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## CHAPTER 18

### Use of Force

#### A. GENERAL

##### 1. War Powers Act Report to Congress

On December 11, 2017, the President sent a report to the Speaker of the House and the President of the Senate of the United States regarding deployment of U.S. combat forces, as required by the War Powers Resolution, P.L. 93-148. The communication to Congress is excerpted below and available at <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-2/>.

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#### **MILITARY OPERATIONS IN SUPPORT OF UNITED STATES COUNTER-TERRORISM EFFORTS**

In furtherance of counterterrorism efforts, the United States continues to work with partners around the globe, with a particular focus on the U.S. Central and Africa Commands' areas of responsibility. In this context, the United States has deployed United States combat-equipped forces to conduct counterterrorism operations and to advise, assist, and accompany security forces of select foreign partners on counterterrorism operations. Specific information about counterterrorism deployments to select countries is provided below, and a classified annex to this report provides further information.

*Military Operations against al-Qa'ida, the Taliban, and Associated Forces and in Support of Related United States Counterterrorism Objectives*

Since October 7, 2001, United States Armed Forces, including Special Operations Forces, have conducted counterterrorism combat operations against al-Qa'ida, the Taliban, and associated forces. Since August 2014, these operations have targeted the Islamic State of Iraq

and Syria (ISIS), also known as the Islamic State of Iraq and the Levant (ISIL), which was formerly known as al-Qa'ida in Iraq. In support of these and other overseas operations, the United States has deployed combat equipped forces to several locations in the U.S. Central, European, Africa, Southern, and Pacific Commands' areas of responsibility. Such operations and deployments have been reported previously, consistent with Public Law 107-40, Public Law 107-243, the War Powers Resolution, and other statutes. These ongoing operations, which the United States has carried out with the assistance of numerous international partners, have been successful in significantly degrading ISIS capabilities in Syria and Iraq. If necessary, in response to terrorist threats, I will direct additional measures to protect the citizens and interests of the United States. It is not possible to know at this time the precise scope or duration of the deployments of United States Armed Forces that are or will be necessary to counter terrorist threats to the United States.

**Afghanistan.** Consistent with the strategy I announced publicly on August 21, 2017, United States forces remain in Afghanistan for the purposes of stopping the reemergence of safe havens that enable terrorists to threaten the United States, supporting the Afghan government and the Afghan military as they confront the Taliban in the field, and creating conditions to support a political process to achieve a lasting peace. United States forces in Afghanistan are training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against al-Qa'ida and against ISIS; and taking appropriate measures against those who provide direct support to al-Qa'ida, threaten United States and coalition forces, or threaten the viability of the Afghan government or the ability of the Afghan National Defense and Security Forces to achieve campaign success. The United States remains in an armed conflict, including in Afghanistan and against the Taliban, and active hostilities remain ongoing.

**Iraq and Syria.** As part of a comprehensive strategy to defeat ISIS, United States Armed Forces are conducting a systematic campaign of airstrikes and other necessary operations against ISIS forces in Iraq and Syria. United States Armed Forces are also conducting airstrikes and other necessary operations against al-Qa'ida in Syria. United States Armed Forces are also deployed to Syria to conduct operations against ISIS with indigenous ground forces. In Iraq, United States Armed Forces are advising and coordinating with Iraqi forces and providing training, equipment, communications support, intelligence support, and other support to select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces. Actions in Iraq are being undertaken in coordination with the Government of Iraq, and in conjunction with coalition partners.

Since the last periodic update report, United States Armed Forces participating in the Defeat-ISIS campaign in Syria have undertaken a limited number of strikes against Syrian government and pro-Syrian government forces. These strikes were lawful measures to counter immediate threats to United States and partner forces engaged in that campaign.

**Yemen.** A small number of United States military personnel are deployed to Yemen to conduct operations against al-Qa'ida in the Arabian Peninsula (AQAP) and ISIS. The United States military continues to work closely with the Government of Yemen and regional partner forces to dismantle and ultimately eliminate the terrorist threat posed by those groups. Since the last periodic update report, United States forces have conducted a number of airstrikes against AQAP operatives and facilities in Yemen, and supported the United Arab Emirates- and Yemen-led operations to clear AQAP from Shabwah Governorate. In October, United States forces also conducted airstrikes against ISIS targets in Yemen for the first time. United States forces, in a

non-combat role, have also continued to provide logistics and other support to regional forces combatting the Houthi insurgency in Yemen.

