques identified by the Army Field Manual or currently used by law enforcement provide adequate and effective means of conducting interrogations.

112. With respect to private contractors, § 1038 of the 2010 National Defense Authorization Act (Public Law 111-84) banned contractor personnel from interrogating any individual “under the effective control of DoD or otherwise under detention in a DoD facility in connection with hostilities” unless the Secretary of Defense determines that a waiver to this prohibition is vital to the national security interests of the United States and waives the prohibition for a period of up to 60 days or renews the waiver for one additional 30-day period. The Department does not currently employ contract interrogators. This does not prohibit contractors from performing tasks ancillary to interrogations. DoD policy (DoD Directive 3115.09) applies the humane treatment standard to contractors performing these ancillary tasks and specifies that their contracts must “comply with the same rules, procedures, policies, and laws pertaining to detainee operations and interrogations as apply to Government personnel in such positions.”

\* \* \* \*

**20. Please indicate if the International Committee of the Red Cross is granted access to all places of detention ....**

119. The United States notes paragraph 6 of this report. Executive Order 13491 requires that “[a]ll departments and agencies of the Federal Government shall provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict 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 U.S. Government, consistent with Department of Defense regulations and policies.” (Section 4(b)). Additional information on detainee registration and ICRC access is provided in response to Question 4(a).

\* \* \* \*

**21. Please provide updated information on the establishment, composition and functioning of the “High-Value Interrogation Group”...**

122. The High-Value Detainee Interrogation Group (HIG) was established as recommended by the Special Task Force, which concluded that the HIG could improve the U.S. ability to interrogate the most dangerous terrorists by bringing together the most effective and experienced interrogators and support personnel from the FBI, the CIA, and DoD to conduct interrogations in a manner that will continue to strengthen national security consistent with the rule of law. The Special Task Force recommended that this specialized interrogation group develop a set of best practices and disseminate them for training purposes to agencies that conduct interrogations. In addition, the Special Task Force recommended that a scientific research program for interrogation be established to study the comparative effectiveness of interrogation approaches and techniques, with the goal of identifying the existing techniques that are most effective and developing new lawful techniques to improve intelligence interrogations.

123. The HIG is an interagency body that is administratively housed within the FBI. The HIG has a Director, who is an FBI employee, and two Deputy Directors, who are drawn from the CIA and DoD. The HIG’s Mobile Interrogation Teams bring together experienced interrogators, analysts, subject matter experts, behavioral science experts, linguists, and others drawn from across the intelligence community, military and law enforcement to conduct and/or provide support to interrogation of high-value detainees.

124. Interrogations conducted or supported by the HIG are consistent with the provisions of E.O. 13491 and with U.S. domestic and international law, including the CAT.

125. Under its charter of operations, the HIG complies with the humane treatment requirements set forth in E.O. 13491, as well as all other U.S. law, policies and guidance regarding the treatment and interrogation of detainees. HIG personnel also have a duty to comply with their home agencies’ operations, and report legal issues regarding compliance with the law to the proper authority. DOJ in its role as HIG legal counsel, in coordination with attorneys at participating agencies and the National Security Council and the White House, is responsible for evaluating legal issues concerning HIG compliance with US domestic and international legal obligations regarding the treatment and interrogation of detainees and other appropriate matters.

\* \* \* \*

**24. Please describe steps taken to ensure prompt and effective investigation into any allegations of torture or ill-treatment by private military and security companies ...**

136. DoD Directive 3115.09 (DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning) ¶ 4.c. states that “[o]nly DoD interrogators who are trained and certified in accordance with the standards . . . may conduct DoD intelligence interrogations. DoD intelligence interrogations shall be conducted only by personnel properly trained and certified to DoD standards” Congress has now effectively barred civilian contractors from performing interrogation functions, and has required private translators involved in interrogation operations to undergo substantial training and to be subject to substantial oversight. ...

137. Several cases have been brought against contractors under the Military Extraterritorial Jurisdiction Act and the Special Maritime and Territorial Jurisdiction (SMTJ). Convictions of David Passaro and Don Ayala under these authorities are discussed in 2011

ICCPR ¶¶ 533 and 534, incorporated herein by reference. The availability of criminal and civil remedies for all forms of torture and ill-treatment is discussed in response to Questions 23(a) and 27(a).

138. In addition, domestic legislative efforts continue to pass a Civilian Extraterritorial Jurisdiction Act (CEJA) that provides clear and unambiguous jurisdiction to prosecute non-DoD personnel for overseas misconduct. CEJA's enactment has been supported by the Executive Branch. It was not passed by the 112<sup>th</sup> Congress, however, and has not been reintroduced in the current Congress to date.

139. At the international level, the U.S. government actively engaged in the development of the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, and the International Code of Conduct for Private Security Service Providers (Code). The latter initiative has the potential to improve private security contractor (PSC) compliance with applicable laws and respect for human rights, and to provide additional tools for identifying, avoiding, and remediating impacts that PSCs may have on communities and other stakeholders. DOS, along with other federal agencies including DoD, is actively engaged in ongoing efforts to establish a credible governance and oversight mechanism for the Code.

\* \* \* \*

**26. Please provide detailed information on the procedures in place to review the circumstances of detention, as well as on steps taken to ensure that the status of detainees is available to all detainees. In this respect, please elaborate on the status and content of the Military Commission Act, as well as its conformity with the Convention.**

143. The United States notes that in ¶ 27 of its 2006 Concluding Observations, the Committee indicated that its concern with review of circumstances of detention and ensuring that status of detainees is available to all detainees arises in particular in the context of military detention at Guantanamo and in Iraq and Afghanistan.

144. As noted in response to Question 8(c), the U.S. Supreme Court has determined that habeas corpus jurisdiction extends to noncitizens detained by DoD at Guantanamo (Rasul v. Bush, 542 U.S. 466 (2004), and Boumediene v. Bush, 553 U.S. 723 (2008)) and to U.S. citizens detained in effective U.S. custody in Iraq (Munaf v. Geren, 553 U.S. 674 (2008)).

145. As also discussed in response to Question 8(c), President Obama issued E.O. 13567 on March 7, 2011, establishing a new robust periodic review process for Guantanamo detainees that includes the ability to present information, call certain witnesses, and receive the assistance of counsel. In 2009 review procedures were also improved for detainees held at the theater internment facility at Bagram airfield in Afghanistan. Safeguards to ensure humane treatment of detainees who were previously held by the United States in Iraq and have been transferred to Iraqi custody are discussed in response to Question 12. As noted there, the last detainee held in U.S. physical custody in Iraq was transferred to Iraqi custody prior to the expiration of the U.S.-Iraq security agreement on December 31, 2011.

146. The United States believes that the Military Commissions Act of 2009 is fully consistent with the Convention. The terms of the Act are described in response to Question 8(b).

\* \* \* \*

**38. Please provide information on steps taken to address the reports of inhumane conditions at Guantánamo Bay....**

216. The conditions of detention at Guantanamo meet or exceed all U.S. obligations under international law. No individuals currently detained at Guantanamo are juveniles. Omar Khadr, who was 16 years old when he was transferred to Guantanamo, pleaded guilty before a military commission as discussed in ¶ 55 and was sentenced pursuant to a pre-trial agreement to eight years imprisonment. On September 29, 2012, he was transferred to Canada to serve the remainder of his sentence.

\* \* \* \*

**2. Transfers**

Eleven individuals were transferred from the detention facility at Guantanamo Bay in 2013 as part of ongoing U.S. efforts to close the facility. On August 29, 2013, the Department of Defense announced the transfer of Algerians Nabil Said Hadjarab and Mutia Sadiq Ahmad Sayyab to the Government of Algeria. In a news release available at [www.defense.gov/releases/release.aspx?releaseid=16235](http://www.defense.gov/releases/release.aspx?releaseid=16235), the Department of Defense explained that these men were approved for transfer by consensus of the six departments and agencies comprising the interagency Guantanamo Review Task Force after a comprehensive review that considered security issues, among other factors. The Department of Defense announced the transfer of two more Algerian citizens to Algeria on December 5: Djamel Saiid Ali Ameziane and Bensayah Belkecem. The December 5, 2013 news release is available at [www.defense.gov/releases/release.aspx?releaseid=16404](http://www.defense.gov/releases/release.aspx?releaseid=16404).

On December 16, in a news release available at [www.defense.gov/releases/release.aspx?releaseid=16427](http://www.defense.gov/releases/release.aspx?releaseid=16427), the Department of Defense announced the transfer of Saad Muhammad Husayn Qahtani and Hamood Abdulla Hamood to the Government of the Kingdom of Saudi Arabia. On December 18, 2013, the Department of Defense announced the transfer of Noor Uthman Muhammed and Ibrahim Othman Ibrahim Idris to the Government of Sudan. As explained in the December 18 news release available at [www.defense.gov/releases/release.aspx?releaseid=16436](http://www.defense.gov/releases/release.aspx?releaseid=16436), the Convening Authority for Military Commissions agreed to suspend Muhammed's confinement after 34 months in exchange for his guilty plea and cooperation in military commission proceedings. Idris was released in accordance with a court order and after review by the Guantanamo Review Task Force.

In a December 31, 2013 news release, available at [www.defense.gov/releases/release.aspx?releaseid=16457](http://www.defense.gov/releases/release.aspx?releaseid=16457), the Department of Defense announced the transfer of the last three ethnic Uighurs remaining at Guantanamo: Yusef Abbas, Saidullah Khalik, and Hajiakbar Abdul Ghuper. The three were transferred

to Slovakia for voluntary resettlement there after the interagency Guantanamo Review Task Force conducted a comprehensive review of their cases.

### 3. U.S. court decisions and proceedings

#### a. *Detainees at Guantanamo: Habeas Litigation*

##### (1) Al Warafi v. Obama

On May 24, 2013, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court's denial of a petition for habeas brought by Yemeni citizen Mukhtar Al Warafi. 716 F.3d 627 (D.C. Cir. 2013). The D.C. Circuit had previously remanded the case after the district court's first denial of the petition, directing the lower court to consider Al Warafi's claim that he should have been afforded protection as "medical personnel" pursuant to the First Geneva Convention. On remand, the district court determined that Al Warafi had not proven his status as medical personnel under Article 24 of the First Geneva Convention. The appeals court affirmed in an opinion excerpted below (with footnotes omitted).

---

\* \* \* \*

The commentary to the First Geneva Convention declares that Article 24 personnel "are to be furnished with the means of proving their identity." GC Commentary 218. Article 40 of the First Geneva Convention mandates that "[t]he personnel designated in Article 24 ... shall wear, affixed to the left arm, a water-resistant armband bearing the distinctive emblem, issued and stamped by the military authority." In addition to mandating the wearing of the armband, Article 40 further declares that "[s]uch personnel ... shall also carry a special identity card bearing the distinctive emblem." That card "shall be water-resistant and of such size that it can be carried in the pocket." It further "shall be worded in the national language," and include the full name, date of birth, rank and service number of the bearer, and "shall state in what capacity he is entitled to the protection of the present Convention." The Article further requires that "[t]he card shall bear the photograph of the owner and also either his signature or his finger-prints or both." Just as the armband must bear the stamp of the military authority issuing it, the card "shall be embossed with the stamp of the military authority." (Emphases added.)

It is undisputed that Al Warafi wore no such armband and carried no such card. For that reason, in our remand order, we stated that "it appears that Al Warafi bears the burden of proving his status as permanent medical personnel." *Al Warafi v. Obama*, 409 Fed.Appx. 360.

On remand, the district court reviewed the evidence. The court opined that the Convention created "a straightforward regime in which proper identification is *necessary* to prove one's protected status as permanent medical personnel." 821 F.Supp.2d at 54 (emphasis in original). In the end, the court concluded that Al Warafi's petition "will be denied."

On appeal, Al Warafi argues, *inter alia*, that "the district court's holding that Article 24

status is conditioned upon detainee having ‘official identification’ is inconsistent with this Court’s remand order....” The argument proceeds that because this court, in our earlier remand decision, stated that we knew that Al Warafi had no identification card or armlet at the time of capture, but nonetheless remanded for further consideration on the question of whether Mukhtar “was permanently and exclusively engaged as a medic,” we were, in effect, establishing the law of the case that the lack of such identification did not deprive petitioner of the ability to establish his status by other evidence. We do not accept Al Warafi’s argument.

The law of the case doctrine will not bear the weight Al Warafi places upon it. “The law-of-the-case doctrine bars us from considering *only* questions *decided* by this Court in this case.” *Coalition for Common Sense in Government Procurement v. United States*, 707 F.3d 311 (D.C.Cir.2013) (emphases added) (other emphasis omitted). *See also LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C.Cir.1996) (en banc) (“The same issue presented a second time in the same case in the same court should lead to the same result.” (emphases omitted)). While this is the same question in the same court, we did not decide the question in the unreported order upon which Al Warafi relies. Concededly, the unpublished order is consistent with his interpretation, but it is also consistent with a court which remained agnostic as to the question at issue. Again, we did not decide the question. We left the question open and remanded the case to the district court for further development. On remand, the district court reinstated its prior decision with further discussion of the determinative question, and an apparent firm conviction that other evidence could not substitute for the indicia of medical personnel status recited in the Convention and in the Army Regulation. Upon review, we agree with the district court.

As we noted above, the Convention speaks in mandatory terms. As relevant to this case, and as noted by the district court, the First Geneva Convention protects personnel who are “[m]edical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, [and] staff *exclusively engaged* in the administration of medical units and establishments.” The commentary to the Convention expressly provides for the identification elements we set forth above. It does so in mandatory terms. *See* First Geneva Convention Commentary 219. Neither the Convention nor the commentary provide for any other means of establishing that status.

The Geneva Conventions and their commentary provide a roadmap for the establishment of protected status. As the district court found, Al Warafi was serving as part of the Taliban. The Taliban has not followed the roadmap set forth in the Conventions, and it has not carried Al Warafi to the destination. We hold that without the mandatory indicia of status, Al Warafi has not carried his burden of proving that he qualified “as permanent medical personnel.”

While not necessary to its decision, the district court, in addition to its legal conclusion that the identification requirements of Article 24 constitute a *sine qua non* for protected status under Article 24, found as fact that petitioner had been stationed in a combat role before serving in a clinic. The court further found that “[p]etitioner was captured with a weapon.” 821 F.Supp.2d at 49. It reiterated its earlier finding that it was more likely than not that Al Warafi was part of the Taliban. The court further reiterated the well-established law that in habeas proceedings such as this, the government bears the burden “to prove that petitioner’s detention is lawful.” That is, the government must prove “‘that petitioner more likely than not was part of the Taliban’ at the time of his capture.” 821 F.Supp.2d at 53 (citing *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C.Cir.2010)). The court renewed its conclusion that the government had met

that burden.

The court recalled that: “ ‘[O]nce the government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.’ ” 821 F.Supp.2d at 53–54 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 534, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion)).

In the end, the question of whether Al Warafi has met his burden of establishing his status as permanent medical personnel entitled to protection under the First Geneva Convention is one of fact, or at least a mixed question of fact and law. Although the district court believed, and we agree, that military personnel without appropriate display of distinctive emblems can never so establish, it also found facts—*e.g.*, the prior combat deployment—inconsistent with that role. These are findings of fact reviewed by us for clear error. *See, e.g., American Soc. for Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 659 F.3d 13, 19 (D.C.Cir.2011). The evidence in the record gives credence to the view that Al Warafi is unable to provide the proof required under the Convention because he was not a medic.

\* \* \* \*

(2) *Enteral feeding cases*

On September 4, 2013, the United States filed its brief on appeal in the consolidating claims brought by several detainees challenging the practice of enteral feeding used with detainees on hunger strikes. The district court denied the detainees’ motions to enjoin the practice. The U.S. brief on appeal, excerpted below (with footnotes omitted), argues that the courts lack jurisdiction over claims such as petitioners,’ which challenge conditions of confinement, and that the standard for granting an injunction cannot be satisfied. The brief is available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

Here, through Section 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e), Congress has exercised its constitutional prerogative to withdraw from the federal courts jurisdiction to adjudicate conditions of confinement and treatment claims by detainees at Guantanamo Bay:

[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, *treatment*, trial, or *conditions of confinement* of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant.

28 U.S.C. § 2241(e)(2) (emphasis added).

By withdrawing jurisdiction over claims relating to detainees' conditions of confinement or treatment, members of Congress specifically intended to prevent detainees from raising claims related to the provision of medical care. . . .

This Court has held that § 2241(e)(2) is a valid exercise of congressional power. *See Al-Zahrani*, 669 F.3d at 318-19 (upholding the continuing applicability of § 2241(e)(2) bar to "our jurisdiction over 'treatment' cases"). And § 2241(e)(2) has been repeatedly applied by district courts in this Circuit to bar a variety of challenges to detainees' conditions of confinement and treatment, including claims related to the provision of medical care. The district court thus correctly concluded that it lacked jurisdiction over the claims raised in petitioners' preliminary injunction motion.

\* \* \* \*

**3.** Petitioners further assert that the court has jurisdiction over their injunction motion because they "assert habeas jurisdiction to review a quantum change in the level of custody in which they are being held." Pet. Br. at 24 (emphasis omitted). According to petitioners, because hunger striking detainees are transferred from communal living quarters to single cells, petitioners' "force-feeding is reviewable via habeas corpus." Pet. Br. at 25.

Petitioners' argument attempts to recast the nature of the claims they presented to the district court, which did not challenge the "level of custody" in which petitioners are being held. Although petitioners allege that JTF-GTMO has made the discretionary decision to house hunger striking detainees separately from other detainees, petitioners are not challenging that particular decision—*i.e.*, they are not asking to be moved to a communal environment. Rather, in the motion at issue, petitioners requested "a preliminary injunction prohibiting respondents from subjecting petitioners to force-feeding of any kind, including forcible nasogastric tube feeding, and from administering medications related to force-feeding without the petitioners' consent." App. 1. And petitioners' motion for an emergency injunction requested an injunction "prohibiting respondents from depriving petitioners of their right to preform nightly communal Ramadan prayers unless they stop hungerstriking." App. 168. Neither of these requests implicates—nor would granting them require—a "quantum change in the level of custody" in which petitioners are being held.

As the Seventh Circuit explained in *Graham v. Broglin*, the case relied upon by petitioners, "[i]f a prisoner seeks by his suit to shorten the term of his imprisonment, he is challenging the state's custody over him and must therefore proceed under the habeas corpus statute . . . while if he is challenging merely the conditions of his confinement his proper remedy is under civil rights law[.]" 922 F.2d 379, 380-81 (7<sup>th</sup> Cir. 1991). . . .

Petitioners here are not seeking a quantum change in the level of their custody; they are seeking an order requiring the government to cease feeding them involuntarily and allowing them to pray communally, wherever they are located. This is akin to "a different program or location or environment," even if the enteral feeding program petitioners are challenging "is more restrictive than the alternative that [they] seek[.]" *See Khadr v. Bush*, 587 F. Supp. 2d 225, 237 (D.D.C. 2008) (holding that Guantanamo detainee's request for a transfer from adult

detention into a rehabilitation and reintegration program for juveniles “is programmatic” and thus not a cognizable habeas action). As Justice Scalia has noted, “[i]t is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a ‘quantum change in the level of custody,’ *Graham v. Broglin*, . . . , such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody.” *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring). But that is precisely what petitioners seek: an order “prohibiting respondents from subjecting petitioners to force-feeding of any kind, including forcible nasogastric tube feeding,” App. 1, which would neither terminate petitioners’ custody, accelerate the date of their release from custody, nor reduce the level of their custody. Respondents’ alleged decision to house hunger striking detainees in single cell living does not somehow transform the enteral feeding program from a condition of petitioners’ confinement into a quantum change in their level of custody.

\* \* \* \*

4. Petitioners’ third attempt to establish the courts’ jurisdiction over their habeas challenge to their treatment and conditions of confinement relies on an assertion that involuntary feeding “constitutes a severe restraint on individual liberty” that “is within the scope of the Great Writ.” Pet. Br. at 26 (emphasis omitted). As an initial matter, it is not clear that petitioners in fact have a “constitutionally-protected [sic] liberty interest in avoiding unwanted medical treatment.” Pet. Br. at 26. *Sell v. United States*, the case cited by petitioners for the proposition that they have such a constitutionally protected interest, reiterated that individuals have “a constitutionally protected liberty ‘interest in avoiding involuntary administration of antipsychotic drugs[.]’” 539 U.S. 166, 178 (2003) (quoting *Riggins v. Nevada*, 504 U.S. 127, 134 (1992)). But the right asserted by petitioners to commit suicide by starvation while in respondents’ custody is not a fundamental liberty interest. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (“[T]he asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.”); *Von Holden v. Chapman*, 450 N.Y.S.2d 623, 625 (N.Y. App. Div. 1982) (“[I]t is self-evident that the right to privacy does not include the right to commit suicide.”).

\* \* \* \*

As previously discussed, the courts lack jurisdiction over petitioners’ challenge because § 2241(e)(2) removes the courts’ jurisdiction over all claims that are not “proper claim[s] for habeas relief.” *Kiyemba*, 561 F.3d at 513. Petitioners’ challenges to their treatment and conditions of confinement are not properly brought via habeas petition, and thus the courts lack jurisdiction over those claims by operation of § 2241(e)(2). Because this conclusion in no way turns on whether petitioners are “in custody” for the purposes of the federal habeas statute, *Hensley* is irrelevant to this case.

\* \* \* \*

c. Even if the Courts Had Jurisdiction Over Petitioners' Preliminary Injunction Motion, Petitioners Have Not Established a Likelihood of Success on the Merits of Their Underlying Claims

\* \* \* \*

Courts have repeatedly recognized the government's legitimate interest in providing life-saving nutritional and medical care in order to preserve the life and prevent suicidal acts of individuals in its care and custody. *See generally In re Soliman*, 134 F. Supp. 2d 1238, 1255-56 (N.D. Ala. 2001) (noting that that "Federal Courts generally have approved of force-feeding hunger striking inmates . . . State courts also have upheld the right to force-feed hunger-striking prisoners"), *vacated as moot*, 296 F.3d 1237 (11th Cir. 2002); Op. at 13, App. 154 (citing cases).