**Jordan.** At the request of the Government of Jordan, approximately 2,300 United States military personnel are deployed to Jordan to support Defeat-ISIS operations, to enhance Jordan's security, and to promote regional stability.

**Lebanon.** At the request of the Government of Lebanon, approximately 100 United States military personnel are deployed to Lebanon to enhance the government's counterterrorism capabilities and to support the Defeat-ISIS operations of Lebanese security forces.

**Turkey.** United States forces, including strike and combat support aircraft and associated United States military personnel, remain deployed to Turkey, at the Turkish government's request, to support Defeat-ISIS operations and to enhance Turkey's security.

**East Africa Region.** In Somalia, United States forces continue to counter the terrorist threat posed by ISIS and al-Shabaab, an associated force of al-Qa'ida. Since the last periodic report, United States forces have conducted a limited number of airstrikes against al-Shabaab as well as ISIS. United States forces also advise, assist, and accompany regional forces, including Somali and African Union Mission in Somalia (AMISOM) forces, during counterterrorism operations. Additional United States forces are deployed to Kenya to support counterterrorism operations in East Africa. United States forces continue to partner with the Government of Djibouti, which has permitted use of Djiboutian territory for basing of United States forces. United States military personnel remain deployed to Djibouti, including for purposes of posturing for counterterrorism and counter-piracy operations in the vicinity of the Horn of Africa and the Arabian Peninsula, and to provide contingency support for embassy security augmentation in East Africa, as required.

**Libya.** Since the last periodic update report, United States forces have conducted a number of airstrikes against ISIS terrorists and their camps in Libya. These airstrikes were conducted in coordination with Libya's Government of National Accord.

**Lake Chad Basin and Sahel Region.** United States military personnel in the Lake Chad Basin and Sahel Region continue to conduct airborne intelligence, surveillance, and reconnaissance operations and to provide support to African and European partners conducting counterterrorism operations in the region, including by advising, assisting, and accompanying these partner forces. On October 4, 2017, an element assessed to be part of ISIS attacked United States and Nigerian forces in Niger. The attack resulted in the deaths of four United States service members. Approximately 800 United States military personnel remain deployed to Niger. United States military personnel are also deployed to Cameroon, Chad, and Nigeria to support counterterrorism operations.

**Cuba.** United States forces continue to conduct humane and secure detention operations for detainees held at Guantánamo Bay, Cuba, under authority provided by the 2001 Authorization for the Use of Military Force (Public Law 107-40), as informed by the law of war. There are 41 such detainees as of the date of this report.

**Philippines.** United States forces deployed to the Philippines are providing support to the counterterrorism operations of the armed forces of the Philippines.

#### MILITARY OPERATIONS IN EGYPT

Approximately 400 United States military personnel are assigned to or supporting the United States contingent of the Multinational Force and Observers, which have been present in Egypt since 1981.

## United States AND NORTH ATLANTIC TREATY ORGANIZATION OPERATIONS IN KOSOVO

The United States continues to contribute forces to the Kosovo Force (KFOR), led by the North Atlantic Treaty Organization in cooperation with local authorities, bilateral partners, and international institutions, to deter renewed hostilities in Kosovo. Approximately 640 United States military personnel are among KFOR's approximately 4,150 personnel.

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

#### a. *Plan to Defeat ISIS*

On January 28, 2017, the President issued Presidential Memorandum-3 on the Plan to Defeat the Islamic State of Iraq and Syria. 82 Fed. Reg. 9125 (Feb. 2, 2017). Excerpts follow from the Presidential Memorandum.

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\* \* \* \*

The Islamic State of Iraq and Syria, or ISIS, is not the only threat from radical Islamic terrorism that the United States faces, but it is among the most vicious and aggressive. It is also attempting to create its own state, which ISIS claims as a "caliphate." But there can be no accommodation or negotiation with it. For those reasons I am directing my Administration to develop a comprehensive plan to defeat ISIS.

ISIS is responsible for the violent murder of American citizens in the Middle East, including the beheadings of James Foley, Steven Sotloff, and Peter Abdul-Rahman Kassig, as well as the death of Kayla Mueller. In addition, ISIS has inspired attacks in the United States, including the December 2015 attack in San Bernardino, California, and the June 2016 attack in Orlando, Florida. ISIS is complicit in a number of terrorist attacks on our allies in which Americans have been wounded or killed, such as the November 2015 attack in Paris, France, the March 2016 attack in Brussels, Belgium, the July 2016 attack in Nice, France, and the December 2016 attack in Berlin, Germany.

ISIS has engaged in a systematic campaign of persecution and extermination in those territories it enters or controls. If ISIS is left in power, the threat that it poses will only grow. We know it has attempted to develop chemical weapons capability. It continues to radicalize our own citizens, and its attacks against our allies and partners continue to mount. The United States must take decisive action to defeat ISIS.

**Sec. 1. Policy.** It is the policy of the United States that ISIS be defeated.

**Sec. 2. Policy Coordination.** Policy coordination, guidance, dispute resolution, and periodic in-progress reviews for the functions and programs described and assigned in this memorandum shall be provided through the interagency process established in National Security Presidential Memorandum-2 of January 28, 2017 (Organization of the National Security Council and the Homeland Security Council), or any successor.

**Sec. 3. Plan to Defeat ISIS.** (a) *Scope and Timing.*

(i) Development of a new plan to defeat ISIS (the Plan) shall commence immediately.

(ii) Within 30 days, a preliminary draft of the Plan to defeat ISIS shall be submitted to the President by the Secretary of Defense.

(iii) The Plan shall include:

(A) a comprehensive strategy and plans for the defeat of ISIS;

(B) recommended changes to any United States rules of engagement and other United States policy restrictions that exceed the requirements of international law regarding the use of force against ISIS;

(C) public diplomacy, information operations, and cyber strategies to isolate and delegitimize ISIS and its radical Islamist ideology;

(D) identification of new coalition partners in the fight against ISIS and policies to empower coalition partners to fight ISIS and its affiliates;

(E) mechanisms to cut off or seize ISIS's financial support, including financial transfers, money laundering, oil revenue, human trafficking, sales of looted art and historical artifacts, and other revenue sources; and

(F) a detailed strategy to robustly fund the Plan.

(b) *Participants.* The Secretary of Defense shall develop the Plan in collaboration with the Secretary of State, the Secretary of the Treasury, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, the Assistant to the President for National Security Affairs, and the Assistant to the President for Homeland Security and Counterterrorism.

(c) *Development of the Plan.* Consistent with applicable law, the Participants identified in subsection (b) of this section shall compile all information in the possession of the Federal Government relevant to the defeat of ISIS and its affiliates. All executive departments and agencies shall, to the extent permitted by law, promptly comply with any request of the Participants to provide information in their possession or control pertaining to ISIS. The Participants may seek further information relevant to the Plan from any appropriate source.

\* \* \* \*

**b. Congressional communications regarding legal basis for counterterrorism operations**

On August 2, 2017, Deputy Secretary of State John Sullivan sent a letter to Chairman of the U.S. House of Representatives Committee on Foreign Relations Edward R. Royce regarding the 2001 AUMF. The letter appears below.

\* \* \* \*

I am following up on our July 10 conversation regarding your request for the Administration's views on the potential consequences of repealing the Authorization for Use of Military Force (2001 AUMF), Public Law 107-40.

The United States has sufficient authority to prosecute the campaign against al-Qa'ida and associated forces, including against the Islamic State of Iraq and Syria (ISIS). This legal authority includes the 2001 AUMF which authorizes the use of military force against these

groups. Accordingly, the Administration is not seeking revisions to the 2001 AUMF or additional authorizations to use force.

Congress passed the 2001 AUMF shortly after the September 11th attacks. In that joint resolution, Congress 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.” Through the 2001 AUMF, Congress gave the President the statutory authority he needed “in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

The 2001 AUMF provides the statutory authority for ongoing U.S. military operations against the following individuals and groups: al-Qa’ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa’ida or the Taliban in Afghanistan; al-Qa’ida in the Arabian Peninsula; al-Shabaab; individuals in Libya who are part of al-Qa’ida; al-Qa’ida in Syria; and ISIS.

The 2001 AUMF also provides statutory authority for the United States to detain those persons who were part of, or substantially supported, Taliban or al-Qa’ida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. During the past decade, the United States has detained individuals pursuant to the authority of the 2001 AUMF in Afghanistan, in Iraq, temporarily at sea, and at the Guantanamo Bay detention facility. The United States continues to detain 41 individuals at Guantanamo Bay.