\* \* \* \*

**2.a.** Petitioners attempt to distinguish their case as one involving "indefinite detention," . . . But respondents' legitimate interests in preserving life, preventing suicide, and enforcing prison security and discipline are in no way dependent on the length or status of petitioners' detention—indeed, if accepted, petitioners' argument would bar prison administrators from preventing the suicide of any person with a life sentence. Moreover, multiple courts have rejected challenges to involuntary feeding brought by prisoners who claimed they were subject to indefinite detention. *See In re Grand Jury Subpoena*, 150 F.3d at 171; *In re Soliman*, 134 F. Supp. 2d at 1245, 1258. In each case, the court concluded that the government had legitimate interests in preserving life and maintaining order and safety regardless of the status of the prisoner's detention. *See generally In re Soliman*, 134 F. Supp. 2d at 1255 ("Federal Courts generally have approved of force-feeding hunger striking inmates, regardless of whether the person was a convicted prisoner, a pre-trial detainee, or a person held pursuant to a civil contempt order."). The fact that petitioners are presently detained pursuant to the Authorization for the Use of Military Force, as informed by the laws of war, as opposed to a criminal conviction or authority, is irrelevant to the question whether respondents have a legitimate interest in administering life-saving nutrition and medical care to preserve petitioners' health and life.

**b.** Petitioners separately claim that enteral feeding "is inhumane, degrading and a violation of medical ethics," Pet. Br. at 33-34, and that it "can be extremely painful," *id.* at 37. Those assertions are not only incorrect, but they do not undercut respondents' legitimate interests in preserving petitioners' lives, safeguarding the health of all detainees, and maintaining order and safety at Guantanamo Bay. Nor do petitioners' assertions establish that feeding petitioners enterally is not reasonably related to those legitimate interests. *See generally Safley*, 482 U.S. at 89 ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests").

While petitioners claim that they "do not wish to die," Pet. Br. at 38, petitioners do not dispute that respondents are feeding petitioners enterally in order to keep them alive, and that such feeding is necessary to do so. *See, e.g.,* Statement of Petitioner Hadjarab, App. 39-40 ("I do not want to die, but I am prepared to. . . [M]y situation is so serious now I am willing to sacrifice my body and my health. . . . I am *prepared to die*"); Statement of Petitioner Belbacha, App. 35

(“I am participating in this hunger strike of my own free choice and am fully aware of the negative consequences which a long-term strike could have on my health.”). Rather than claiming that enteral feeding is unnecessary to preserve petitioners’ lives, petitioners assert that “there are *ready alternatives* to such force-feeding: *promptly bring the detainees to trial or military commission proceedings*, the absence of which is the reason why they are hunger striking. Those alternatives make their force-feeding unreasonable.” Pet. Br. at 40. This is an argument challenging petitioners’ detention; it does not address the merits of respondents’ decision to feed petitioners enterally. As the district court recognized, in making this argument, petitioners are “using their motion for preliminary injunction as a vehicle for challenging their detention. . . . Petitioners, in fact, are seeking trial or release; that relief is properly the basis of their habeas petitions.” Op. at 9-10, App. 150-51.

In any event, the district court did not abuse its discretion in concluding that “there is nothing so shocking or inhumane in the treatment of Petitioners—which they can avoid at will—to raise a constitutional concern that might otherwise necessitate review.” *Id.* at 7, App. 148. JTF-GTMO’s hunger strike protocol follows the Federal Bureau of Prisons’ model and guidelines for managing hunger strikers. SMO Decl. ¶ 9, App. 93. A hunger striking detainee is only fed enterally once the detainee’s refusal to consume food or nutrients voluntarily reaches the point where JTF-GTMO medical staff determines that the detainee’s life or health could be threatened. *Id.* ¶ 11, App. 94. Even then, prior to every feeding, the detainee is offered the opportunity to eat a meal or consume a liquid nutritional supplement orally, instead of being enterally fed. *Id.* If enteral feeding is necessary, it is administered in a humane manner through a nasogastric tube, and only when medically necessary to preserve the detainee’s health or life. *Id.* ¶ 12, App. 94. The process is never undertaken in a fashion intentionally designed to inflict pain or harm on the detainee. *Id.* ¶ 15, App. 95. To the contrary, the detainee’s comfort and safety is a priority for the medical staff. *Id.*

Nothing about the process described above constitutes “torture” or “cruel, inhuman, and degrading treatment or punishment.” Pet. Br. at 34. None of the many courts that have rejected challenges to the involuntary feeding of prisoners have suggested that the involuntary feeding process constitutes torture or punishment. Indeed, the Eighth Circuit has concluded that “[t]he mere allegation of forced-feeding does not describe a constitutional violation.” *Martinez v. Turner*, 977 F.2d 421, 423 (8<sup>th</sup> Cir. 1992). Nor is there any suggestion that respondents have acted with deliberate indifference to petitioners’ medical needs. *See generally Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (applying deliberate indifference standard to Eighth Amendment claims involving prisoners’ medical care and conditions of confinement); *O.K. v. Bush*, 344 F. Supp. 2d 44, 60-63 & n.23 (D.D.C. 2004) (“Without concluding that the ‘deliberate indifference’ doctrine” applies to challenges to Guantanamo detainee medical care, “the Court will draw on this well-developed body of law to guide its analysis”). Quite the opposite: respondents are acting appropriately and humanely in response to petitioners’ attempt to starve themselves to death. *See, e.g., Freeman v. Berge*, 441 F.3d 543, 547 (7<sup>th</sup> Cir. 2006) (“[A]t some point in Freeman’s meal-skipping the prison doctors would have had a duty and certainly a right to step in and force him to take nourishment.”).

Nor are petitioners correct in their suggestion that enteral feeding is “out of step with international norms.” Pet. Br. at 39 (quotation marks omitted). The International Criminal

Tribunal for the Former Yugoslavia (ICTY), for example, has ordered a hunger striking detainee to be involuntarily fed “with the aim of protecting the health and welfare of the Accused and avoiding loss of life[.]” *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused, at 6 (Dec. 6, 2006) (Urgent Order). The ICTY explained that “according to jurisprudence of the European Court of Human Rights, ‘force-feeding’ does not constitute torture, inhuman or degrading treatment if there is a medical necessity to do so, if procedural guarantees for the decision to force-feed are complied with and if the manner in which the detainee is force-fed is not inhumane or degrading.” *Id.* at 5 (citing *Nevmerzhitsky v. Ukraine*, ECHR Judgment, Application No. 54825/00 (Oct. 12, 2005)). The ICTY also noted that detainees may be fed involuntarily in countries such as Germany, Austria, and Australia. *See* Urgent Order at 5 n.13. More recently, it has been recognized in the Copenhagen Process on the Handling of Detainees in International Military Operations that “[m]edical assistance should, wherever possible, be undertaken with the consent of the wounded or sick detainee” but that “medical actions to preserve the health of the detainee may be justified even where the detainee refuses to provide consent.”<sup>9</sup> Chairman’s Commentary to the Copenhagen Process: Principles and Guidelines *available at* <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>.

\* \* \* \*

(3) *Abdullah v. Obama*

On October 31, 2013, the United States filed its brief in support of affirming a district court denial of a motion brought by a detainee at Guantanamo seeking a preliminary injunction against his ongoing detention while his habeas petition was still pending. The U.S. brief is excerpted below and available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

Petitioner asserts that his detention is inconsistent with Article III of the Yemen agreement because it violates the Third Geneva Convention. This contention is without merit. As is explained more fully below, assuming arguendo that petitioner has rights under the Yemen agreement that are enforceable in federal court, detention under the AUMF is consistent with the “requirements and practices of generally recognized international law.” *See infra* 16-19; Add. 5. Additionally, we note that on its face, Article III applies only to citizens of Yemen “in the United States of America.” Add. 5. Guantanamo Bay, however, has been deemed not to be part of the United States of America. *See Boumediene v. Bush*, 553 U.S. 723, 753 (2008) (noting Cuban sovereignty over Guantanamo Bay); *see also* Detainee Treatment Act of 2005, Pub. L. No. 109-

148, Tit. X, § 1005(g), 119 Stat. 2739, 2743 (2005); 8 U.S.C. § 1101(a)(38) (Guantanamo Bay is not a territory of the United States for purposes of federal immigration statutes).<sup>2</sup>

Moreover, to the extent that petitioner relies directly on the Third Geneva Convention, his claim is also barred by the Military Commissions Act of 2006 (“MCA”). In that Act, Congress “provided explicitly that the Convention’s provisions are not privately enforceable in habeas proceedings.” *Al-Adahi v. Obama*, 613 F.3d 1102, 1111 (D.C. Cir. 2010); see Pub. L. No. 109-366, 120 Stat. 2600, 2631 (“No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus . . . proceeding” against the federal government “as a source of rights in any court of the United States or its States or territories.”). The MCA confirms that, as with the prior 1929 version of the Third Geneva Convention, the protections afforded under the current version of the Third Geneva Convention are not judicially enforceable by individuals in a habeas proceeding. Cf. *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950); see also *Holmes v. Laird*, 459 F.2d 1211, 1221-22 (D.C. Cir. 1972).

Petitioner’s contention that the Geneva Conventions can be relied upon as a source of rights because the Geneva Conventions have been incorporated into the Yemen agreement rests on a misunderstanding of *Al Warafi v. Obama*, 716 F.3d 627, 629 (D.C. Cir. 2013). At best, *Al Warafi* is relevant to the merits of the habeas petition, not the question of preliminary injunctive relief. In any event, *Al Warafi* held that where domestic U.S. law codified in army regulations “expressly incorporates relevant aspects of the Geneva Conventions” and “explicitly establishes a detainee’s entitlement to release from custody,” the court may analyze “aspects of the Geneva Conventions that have been expressly incorporated” into the army regulations. *Al Warafi*, 716 F.3d at 629. In this case, by contrast, petitioner relies not on the army regulations but on the executive agreement with Yemen. Unlike the army regulations at issue in *Al Warafi*, the Yemen Agreement, even if it applied and could be invoked as a source of individual rights in this proceeding, does not reference the Geneva Conventions by name or explicitly import their provisions and apply them to wartime detainees. Rather, it makes general mention of the “requirements and practices of generally recognized international law.” Add. 5. It therefore does not “expressly incorporate relevant aspects of the Geneva Convention” that “explicitly establish a detainee’s entitlement to release from custody” in the manner proposed by the *Al Warafi* court. *Al Warafi*, 716 F.3d at 629.

Petitioner also contends that any rights he asserts under the Yemen Agreement cannot be abrogated by Congress, because that would constitute an impermissible interference with the President’s recognition power. Petitioner relies on *Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013), see Pet. Br. 13-14, but that case holds that the President “exclusively holds the power to determine whether to recognize a foreign sovereign.” *Id.* at 214. *Zivotofsky* did not address Congress’ authority to define the jurisdiction of the federal courts.

---

<sup>2</sup> Because Petitioner’s claims fail for several distinct reasons, this Court need not decide, and the government does not take a position on, whether the Yemen Agreement is judicially enforceable against the signatory nations at the behest of an individual. We note, however, that this Court has held that “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”” *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 489 (D.C. Cir. 2008) (quoting *Medellin v. Texas*, 552 U.S. 491, 506 n.3(2008)).

2. In any event, Petitioner's continued detention under the AUMF is consistent with the "requirements and practices of generally recognized international law." The United States bases its authority to detain Petitioner (and others in military custody at Guantanamo Bay) on the AUMF, as informed by the laws of war. 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). In *Hamdi*, a plurality of the Supreme Court concluded that what is "necessary and appropriate" under the AUMF is properly understood in light of "[l]ongstanding law-of-war principles." Those principles recognize that the capture and detention of enemy forces, "by 'universal agreement and practice,'" are "important incident[s] of war," and supported the conclusion that the detention of enemy forces could continue "for the duration of the relevant conflict." See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 521 (2004) (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)). Significantly, the writings on the law of war cited in *Hamdi* included authorities discussing both the Geneva Conventions and principles of international law predating those conventions. Thus, lawful detention under the AUMF, including detention for the "duration of the relevant conflict," is consistent with applicable international law—specifically, principles of the laws of war. It therefore complies with the Yemen Agreement provision referencing the "requirements and practices of generally recognized international law." See Add.5.

Petitioner further errs in arguing that his continued detention violates Article 87 of the Third Geneva Convention (and by extension, the Yemen Agreement) which provides that "[p]risoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." See Pet. Br. 9.

Article 87's limitation on when a prisoner of war can be "sentenced" to "penalties" does not apply to preventive wartime detention, the purpose of which "is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518. Wartime detention is "neither revenge, nor punishment" and is "devoid of all penal character." See *ibid.* (internal quotation marks omitted).

Petitioner also argues that Article 87 bars indefinite detention without trial, but petitioner is not being indefinitely detained. Petitioner is being held for the duration of hostilities as authorized by the AUMF, as informed by the laws of war.

Wartime detention is "merely a temporary detention." *Hamdi*, 542 U.S. at 518. If petitioner is lawfully detained under the AUMF, as informed by the laws of war—a question that the district court will decide in reviewing petitioner's habeas petition—his detention is consistent with generally recognized principles of international law.

Petitioner's reliance on the ICCPR is likewise unavailing. The ICCPR was signed by the President, and ratified by the President with the advice and consent of the Senate, "on the express understanding that [the ICCPR] was not self-executing and so did not itself create obligations enforceable in the federal courts." *Sosa*, 542 U.S. at 735; see also S. Exec. Rep. No. 102-23, at 9, 19, 23 (1992). It would be flatly inconsistent with the decisions of the political branches for a court to permit an individual to enforce the terms of the ICCPR in a U.S. court.

Petitioner also asserts that the district court erred by not enjoining “[o]ther [v]iolations of [i]nternational [l]aw.” Pet. Br. 16. But petitioner has not set out, either in district court or in this Court, any argument regarding how the government has violated any other specific provisions of international law in its dealings with him. *See* Pet. Br. 16 (asserting without explanation that “[r]espondents are now, and have been for a decade, violating [Third Geneva Convention] sections 3, 25, 70-72, and 78-79, among others”); Mot. for Prelim. Inj., Dkt. No. 295, at 34 (listing other Geneva Convention provisions that petitioner considers to be self-executing, but not making an argument regarding how those provisions have been violated as to petitioner and asserting that “Abdullah’s claim here is based” on Article 87). Petitioner has not carried his burden of demonstrating a probability of success on the merits.

Ultimately, petitioner’s main complaint appears to be that he has not been able to challenge the factual basis for his detention. *See e.g.*, Pet. Br. 10 (discussing indefinite detention without trial). Under *Boumediene*, that question is to be addressed through the adjudication of his habeas petition. Petitioner cannot short circuit the habeas process by bringing a motion for a preliminary injunction.

\* \* \* \*

(4) Hatim v. Obama

On June 3, 2013, the United States filed a brief in opposition to motions regarding access to counsel filed by detainees at Guantanamo in U.S. District Court for the District of Columbia. *Hatim v. Obama*, Civil No. 1 :05-cv-1429. Petitioners allege that Joint Task Force-Guantanamo (“JTF-GTMO”) changed certain security procedures at the detention facility to interfere with their access to their attorneys. The new security protocol includes frisking the area between the waist and thigh as well as hand-wanding the entire body with a metal detector whenever a detainee leaves or returns to camp. Excerpts below from the U.S. brief explain why the challenged procedures are valid. The U.S. brief is available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). On July 11, 2013, the district court entered an order granting the detainees’ motions and enjoining implementation of the security procedures. The United States appealed on July 17, 2013 and the Court of Appeals for the District of Columbia stayed the district court’s order pending appeal. The United States filed its opening brief on appeal on September 20, 2013 and its reply brief on October 25, 2013. The U.S. briefs on appeal are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

Even if Petitioners had made a credible showing that the new frisk-search and meeting location policies have some impact on detainees’ ability to meet and speak with their counsel, which they have not, they still would not be entitled to extraordinary relief dictating to military prison

officials the terms and conditions under which detainees will be permitted to meet and speak with persons from outside the facility.

In the domestic prison context, the Supreme Court has long held that prison administrators “should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Bell*, 441 U.S. at 547. This deference recognizes that prison administrators, not the courts, are the subject-matter experts when it comes to operating and safeguarding prisons. See *Turner*, 482 U.S. at 85 (recognizing that prison administration is an “inordinately difficult undertaking” requiring expertise, planning, and resources that are “peculiarly within the province of the legislative and executive branches”); *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974) (prison administrators must deal with complex, intractable problems that “are not readily susceptible of resolution by decree”). Accordingly, courts cannot “freely substitute their judgment for that of officials who have made a considered choice.” *Whitley v. Albers*, 475 U.S. 312, 322 (1986). Detention officials “are to remain the primary arbiters of the problems that arise in the facility.” *Shaw v. Murphy*, 532 U.S. 223, 230 (2001). Consequently, even where prison regulations are said to infringe on constitutionally evidence of any prejudice to an inmate in bringing or prosecuting a lawsuit” as protected interests of prison inmates, they will be upheld so long as they are reasonably related to legitimate interests of prison security and operations. *Turner*, 482 U.S. at 89.<sup>11</sup>

Here, the objective—security—is legitimate. It is well-settled that the “internal security of a detention facility is a legitimate government interest,” *Block v. Rutherford*, 468 U.S. 576, 586 (1984), perhaps the most legitimate concern, *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003). See also *Bell*, 441 U.S. at 546 (“Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.”); *Pell*, 417 US at 873 (“Central to all other corrections goals is the institutional consideration of internal security with the corrections facilities themselves.”).

And the required connection between this legitimate objective and the two challenged procedures is readily demonstrated.<sup>12</sup> As for the challenged search procedure, precedent readily establishes the requisite logical connection. In *Bell v. Wolfish*, the Supreme Court upheld visual-body-cavity searches of pretrial detainees, 441 U.S. at 558-560, searches that were conducted after every contact visit with someone from outside the facility, including visits with defense attorneys, *id.* at 576-577 (Marshall, J., dissenting). The Court rested its holding on the obvious connection between the serious security dangers inherent in a detention facility and the ability of detainees to smuggle money, drugs, weapons, and other contraband as a result of a contact visit. *Id.* at 559. And it did so despite the factual finding that only one case of smuggling had ever been

---

<sup>11</sup> As reflected in the commentary to Chapter VI of the Third Geneva Convention of 1949, the law of war similarly recognizes that a “Detaining Power can carry out its duty to treat prisoners of war in accordance with the Convention only if it ensures that discipline is maintained in prisoner-of-war camps. And in fact disciplinary measures do assist the application of standards designed to improve the situation of the prisoners in the camp. A considerable part of the Convention is therefore composed of Articles providing for the establishment or strengthening of discipline in prisoner-of-war camps ....” See Jean S. Pictet, ed., *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* at 238 (Geneva: International Committee of the Red Cross, 1960).

<sup>12</sup> The logical connection between objective and procedure is not high; the connection need only be not so “remote as to render the policy arbitrary or irrational.” *Turner*, 482 U.S. at 89-90.

detected during these searches, relying on a further logical connection between the searches and their deterrent effect on smuggling. *Id.*; see also *id.* at 551 n.32 (noting that detention facility administrators should be permitted to prevent a problem before it arises); see *Goff*, 803 F.2d at 367-369 (upholding visual-body-cavity searches after contact visits by inmates not only with attorneys, but even with the prison chaplain, because even conceding that the chaplain was unlikely to smuggle contraband, prisoners might still obtain contraband from other sources during these visits).

The rational connection between adequate searches and the need for institutional security found in *Bell* and *Goff* is equally present here. As explained by Col. Bogdan, the prior policy, because of its inconsistency with standard procedures in which U.S. Army personnel are trained, created a risk that detainee searches would not be effective in uncovering weapons or contraband, such as the smuggled medications that Adnan Latif used to end his life. Thus, the decision by JTF-GTMO to alter their search procedures to enhance the safety of guards and detainees easily passes muster, even in the face of Petitioners' claims of interference with access to their counsel.

\* \* \* \*

The transportation of detainees to Camp Echo for counsel visits (and to Camp Delta for telephone calls) is also a perfectly valid procedure that is rationally related to legitimate prison security and operational interests. As an initial matter, it is difficult to understand what Petitioners hope to gain by suddenly insisting, ten months after the new visit location policy was put in place, that counsel visits take place in Camp 6. Even if that request were granted, they would still have to endure the body searches they claim to find objectionable, as those searches must be conducted before and after all meetings with non-JTF GTMO personnel, regardless of where they take place. Col. Bogdan Decl. ¶ 19. And the claimed physical discomfort of the van rides will soon be remedied by the installation of lower benches that will allow detainees to sit upright during transport to Camp Echo or Camp Delta. *Id.* ¶ 22. ...

\* \* \* \*

In summary, this is at bottom a challenge to routine conditions of confinement that Petitioners may find disagreeable, but which is jurisdictionally barred by § 2241 ( e )(2). Their claims that the frisk-search and meeting-location policies were adopted with the purpose and effect of interfering with their access to counsel are unsubstantiated and affirmatively refuted by the competent evidence of record. Hence they cannot succeed in removing this matter from the ambit of § 2241 ( e )(2)'s prohibition. Even if the change in search procedures, and the restriction of counsel visits to Camp Echo, involve Petitioners' access to counsel, those policies remain constitutionally valid. Both are rationally connected to the legitimate government concern of detention facility security, and orderly prison operations. Thus, even if Petitioners' own choice to refuse visits by their counsel to avoid succumbing to these policies could rightly be characterized as an infringement on their access to counsel, that choice does not render the challenged policies invalid.

\* \* \* \*

(5) Ali v. Obama

On December 3, 2013, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013). Mr. Ali, an Algerian national, was taken into custody in Pakistan where he had been staying in an al-Qaeda guesthouse with al-Qaeda terrorist leader Abu Zubaydah and al-Qaeda trainers and explosive experts. The court of appeals affirmed the district court's denial of habeas relief, holding that the evidence established that it was more likely than not that Ali was a member of a force associated with al-Qaeda and that any error in the district court was harmless. Judge Edwards filed a separate concurrence in which he expressed concern that the court's interpretation of the AUMF could lead to the result that someone who had stayed in an al-Qaeda guesthouse for 18 days could be detained, possibly for life, when he had no part in the terrorist attacks of September 11, 2001 or any other attacks against the United States. Judge Edwards wrote in his concurrence:

The troubling question in these detainee cases is whether the law of the circuit has stretched the meaning of the AUMF and the NDAA so far beyond the terms of these statutory authorizations that habeas corpus proceedings like the one afforded Ali are functionally useless.\*\*

---

\*\* Editor's note: In *Hussain v. Obama*, decided June 18, 2013, Judge Edwards also concurred, similarly questioning the Court's precedent regarding the application of the appropriate evidentiary standard for the burden of proof in Guantanamo habeas cases. He wrote:

To hold a detainee at Guantanamo, we have required that the Government show, by a *preponderance of the evidence*, that the detainee was a "part of" al Qaeda, the Taliban, or associated forces at the time of his capture. *See Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010) ("Although we doubt . . . that the [Constitution] requires the use of the preponderance standard, we will not decide the question in this case. As we [have done previously], we will assume *arguendo* that the government must show by a preponderance of the evidence that [the detainee] was part of al-Qaida."). Under the preponderance of the evidence standard, "the factfinder must evaluate the raw evidence, [and] find[] it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993). The evidence in this case may satisfy the lesser substantial evidence standard, *see Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (the substantial evidence standard requires a reviewing court "to ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion"), but it does not meet the preponderance of the evidence test."