In the absence of an appropriate statutory replacement, the repeal of the 2001 AUMF would call into question the domestic law basis for these ongoing U.S. counterterrorism military operations and could impede our counterterrorism efforts, including the campaign to defeat ISIS in Iraq and Syria and the detention of members of al-Qa’ida and the Taliban at the Guantanamo Bay detention facility.

I hope this information is useful. Please do not hesitate to contact me if you or your Committee requires further assistance from the Department of State.

\* \* \* \*

Also on August 2, 2017, Charles Faulkner of the State Department’s Bureau of Legislative Affairs sent a letter to Chairman of the Senate Committee on Foreign Relations Bob Corker responding to an inquiry about the legal basis for the use of force in U.S. military actions in Syria in May and June 2017. The body of that letter appears below.

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\* \* \* \*

The 2001 AUMF also provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations. As Secretary Tillerson indicated in his testimony before the Committee on June 13, 2017, our purpose and reason for being in Syria

are unchanged: defeating ISIS. The strikes taken by the United States in May and June 2017 against the Syrian Government and pro-Syrian-Government forces were limited and lawful measures to counter immediate threats to U.S. or partner forces engaged in that campaign. The United States does not seek to fight the Syrian Government or pro-Syrian-Government forces. However, the United States will not hesitate to use necessary and proportionate force to defend U.S., Coalition, or partner forces engaged in the campaign against ISIS.

As a matter of international law, the United States is using force in Syria against al-Qa'ida and associated forces, including ISIS, and is providing support to Syrian partners fighting ISIS, such as the Syrian Democratic Forces, in the collective self-defense of Iraq (and other States) and in U.S. national self-defense.

Upon commencing airstrikes against ISIS in Syria in September 2014, the United States submitted a letter to the U.N. Security Council consistent with Article 51 of the U.N. Charter explaining the international legal basis for its use of force. As the letter explained, Iraq has made clear that it faces serious threats of continuing armed attacks from ISIS, operating from safe havens in Syria; the Syrian Government has shown it cannot, or will not, confront these safe havens. The Government of Iraq has requested the United States lead international efforts to strike ISIS sites and strongholds inside Syria to end armed attacks on Iraq, to protect Iraqi citizens, and to enable Iraq to control its borders. Moreover, ISIS threatens Iraq, U.S. partners in the region, and the United States. Therefore, consistent with the inherent right of individual and collective self-defense, the United States initiated necessary and proportionate actions in Syria against ISIS in 2014, and those actions continue to the present day. Such necessary and proportionate measures include the use of force to defend U.S., Coalition, and U.S.-supported partner forces from threats by Syrian Government and pro-Syrian Government forces.

\* \* \* \*

On September 5, 2017, Secretary of Defense James Mattis and Secretary of State Rex Tillerson sent a letter to U.S. Senate Majority Leader Mitch McConnell regarding the legal authority under the AUMF to pursue the Taliban, al-Qa'ida, and associated forces. The text of the letter appears below.

\* \* \* \*

As the Senate resumes its work on the Fiscal Year 2018 National Defense Authorization Act, we write to reaffirm the Administration's position that the United States has sufficient legal authority to prosecute the campaign against the Taliban, al-Qa'ida, and associated forces, including against the Islamic State of Iraq and Syria (ISIS). The legal authority for these operations includes the 2001 Authorization for the Use of Military Force (2001 AUMF), which authorizes the use of "all necessary and appropriate force" against these groups, including, as necessary, to implement the President's recently announced South Asia Strategy. The 2002 Authorization for the Use of Military Force (2002 AUMF) provides the President with the authority "to defend the national security of the United States against the continuing threat posed by Iraq," which the previous Administration invoked at points "to address the threat posed by ISIL's operations in Iraq."



The AUMFs also provide statutory authority for the United States to detain persons who were part of or substantially supporting the groups covered by the AUMFs. The United States continues to detain 41 individuals at Guantanamo Bay.

The Administration therefore opposes the adoption of any measure to revise or repeal the 2001 AUMF and 2002 AUMF. In the absence of an appropriate statutory replacement, changes to, or repeal of, the 2001 AUMF and 2002 AUMF could call into question the domestic legal basis for ongoing U.S. military and counterterrorism operations, including operations to defeat the Taliban, al-Qa'ida, and associated forces, including those to defeat ISIS, and for the detention of captured combatants at Guantanamo Bay. However, we look forward to working with the Congress to develop other appropriate expressions of national unity.