*Hussain v. Obama*, 718 F.3d 964, 971 (D.C. Cir. 2013).

**b. Former Detainees**

(1) Al Janko v. Gates

On March 1, 2013, the United States filed its brief in the U.S. Court of Appeals for the D.C. Circuit in a case brought by former detainee Abdul Rahim Abdul Razak Al Janko, a Syrian national. *Al Janko v. Gates*, No. 12-5017 (D.C. Cir.). After plaintiff’s petition for habeas corpus was granted by a federal district court in the District of Columbia in 2009, he brought damages claims against government officials in their individual capacities, asserting violations of, inter alia, international law and the Fourth and Fifth Amendments to the U.S. Constitution. He also sought damages under the Federal Tort Claims Act (“FTCA”) from the United States for alleged violations of District of Columbia law. The district court dismissed plaintiff’s claims and plaintiff appealed. The U.S. brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). Excerpts below summarize the U.S. arguments for affirming the district court’s dismissal of all claims. The U.S. brief relies, first, on the jurisdiction stripping provision of the Military Commissions Act (“MCA”), codified at 28 U.S.C. § 2241(e)(2), which says:

[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

The U.S. brief also relies on past precedents including *Rasul*, discussed in *Digest 2009* at 751-52, and *Ali*, discussed in *Digest 2011* at 582.

---

\* \* \* \*

Plaintiff filed a damages action against the United States and twenty current and former senior government officials, in their individual capacities, for harm allegedly stemming from his military detention. The district court’s dismissal of plaintiff’s action should be affirmed on one or more independent grounds.

I. The district court correctly held that it lacked subject-matter jurisdiction over all of plaintiff’s claims under 28 U.S.C. § 2241(e)(2). Plaintiff here was “determined by the United States to have been properly detained as an enemy combatant” as required by § 2241(e)(2) because two [Combatant Status Review Tribunals or] CSRTs concluded that he was an “enemy combatant.”

The subsequent grant by a district court of plaintiff’s habeas petition does not alter this conclusion because a habeas ruling is not a “determin[ation] by the United States” within the

meaning of § 2241(e)(2) and, in any event, § 2241(e)(2) is triggered by any prior determination that an individual was properly detained as an enemy combatant.

Plaintiff argues that § 2241(e)(2) is unconstitutional because it deprives him of a damages remedy, but this Court rejected that argument in *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319-20 (D.C. Cir. 2012). Although plaintiff argues that § 2241(e)(2) violates due process because his CSRT determinations were assertedly erroneous and violative of due process, plaintiff's arguments invoking due process are inconsistent with this Court's precedent that aliens at Guantanamo have no due process rights. In any case, it was not irrational for Congress to conclude that CSRT determinations should trigger application of the statute.

II. The district court's dismissal of plaintiff's constitutional claims asserted against the individual defendants may be affirmed on two independent grounds.

A. First, the district court properly held that the individual defendants are entitled to qualified immunity because it was not clearly established during plaintiff's detention (which ended in 2009) that aliens at Guantanamo possessed any Fourth and Fifth Amendment rights. *Boumediene v. Bush*, 553 U.S. 723 (2008), is not to the contrary because it was expressly limited to the constitutional privilege of habeas corpus. In any event, the contours of any applicable Fourth and Fifth Amendment rights were not clearly established during plaintiff's detention. In addition, although this Court should not reach the question, the defendants are entitled to qualified immunity on the independent ground that controlling precedent holds that aliens detained at Guantanamo do not possess Fourth and Fifth Amendment rights.

B. Although the district court did not reach the issue, its dismissal of the constitutional claims should also be affirmed on the alternative ground that special factors bar the recognition of a damages action in the military-detention context, as this Court has held in *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) ("*Rasul II*"), *Ali v. Rumsfeld*, 649 F.3d 762, 773-74 (D.C. Cir. 2011), and *Doe v. Rumsfeld*, 683 F.3d 390, 394-97 (D.C. Cir. 2012). Plaintiff argues that his case does not implicate sensitive national security decisions because a district court has already determined on habeas review that he was not lawfully detained, but special factors bar the recognition of a Bivens action for the category of military-detention cases regardless of the specifics of a given plaintiff's case. In any event, plaintiff's action seeking to hold senior government officials liable for their roles in making decisions about plaintiff's detention, treatment, CSRTs, and transfer plainly implicates sensitive national security and military matters not addressed in the district court habeas decision. In addition, as in *Doe*, a judicially created damages remedy would be inappropriate here because Congress has devoted significant attention to military detainee matters but has declined to create a damages remedy.

III. The district court correctly held that the United States properly substituted itself under the Westfall Act for the individual defendants on plaintiff's international law claims asserted under the ATS because the named defendants were acting within the "scope of their employment" at the time of the incidents alleged in the complaint. That holding is controlled by *Ali and Rasul v. Myers*, 512 F.3d 644, 654-63 (D.C. Cir. 2008) ("*Rasul I*"), *vacated*, 555 U.S. 1083, *reinstated in relevant part*, *Rasul II*, 563 F.3d at 528-29. Plaintiff's attempts to circumvent these rulings fail because the underlying conduct here—the management by senior Department of Defense officials of the detention and interrogation of an individual found by two CSRTs to have been an "enemy combatant"—is precisely the type of conduct that *Rasul I* and *Ali* held the defendants were employed to perform. In addition, plaintiff's argument that the defendants'

purpose in engaging in the alleged conduct was not to serve their “master” is contradicted by his complaint, which levels no such allegations against any of the named defendants.

IV. The district court properly held that all of plaintiff’s FTCA claims, including plaintiff’s ATS claims that were converted into FTCA claims upon substitution by the United States, are barred because they “aris[e] in a foreign country,” 28 U.S.C. § 2680(k). Plaintiff argues that Guantanamo Bay, Cuba, is not a “foreign country” under § 2680(k), but the Supreme Court and other courts have held that “de jure sovereignty” is the relevant touchstone, and Cuba retains de jure sovereignty over Guantanamo. Although the district court did not reach the issue, plaintiff’s international-law claims asserted under the ATS are also properly dismissed for the independent reason that plaintiff failed to exhaust his administrative remedies regarding those claims. In addition, the district court correctly held that plaintiff’s international-law claims asserted under the ATS and FTCA were properly dismissed on the independent ground that they do not assert violations of the “law of the place,” 28 U.S.C. § 1346(b), *i.e.*, state tort law. Although plaintiff argues that customary international law has been incorporated into D.C. law, any customary international law recognized by U.S. courts today as domestic law is federal law, which is not the “law of the place.”

\* \* \* \*

(2) Hamad v. Gates

On October 7, 2013, the U.S. Court of Appeals for the Ninth Circuit held that 28 U.S.C. § 2241(e)(2) deprived the district court of subject-matter jurisdiction over claims brought by a former detainee, Adel Hassan Hamad, who sought damages for his detention and treatment from former Secretary of Defense Robert Gates and numerous other military and civilian officials. *Hamad v. Gates*, 732 F.3d. 990 (9<sup>th</sup> Cir. 2013). The court considered whether the Supreme Court’s decision in *Boumediene v. Bush*, discussed in *Digest 2008* at 891-902, invalidated the entirety of § 2241(e) or just section 2241(e)(1), relating to habeas actions. The Ninth Circuit panel held that *Boumediene* did not invalidate § 2241(e)(2); that the latter subsection was severable from § 2241(e)(1); and that, as applied to Hamad, the provision was not unconstitutional. The appeals court vacated the district court’s decision, which reasoned that *Boumediene* invalidated § 2241(e) in its entirety.

The Ninth Circuit’s decision in *Al Nashiri v. MacDonald*, 741 F.3d 1002 (9<sup>th</sup> Cir. 2013) applied the ruling in *Hamad v. Gates* to dismiss a suit which was a collateral attack on the military commission prosecution of Nashiri, seeking a declaratory judgment that the military commission lacks jurisdiction to hear the charges against him because his alleged crimes took place outside the context of, and not associated with, hostilities. The Ninth Circuit affirmed the dismissal of the suit for lack of jurisdiction.

(3) *Allaithi v. Rumsfeld*

On November 13, 2013, the United States filed its brief on appeal in another case in the D.C. Circuit, consolidating claims brought by several former detainees who were transferred from detention, some after a CSRT determination that they were no longer “enemy combatants,” and others prior to the establishment of CSRTs. *Allaithi v. Rumsfeld*, Nos. 13-5096, 13-5097 (D.C. Cir. 2013). Plaintiffs sought declaratory relief and money damages for alleged violations of: (1) the First and Fifth Amendments to the U.S. Constitution; (2) international law, including Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; (3) 42 U.S.C. § 1985(3); and (4) the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. The district court had dismissed all claims. The U.S. brief makes similar arguments to those made in the brief in *Al-Janko*, discussed above. The brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The section of the brief summarizing the U.S. argument appears below.

---

\* \* \* \*

Plaintiffs seek damages against a number of current and former senior government officials, in their individual capacities, for harm allegedly stemming from plaintiffs’ prior military detention. Plaintiffs acknowledge (Br. 4 n.4) that the claims asserted by the three plaintiffs transferred prior to the establishment of Combatant Status Review Tribunals (Celikgogus, Sen, and Mert) are materially identical to those rejected by this Court in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (“*Rasul II*”), and *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) (“*Rasul I*”). They argue, however, that the claims of the remaining three plaintiffs (Allaithi, Hasam, and Muhammad) survive *Rasul II*, *Rasul I*, and related cases. That argument is without merit.

**I.** The district court’s dismissal of plaintiffs’ constitutional claims may be affirmed on two independent grounds, the first of which also provides a basis for affirming the dismissal of plaintiffs’ § 1985 claims.

**A.** First, the district court properly held that the individual defendants are entitled to qualified immunity with respect to the constitutional and § 1985 claims. As the district court concluded, it was not clearly established during plaintiffs’ detention (which ended on dates ranging from November 2003 to November 2006) that aliens in Afghanistan and at Guantanamo possessed any First and Fifth Amendment rights. Plaintiffs do not challenge the district court’s conclusion with respect to their Afghanistan-related claims. Moreover, recognizing that *Rasul II* held that it was not clearly established as of early 2004 that aliens at Guantanamo have Fifth and Eighth Amendment rights, plaintiffs make no attempt to argue that *Rasul II* is not dispositive of their Guantanamo-related claims up to early 2004. Instead, the three plaintiffs transferred in 2005 and 2006 contend that the Supreme Court’s June 2004 decision in *Rasul v. Bush*, 542 U.S. 466

(2004), clearly established that they have constitutional rights. But *Rasul v. Bush* was a statutory decision and thus did not address, much less clearly establish, plaintiffs' constitutional rights.

In any event, the contours of any applicable First and Fifth Amendment rights were not clearly established during plaintiffs' detention. In addition, although this Court should not reach the question, the defendants are entitled to qualified immunity on the Fifth Amendment claims on the independent ground that this Court's binding precedent holds that aliens detained at Guantanamo do not possess Fifth Amendment rights.

**B.** Although the district court did not reach the issue, its dismissal of the constitutional claims can also be affirmed on the alternative ground that special factors bar the recognition of a damages action in the military-detention context, as this Court has held in *Rasul II*, *Ali v. Rumsfeld*, 649 F.3d 762, 773-74 (D.C. Cir. 2011), and *Doe v. Rumsfeld*, 683 F.3d 390, 394-97 (D.C. Cir. 2012). The three plaintiffs who were determined by CSRTs to no longer be "enemy combatants" contend that their cases would not implicate sensitive national security decisions, but special factors bar the recognition of a *Bivens* action for the *category* of military-detention cases regardless of the specifics of a given plaintiff's case. Plaintiffs' actions seeking to hold senior government officials liable for their roles in making decisions about plaintiffs' detention, treatment, and transfer plainly implicate sensitive national security and military matters regardless of the outcome of any CSRT proceeding. In addition, as in *Doe*, a judicially created damages remedy would be inappropriate here because Congress has devoted significant attention to military detainee matters but has declined to create a damages remedy.

**II.** The district court correctly held that the United States properly substituted itself under the Westfall Act for the individual named defendants on plaintiffs' international-law claims because the named defendants were acting within the "scope of their employment" at the time of the incidents alleged in the complaints. That holding is controlled by *Ali* and *Rasul I*, which held that many of the same defendants (and others in the same or similar positions) were acting within the scope of their employment with respect to materially identical conduct underlying virtually identical claims alleging unlawful detention and mistreatment.

Plaintiffs attempt to distinguish these rulings by arguing that once the CSRTs determined that three of the plaintiffs were no longer "enemy combatants," the government lacked the authority to detain those individuals, and thus the defendants' actions were outside the scope of their employment. But the question whether the government had the authority to continue to detain plaintiffs while seeking their transfer to a suitable country is not the proper focus of the Westfall Act analysis. The relevant inquiry centers on the nature of the underlying conduct. Here, as in *Rasul I*, the underlying conduct is the management of detention and interrogation in a military detention facility, and that conduct falls well within the scope of the named defendants' employment.

Plaintiffs' argument that their Vienna Convention claim should be treated differently is without merit because the conduct underlying that claim is the defendants' alleged failure to issue timely notifications to consular officers and detainees, and that conduct is clearly incidental to the defendants' employment duties managing the military detention facility. In addition, plaintiffs' argument that the named defendants' purpose in engaging in the alleged conduct was not, even in part, to serve their "master" is contradicted by plaintiffs' complaints, which do not plausibly level any such allegations against any of the named defendants.

**III.** The district court also correctly concluded that plaintiffs' Religious Freedom Restoration Act claims must be dismissed under this Court's binding decision in *Rasul II*. That decision held that aliens at Guantanamo are not "persons" protected by the statute, 42 U.S.C. § 2000bb-1(a), and, in the alternative, that the defendants were entitled to qualified immunity because it was not clearly established as of early 2004 that aliens at Guantanamo were "persons" within the meaning of the statute. Plaintiffs make no attempt to distinguish their case from *Rasul II*, and thus the district court's dismissal of the Religious Freedom Restoration Act claims must be affirmed.

\* \* \* \*

(4) Former detainees challenging convictions after accepting plea agreements

On November 8, 2013 counsel for Omar Khadr filed an appeal with the U.S. Court of Military Commission Review of his military commission convictions for murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material for terrorism, and spying in violation of the law of war. See *Digest 2012* at 608 regarding Khadr's transfer to Canada and *Digest 2007* at 976-82 regarding Khadr's case. Khadr argues that his convictions must be vacated pursuant to the rule of *Hamdan II*, because the offenses of which he was convicted are not violations of the international law of war and the military commission therefore lacked jurisdiction over the charged conduct. Khadr also maintains he did not submit a valid waiver of appellate review and in any case the commission's lack of jurisdiction cannot be waived, and that his convictions should also be dismissed for outrageous government conduct as a result of the severe mistreatment he suffered at Bagram and GTMO.

On November 5, 2013, counsel for David Hicks filed an appeal with the U.S. Court of Military Commission Review of his conviction for providing material support for terrorism. Like Khadr, Hicks argues that his conviction must be vacated because, pursuant to the D.C. Circuit's decision in *Hamdan II*, the military commission lacked jurisdiction to try, convict, or sentence Hicks for his alleged conduct. On December 19, 2013, the U.S. government filed briefs in both cases arguing that the U.S. Court of Military Commission Review should dismiss the appeals for lack of jurisdiction, because Hicks and Khadr both validly waived appeal as a condition of their plea deals. The U.S. brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

**c. Scope of Military Detention Authority: Hedges v. Obama**

On July 17, 2013, the U.S. Court of Appeals for the Second Circuit issued its decision in *Hedges et al. v. Obama et al.*, 724 F.3d 170 (2d Cir. 2013). The case was brought by activists and journalists who allegedly feared they could be detained under the authority affirmed by the National Defense Authorization Act for Fiscal Year 2012 ("NDAA"). The

lower court granted both preliminary and permanent injunctions against enforcement of Section 1021(b) of the NDAA. The Court of Appeals for the Second Circuit vacated the injunction and remanded the case. The opinion of the appeals court reviews the history of the military detention authority, beginning with the Authorization for the Use of Military Force (“AUMF”) following the September 11, 2001 attacks. The opinion reviews litigation regarding the scope of the executive’s detention authority, including the *Hamdi*, *Padilla*, and *al-Marri* cases. And the opinion surveys developments in the law relating to Guantánamo detainees, including *Boumediene*; the Obama administration memorandum to the D.C. District Court (the “March 2009 Memo”) stating the government’s position regarding its detention authority for detainees at Guantánamo; subsequent D.C. District Court rulings; and the D.C. Circuit’s decision in *al-Bihani* and subsequent cases.

Viewing the NDAA against this backdrop, the Second Circuit held that the plaintiffs lacked Article III standing to challenge the NDAA. First, the U.S. citizen plaintiffs lacked standing because the NDAA said nothing about application to U.S. citizens. Second, the non-citizen plaintiffs lacked standing because they face a sufficient threat that the detention authority affirmed by the NDAA would be exercised against them. Excerpts follow from the opinion of the court of appeals (with footnotes omitted). For background on *Hamdi*, see *Digest 2004* at 1001-15; for *Padilla*, see *Digest 2005* at 1018; for *al-Marri*, see *Digest 2008* at 917-18; for *Boumediene*, see *Digest 2008* at 891-903; for the March 2009 memo, see *Digest 2009* at 732-40; for *al-Bihani*, see *Digest 2010* at 754-56 .

---

\*   \*   \*   \*

The AUMF authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” Section 1021(a) “affirms” that the AUMF authority includes the detention of a “covered person[ ],” which under Section 1021(b) means (1) a “person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks” or (2) a “person who was a part of or substantially supported al-Qaeda, the Taliban, 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 such hostilities in aid of such enemy forces.”

At first blush, Section 1021 may seem curious, if not contradictory. While Section 1021(b)(1) mimics language in the AUMF, Section 1021(b)(2) adds language absent from the AUMF. Yet Section 1021(a) states that it only “affirms” authority included under the AUMF, and Section 1021(d) indicates that Section 1021 is not “intended to limit or expand the authority of the President or the scope of the [AUMF].”

Fortunately, this apparent contradiction—that Section 1021 merely affirms AUMF

authority even while it adds language not used in the AUMF—is readily resolved. It is true that the language regarding persons who “planned, authorized, committed, or aided” the 9/11 attacks (or harbored those who did) is identical in the AUMF and Section 1021(b)(1). The AUMF, however, does not merely define persons who may be detained, as does Section 1021(b). Instead, it provides the President authority to use “force” against the “nations, organizations, or persons” responsible for 9/11. Section 1021(b)(1) (read with Section 1021(a)) affirms that the AUMF authority to use force against the *persons* responsible for 9/11 includes a power to detain such persons. But it does not speak to what additional detention authority, if any, is included in the President’s separate AUMF authority to use force against the *organizations* responsible for 9/11.

This is where Section 1021(b)(2), a provision concerned with the organizations responsible for 9/11—al-Qaeda and the Taliban—plays a role. Section 1021(b)(2) naturally is understood to affirm that the general AUMF authority to use force against these organizations includes the more specific authority to detain those who were part of, or those who substantially supported, these organizations or associated forces. Because one obviously cannot “detain” an organization, one must explain how the authority to use force against an organization translates into detention authority. Hence, it is not surprising that Section 1021(b)(2) contains language that does not appear in the AUMF, notwithstanding Section 1021(d). Plaintiffs create a false dilemma when they suggest that either Section 1021 expands the AUMF detention authority or it serves no purpose.

Indeed, there are perfectly sensible and legitimate reasons for Congress to have affirmed the nature of AUMF authority in this way. To the extent that reasonable minds might have differed—and in fact very much did differ—over whether the administration could detain those who were part of or substantially supported al-Qaeda, the Taliban, and associated forces under the AUMF authority to use force against the “organizations” responsible for 9/11, Section 1021(b)(2) eliminates any confusion on that particular point. At the same time, Section 1021(d) ensures that Congress’ clarification may not properly be read to suggest that the President did not have this authority previously—a suggestion that might have called into question prior detentions. This does not necessarily make the section a “ ‘legislative attempt at an ex post facto “fix” ... to try to ratify past detentions which may have occurred under an overly-broad interpretation of the AUMF,’ ” as plaintiffs contend. Rather, it is simply the 112th Congress’ express resolution of a previously debated question about the scope of AUMF authority.

\* \* \* \*

We thus conclude, consistent with the text and buttressed in part by the legislative history, that Section 1021 means this: With respect to individuals who are not citizens, are not lawful resident aliens, and are not captured or arrested within the United States, the President’s AUMF authority includes the authority to detain those responsible for 9/11 as well as those who were a part of, or substantially supported, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners—a detention authority that Section 1021 concludes was granted by the original AUMF. But with respect to citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all.

\* \* \* \*

With this understanding of Section 1021, we may dispose of the claims of the citizen plaintiffs, Hedges and O’Brien. As discussed above, Section 1021 says nothing at all about the authority of the government to detain citizens. There simply is no threat whatsoever that they could be detained pursuant to that section. While it is true that Section 1021(e) does not foreclose the possibility that previously “existing law” may permit the detention of American citizens in some circumstances—a possibility that *Hamdi* clearly envisioned in any event—Section 1021 cannot itself be challenged as unconstitutional by citizens on the grounds advanced by plaintiffs because as to them it neither adds to nor subtracts from whatever authority would have existed in its absence. For similar reasons, plaintiffs cannot show that any detention Hedges and O’Brien may fear would be redressable by the relief they seek, an injunction of Section 1021.

\* \* \* \*

The claims of Jonsdottir and Wargalla stand differently. Whereas Section 1021 says nothing about the government’s authority to detain citizens, it does have real meaning regarding the authority to detain individuals who are not citizens or lawful resident aliens and are apprehended abroad. It provides that such individuals may be detained until the end of hostilities if they were part of or substantially supported al-Qaeda, the Taliban, or associated forces. To be sure, Section 1021 in substance provides also that this authority was implicit in the original AUMF. But, as discussed above, that the 112th Congress in passing Section 1021 expressed such a view does not mean that Section 1021 itself is a nullity. It is not immediately apparent on the face of the AUMF alone that the President had the authority to detain those who substantially supported al-Qaeda, and indeed many federal judges had concluded otherwise prior to Section 1021’s passage. Hence, Section 1021(b)(2) sets forth an interpretation of the AUMF that had not previously been codified by Congress. Where a statute codifies an interpretation of an earlier law that is subject to reasonable dispute, the interpretive statute itself may affect the rights of persons under the earlier law.

As the standing inquiry as to these two plaintiffs is more involved, we discuss the relevant facts and applicable law in detail.

#### *1. Relevant Facts*

Jonsdottir is a citizen of Iceland and a member of its parliament. She is an activist and spokesperson for a number of groups, including WikiLeaks, an organization famous for releasing troves of classified information of the United States government to the public. ...

Wargalla, a German citizen, is an organizer and activist based in London, and is associated with the organizations Revolution Truth, Occupy London, and Justice for Assange UK. She testified that Occupy London has been listed as a terrorist group by the City of London police department. Moreover, she testified that she has been a supporter of WikiLeaks since 2010

....

The district court found that both Jonsdottir and Wargalla had an actual fear of detention under Section 1021 and had incurred costs and other present injuries due to this fear.

\* \* \* \*

... [T]he government here disputes that plaintiffs are subject to the statute. Plaintiffs never articulate a precise theory on which they fear detention under Section 1021(b)(2)—that is, in what sense the government may conclude that they were a “part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.” The strongest argument would seem to be a contention that the work of Jonsdottir and Wargalla substantially, if indirectly, supports al-Qaeda and the Taliban as the term “support” is understood colloquially. The record demonstrates a number of ways in which the government has concluded, or would have a basis to conclude, that WikiLeaks has provided some support to al-Qaeda and the Taliban. This includes the evidence that the government is prosecuting Manning for aiding the enemy by his releases to WikiLeaks and news articles in the record or cited by the Jonsdottir declaration reporting on the immense amount of classified information that WikiLeaks made public, much of which is related specifically to the government’s military efforts against al-Qaeda and the Taliban. One perhaps might fear that Jonsdottir’s and Wargalla’s efforts on behalf of WikiLeaks could be construed as making them indirect supporters of al-Qaeda and the Taliban as well.

The government rejoins that the term “substantial support” cannot be construed so in this particular context. Rather, it contends that the term must be understood—and limited—by reference to who would be detainable in analogous circumstances under the laws of war. It points to (1) the *Hamdi* plurality’s limitation of the duration of the detention authority it recognized based on the laws of war, (2) the March 2009 Memo’s repeated invocation of law-of-war limiting principles and the legislative history suggesting that Section 1021 was meant to codify the interpretation that the Memo set forth, (3) Section 1021(d), to the extent that *Hamdi* and the administration suggested that the laws of war inform AUMF authority, as bearing on how broadly “substantial support” may be construed, and (4) the references to “law of war” in Section 1021 itself, albeit not in Section 1021(b)(2). The government then contends that individuals like Jonsdottir and Wargalla are civilians who are not detainable under these law-of-war principles and so cannot reasonably fear detention under Section 1021.

In these circumstances, we are faced with a somewhat peculiar situation. The government has invited us to resolve standing in this case by codifying, as a matter of law, the meaningful limits it has placed on itself in its interpretation of Section 1021. We decline the government’s invitation to do so. Thus, we express no view regarding whether the laws of war inform and limit detention authority under Section 1021(b)(2) or whether such principles would foreclose the detention of individuals like Jonsdottir and Wargalla. This issue presents important questions about the scope of the government’s detention authority under the AUMF, and we are wary of allowing a preenforcement standing inquiry to become the vehicle by which a court addresses these matters unless it is necessary. Because we conclude that standing is absent in any event, we will assume without deciding that Section 1021(b)(2) covers Jonsdottir and Wargalla in light of their stated activities.

\* \* \* \*

...[T]here are several important differences between Section 1021 and a typical statute imposing criminal or civil penalties. Section 1021 is not a law enforcement statute, but an

affirmation of the President’s military authority. As discussed above, it applies only to individuals who are not citizens, are not lawful resident aliens, and are apprehended outside the United States. It thus speaks entirely to the authority of the President in the context of military force, national security, and foreign affairs, areas in which the President generally enjoys “unique responsibility” and “broad discretion.” The Supreme Court has recognized that “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take” in the fields of national security and foreign affairs. As a result, “Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.”

Moreover, Section 1021 “at most *authorizes*—but does not *mandate* or *direct*”—the detention that plaintiffs fear. To be sure, the executive branch enjoys prosecutorial discretion with regard to traditional punitive statutes. Congress generally does not mandate or direct criminal prosecution or civil enforcement. But we can distinguish between Congress, on the one hand, proscribing a certain act and then leaving it to the President to enforce the law under his constitutional duty to “take Care that the Laws be faithfully executed” and Congress, on the other hand, authorizing the President to use a certain kind of military force against non-citizens abroad.

... In short, while it generally may be appropriate to presume for standing purposes that the government will enforce the law against a plaintiff covered by a traditional punitive statute, such a presumption carries less force with regard to a statute concerned entirely with the President’s authority to use military force against non-citizens abroad.<sup>FN183</sup> Thus, in the circumstances of this case, Jonsdottir and Wargalla must show more than that the statute covers their conduct to establish preenforcement standing.

We need not quantify precisely what more is required because Jonsdottir and Wargalla have shown nothing further here. Indeed, they have not established a basis for concluding that enforcement against them is even remotely likely. We reach this conclusion independent of the government’s litigation position on appeal that plaintiffs are “in no danger whatsoever” of being detained on the basis of their stated activities.

\* \* \* \*

#### **4. Criminal Prosecutions and Other Proceedings**

##### **a. Al Bahlul v. United States**

On July 10, 2013, the United States filed its brief in *Ali Hamza Ahmad Suliman Al Bahlul v. United States*, No. 11-1324 in the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc. Mr. Bahlul had been convicted by a U.S. military commission of conspiracy, solicitation, and material support for terrorism based on his activities as a recruiter for al-Qaida; a secretary of public relations for Osama bin-Laden; and his involvement in preparation for the September 11, 2001 attacks. In January 2013, a panel of the D.C. Circuit vacated his conviction based on the decision of another panel of the D.C. Circuit in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (“*Hamdan II*”),

which concluded that conspiracy and other crimes not recognized under the international law of war could not be the basis for prosecution under the 2006 Military Commissions Act (“MCA”). The U.S. brief argues that *Hamdan II* erred in finding that Article 21 of the Uniform Code of Military Justice (“UCMJ”) limits the jurisdiction of military commissions to international law war crimes. Excerpts from the U.S. brief (with footnotes omitted) follow. The full text of the brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

---

\* \* \* \*

Since the founding of this Nation, the United States has used military commissions to try unprivileged enemy belligerents for crimes committed in the context of hostilities against the United States. *See Ex parte Quirin*, 317 U.S. 1, 26-27, 42 n.14 (1942). Congress has at times codified specific offenses as crimes subject to trial by military commission, *see* 10 U.S.C. § 904 (aiding the enemy); *id.* § 906 (spying), but prior to 2006 it had not “crystalliz[ed] in permanent form and in minute detail” the offenses triable by military commission, *Quirin*, 317 U.S. at 30. Instead, U.S. military commissions have exercised jurisdiction over offenses that have been traditionally recognized as such under the “system of common law applied by military tribunals.” *Id.*; *cf. Parker v. Levy*, 417 U.S. 733, 743-47 (1974) (recognizing the traditional flexibility of the military’s separate legal system).

After a plurality of the Supreme Court found in *Hamdan I* that conspiracy could not be tried by military commission in the absence of explicit legislation, Congress in the 2006 MCA codified common law offenses that it determined had traditionally been triable by military commission. The codified offenses include the crimes for which Bahlul was convicted: conspiracy to commit offenses triable by military commission, solicitation of others to commit such offenses, and providing material support for terrorism. 10 U.S.C. § 950v(b)(28) (2006) (conspiracy); *id.* § 950u (solicitation); *id.* § 950v(b)(25)(A) (material support for terrorism).

The 2006 MCA expressly authorizes prosecution of the codified offenses for conduct committed before the 2006 MCA’s enactment. Congress included in the 2006 MCA an explicit finding that it was *not* creating new crimes but rather codifying offenses that had long been recognized as subject to military commission jurisdiction:

The provisions of [the 2006 MCA] codify offenses that have traditionally been triable by military commissions. [The 2006 MCA] does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

10 U.S.C. § 950p(a) (2006). Congress therefore expressly permitted prosecution of offenses codified in the 2006 MCA for conduct committed before its enactment:

Because the provisions of [the 2006 MCA] (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

*Id.* § 950p(b). This language unambiguously establishes three principal points: (1) Congress specifically considered the question whether, in light of *ex post facto* principles, the statute should permit the codified offenses to be applied to pre-enactment conduct; (2) Congress determined that such application was appropriate because the statute codified pre-existing offenses; and (3) Congress authorized jurisdiction over pre-enactment conduct for all of the offenses codified in the 2006 MCA.

A separate provision setting forth the jurisdiction of military commissions under the 2006 MCA provides that such commissions “shall have jurisdiction to try *any offense made punishable by this chapter* or the law of war when committed by an alien unlawful enemy combatant *before, on, or after September 11, 2001.*” 10 U.S.C. § 948d(a) (2006) (emphasis added). That provision, like Section 950p, plainly authorizes military commission jurisdiction over conduct committed prior to 2006 for *all* of the codified offenses.

Congress reaffirmed military commissions’ jurisdiction over pre-enactment conduct in its most recent action in this area. In 2009, Congress amended the 2006 MCA, *see* Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574, and adopted without change the 2006 MCA’s definitions of conspiracy, solicitation, and material support offenses. *See* 10 U.S.C. § 950t(25), (29), (30) (2009). Congress also reaffirmed that “[b]ecause the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter.” *Id.* § 950p(d); *see also id.* § 948d (authorizing military commission jurisdiction “for any offense made punishable by this chapter ... whether [the] offense was committed before, on, or after September 11, 2001”). Thus, the express terms of both the 2006 MCA and the 2009 MCA manifest the intent of two Congresses that the codified offenses apply to conduct predating the legislation’s enactment. In enacting these statutes, Congress has specifically recognized and ratified this Nation’s traditional use of military commissions to try conspiracy, solicitation, and material support for terrorism offenses, it has explicitly authorized jurisdiction over each of those offenses for pre-enactment conduct, and it has expressed its view that such jurisdiction is appropriate and consistent with *ex post facto* principles.

Although these provisions are clear enough to obviate the need to consider the 2006 MCA’s background, purpose, and legislative history, that context nevertheless supports construing the statute, consistent with its plain language, as providing jurisdiction over the codified offenses for pre-enactment conduct. First, the references in the 2006 MCA to the attacks of September 11 and to the al Qaeda organization that perpetrated them indicate that a major purpose of the legislation was to provide a forum for bringing the September 11 conspirators and their cobelligerents to justice. *See* 10 U.S.C. § 948a (2006) (defining enemy combatants to include “a person who is part of the Taliban, al Qaeda, or associated forces”); *see also* 152 Cong. Rec. 20,727 (Sept. 29, 2006) (The 2006 MCA would “establish[] a system to prosecute the terrorists who on [September 11, 2001] murdered thousands of civilians and who continue to seek to kill Americans both on and off the battlefield.”) (statement of Rep. Hunter); H.R. Rep. No. 109-664, Pt. I, at 24 (2006) (“[T]he committee firmly believes that trial for crimes that occurred before the date of the enactment of this chapter” is permissible.).

Moreover, the 2006 MCA is designed to establish a military commission system to try offenses arising out of the current armed conflict in which the Nation remains engaged. The

statute authorizing the President's use of force in that conflict refers specifically to the September 11 attacks, authorizing force against the "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." AUMF, § 2(a), 115 Stat. 224 (2001). Congress's purpose in enacting the 2006 MCA would be frustrated if some of the charges authorized could not be brought against the enemies who conspired to commit and otherwise supported the very terrorist attacks that gave rise to the AUMF and the current military commission system.

\* \* \* \*

Bahlul relies (Br. 16) on *Hamdan II*'s assumption that, "[i]f Congress had known" that a court would conclude, contrary to Congress's finding, that the only offenses previously triable by military commission were offenses against international law and that a codified offense was a "new war crime[.]" Congress "would *not* have wanted [such] *new* crimes to be applied retroactively." 696 F.3d at 1247-48. That reliance is misplaced.

First, that construction is inconsistent with the statutory text. Nothing in the 2006 MCA suggests that Congress intended, as the *Hamdan II* court held, for its authorization of jurisdiction over pre-enactment conduct to depend on whether the offense was an international-law war crime and therefore clearly subject to military commission jurisdiction under Article 21. *See Hamdan II*, 696 F.3d at 1247 (holding that 10 U.S.C. § 821 (Article 21 of the UCMJ) was "the federal statute in effect" prior to the 2006 MCA and that military commissions could only prosecute war crimes under Article 21 for international-law war crimes). Had Congress intended that result, it easily could have referred explicitly to international law and expressly provided that *only* such offenses (along with the statutory offenses of spying and aiding the enemy) could be applied to pre-enactment conduct. But it did neither. To the contrary, Congress included a provision in the 2006 MCA that amended Article 21 to provide that "[t]his section does not apply to a military commission established under [the MCA]." 2006 MCA, § 4(a)(2), 120 Stat. 2631. That amendment establishes that, whatever limits Article 21 may impose on military commission jurisdiction, those limits do not apply to military commissions, such as the one here, established under the 2006 MCA. Thus, *Hamdan II*'s interpretation of the 2006 MCA, which reads Article 21 as an implicit limit on the 2006 MCA's express provision of pre-enactment jurisdiction for all of the codified offenses, cannot be squared with Congress's amendment of Article 21.

\* \* \* \*

With respect to Bahlul's conspiracy conviction, the government has acknowledged that conspiracy has not attained recognition at this time as an offense under customary international law. This is true even when the objects of the conspiracy are offenses prohibited by customary international law, as some of them are in this case. That concession, however, does not lead to the conclusion that Bahlul's conspiracy conviction for pre-enactment conduct under the 2006 MCA raises *ex post facto* concerns. The Ex Post Facto Clause bars retroactive application of a "statute which punishes as a crime an act previously committed, which was innocent when done." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (citation omitted). The Supreme Court has explained that the "central concerns" underlying the Ex Post Facto Clause are "the lack of fair

notice and governmental restraint” when the law changes the legal consequences of acts completed before the law’s effective date. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (citation omitted). Congress’s decision to make conspiracy punishable by military commission for pre-2006 conduct does not run afoul of those principles because of the longstanding practice of trying conspiracy offenses in U.S. military commissions.

a. Although uncodified until the enactment of the 2006 MCA, the offense of conspiracy to violate the laws of war, including conspiracy to murder protected persons or to attack civilians and civilian objects, is both firmly rooted in our Nation’s history and expressly recognized in “the long-standing public position of the United States Army.” *Al Bahlul*, 820 F. Supp. 2d at 1264-65 (Sims, J., concurring) (citing FM 27-10, ¶ 500). As Justice Thomas observed in *Hamdan I*, “in the highest profile case to be tried before a military commission relating to [the Civil War], namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had ‘combin[ed], confederat[ed], and conspir[ed] ... to kill and murder’ President Lincoln.” 548 U.S. at 699 (Thomas, J., dissenting) (quoting General Court-Martial Order (“G.C.M.O.”) No. 356, War Dep’t (July 5, 1865), *reprinted in* H.R. Doc. No. 55-314, at 696 (1899)); *see also Ex parte Mudd*, 17 F. Cas. 954, 954 (S.D. Fla. 1868) (holding that the Lincoln conspirators were properly subjected to trial by military commission because conspiring to assassinate “the Commander in Chief of the army for military reasons” was a violation of the law of war); G.C.M.O. No. 607, War Dep’t (Nov. 6, 1865), *reprinted in* H.R. Doc. No. 55-314, at 785, 789 (conviction of former Confederate Army Captain Henry Wirz for “combin[ing], confederat[ing], and conspir[ing] with [others] ... in violation of the laws of war” to kill and mistreat Union prisoners); G.C.M.O. No. 452, War Dep’t (Aug. 22, 1865), *reprinted in* H.R. Doc. No. 55-314, at 724-25 (approving conviction of G. St. Leger Grenfel for “[c]onspiring, in violation of the laws of war, to release the rebel prisoners” and “[c]onspiring, in violation of the laws of war, to lay waste and destroy the city of Chicago”); General Order (“G.O.”) No. 9, HQ, Dep’t of the Mississippi (Mar. 25, 1862), *reprinted in* 1 *The War of the Rebellion, Official Records of the Union and Confederate Armies* (“OR”), ser. II, at 470 (1894) (approving conviction of Joseph Sublett for conspiring to fire on trains); Opinion of the Judge Advocate General in the Matter of William Murphy (Mar. 21, 1866) (*available at* XVI JAG Record Books 280) (approving conviction by military commission for conspiracy to burn steamboats); William Winthrop, *A Digest of Opinions of the Judge Advocate General of the Army* 328-29 (1880) (“*Dig. Ops.*”) (including “[c]onspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy” as an “offence[] against the laws and usages of war”); Charles Roscoe Howland, *A Digest of the Opinions of the Judge Advocate General of the Army* 1071 (1912) (noting that conspiracy “to violate the laws of war by destroying life or property in aid of the enemy” was an offense against the law of war that was “punished by military commissions” throughout the Civil War).

Similarly, during the Second World War, enemy spies and saboteurs were convicted by military commissions of conspiring to commit war crimes. See *Quirin*, 317 U.S. at 23 (noting that military commission charges against eight Nazi saboteurs included, among other offenses, conspiracy to violate the laws of war); *Colepaugh v. Looney*, 235 F.2d 429, 431-33 (10th Cir. 1956) (noting that military commission convictions against other Nazi saboteurs included conspiring to clandestinely enter the United States for the purpose of spying and sabotage). And, during the Korean conflict, General MacArthur issued regulations making conspiracy to commit

war crimes an offense subject to trial by military commission. See Letter Order, Gen. HQ, United Nations Command, Tokyo, Japan, *Trial of Accused War Criminals* (Oct. 28, 1950) (Rules of Criminal Procedure for Military Commissions, Rule 4). In 1956, the United States Army reaffirmed its longstanding position that conspiracy is triable by military commission by providing explicitly in its field manual on the law of land warfare that conspiracy to commit war crimes is a punishable offense. See FM 27-10, ¶ 500.

\* \* \* \*

Because both providing material support to unlawful combatants and solicitation to commit offenses triable by military commission are themselves offenses that have long been punishable by military commission, neither offense raises a serious question under the Ex Post Facto Clause. Moreover, longstanding U.S. military doctrine, embodied in FM 27-10, *The Law of Land Warfare*, provides notice that the United States viewed “direct incitement” of a war crime and “complicity” in the commission of a war crime as punishable. See *id.* ¶ 500. Indeed, at the end of World War II, both the knowing facilitation of war crimes and solicitation to commit such acts were subject to punishment by international military tribunals. For example, in 1947, a U.S. military tribunal, sitting in Nuremberg, Germany, as an “international tribunal,” convicted Friedrich Flick and Otto Steinbrinck of providing financial support to the Nazi S.S. See *The Flick Trial*, 9 L. Rep. Trials of War Criminals 1, 16, 28-29 (1949); *Flick v. Johnson*, 174 F.2d 983, 985 (D.C. Cir. 1949). Similarly, a British military tribunal sentenced to death the owner of a German chemical firm who, “in violation of the laws and usages of war,” supplied the gas-producing substance Zyklon B to the S.S., “well knowing” that it would be used to murder concentration camp inmates. *The Zyklon B Case*, 1 L. Rep. Trials of War Criminals 93, 93 (1947). The Nuremberg International Military Tribunal convicted Nazi propagandist Julius Streicher, publisher of the anti-Semitic weekly *Der Sturmer*, of inducing others to commit murder of protected persons “on political and racial grounds in connection with War Crimes, as defined by the [Nuremberg] Charter.” 1 *Trial of the Major War Criminals Before the International Military Tribunal* 301, 304 (1947); see also 820 F. Supp. 2d at 1240-41 (finding Bahlul’s conduct analogous to Streicher’s). Prosecution of such conduct under the 2006 MCA accordingly raises no concerns under the Ex Post Facto Clause.

\* \* \* \*

**b. New Military Commission Charges**

On June 10, 2013, the Department of Defense announced that military commission charges had been sworn against Guantanamo detainee Abd al Hadi al Iraqi, an Iraqi national. The charges are described in a Department of Defense news release, available at <http://www.defense.gov/releases/release.aspx?releaseid=16086>.

**c. *Periodic Review Process***

The periodic review process established by Executive Order 13567 (for Guantanamo detainees designated for continued detention or referred for prosecution, but not yet charged or convicted) commenced in 2013. See *Digest 2011* at 576-79 for a discussion of E.O. 13567. As described in an October 9, 2013 Department of Defense news release, available at <http://defense.gov/releases/release.aspx?releaseid=16302>, the periodic review board process:

makes an important contribution toward the Administration's goal of closing Guantanamo Bay by ensuring a principled and sustainable process for reviewing and revisiting prior detention determinations in light of the current circumstances and intelligence, and identifying whether additional detainees may be designated for transfer.

**Cross References**

*Report to UN Committee Against Torture*, **Chapter 6.H.**

*ILC's work on protection of the environment in relation to armed conflict*, **Chapter 7.D.3.**

*Gulf Cooperation Council's eligibility under Arms Export Control Act*, **Chapter 7.E.4.**

*Sanctions relating to armed conflict*, **Chapter 16.A.7.**

*Arms Export Control Act and International Trafficking In Arms regulations*, **Chapter 16.B.**

*Syria*, **Chapter 17.B.1.**

*Responsibility to protect*, **Chapter 17.C.3.**

*Syrian chemical weapons*, **Chapter 19.F.1.**

*Arms Trade Treaty*, **Chapter 19.J.**