Specifically, the Administration opposes S.J. Res. 43, "To authorize the use of United States Armed Forces against al-Qaeda, the Taliban, and the Islamic State of Iraq and Syria, and associated persons or forces, that are engaged in hostilities against the United States, the Armed Forces, or its other personnel." For the reasons highlighted below, S.J. Res. 43 would undermine the President's authority to use force against the Taliban, al-Qa'ida, and associated forces, including against ISIS, which threaten U.S. national security.

Among other key concerns, the legislation would arbitrarily terminate the authorization five years after the date of enactment. This is inconsistent with the conditions-based approach in the President's South Asia Strategy. Such a provision could also unintentionally embolden our enemies with the recognizable goal of outlasting us. In addition, S.J. Res. 43 includes a definition of "associated persons or forces" which is inconsistent with the standard applied by the Executive Branch and which could result in unnecessary uncertainty regarding its scope. Further, the joint resolution would create a cumbersome Congressional review and disapproval process for the use of force against new associated forces or in new countries.

In sum, the Administration affirms that the United States has sufficient legal authority to prosecute the campaign against the Taliban, al-Qa'ida, and associated forces, including against ISIS, and S.J. Res. 43 would, in our view, undermine this campaign. We look forward to working with Congress on reviewing and analyzing any further proposals.

\* \* \* \*

On October 30, 2017, Secretary Tillerson testified before the Senate Foreign Relations Committee on the administration's perspective on the AUMF in its counterterrorism efforts. The Secretary's opening remarks are excerpted below and available at

<https://www.state.gov/secretary/20172018tillerson/remarks/2017/10/275196.htm>.

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\* \* \* \*

Thank you, Mr. Chairman, Chairman Corker, Ranking Member Cardin, distinguished members. I appreciate the opportunity to speak to you today. I know the Senate's desire to understand the United States' legal basis for military action is grounded in your constitutional role related to foreign policy and national security matters. I understand your sense of obligation to the American people well in this regard.

In the 2001 Authorization for Use of Military Force, or AUMF, Congress authorized the President to “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.” Congress granted the President this statutory authority “in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”

The 2001 AUMF provides statutory authority for ongoing U.S. military operations against al-Qaida, the Taliban, and associated forces, including against the Islamic State in Iraq and Syria, or ISIS.

The administration relies on the 2001 AUMF as a domestic legal authority for our own military actions against these entities, as well as the military actions we take in conjunction with our partners in the Coalition to Defeat ISIS.

The 2001 AUMF provides a domestic legal basis for our detention operations at Guantanamo Bay, where the United States currently detains members of al-Qaida, the Taliban, and associated forces.

The 2001 AUMF also authorizes the use of necessary and appropriate force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS in Iraq and Syria. In Syria, the efforts of the U.S.-led Coalition are aimed at the defeat of ISIS; the United States does not seek to fight the Syrian Government or pro-Syrian-Government forces. However, the United States will not hesitate to use necessary and proportionate force to defend U.S., Coalition, or partner forces engaged in the campaign against ISIS.

The President’s authority to use force against ISIS is further reinforced by the Authorization for Use of Military Force Against Iraq, or, in more plain terms, the “2002 AUMF.”

In addition to authorities granted to the President by statute, the President has the power under Article II of the Constitution to use military force in certain circumstances to advance important U.S. national interests, including to defend the United States against terrorist attacks. As an example, President Reagan relied on his authority as Commander-in-Chief in 1986 when he ordered airstrikes against terrorist facilities and military installations in Libya following a terrorist attack by Libya in West Berlin which killed and wounded both civilians and U.S. military personnel.

The United States has the legal authority to prosecute campaigns against the Taliban, al-Qaida, and associated forces, including ISIS, and is not currently seeking any new or additional congressional authorization for the use of force. The 2001 AUMF remains a cornerstone for ongoing U.S. military operations and continues to provide legal authority relied upon to defeat this threat.

However, should Congress decide to write new AUMF legislation, I submit to you several recommendations that the administration would consider necessary to a new AUMF:

First, new AUMF authorities must be in place prior to or simultaneous with the repeal of old ones. Failure to do so could cause operational paralysis and confusion in our military operations. Diplomatically speaking, it could cause our allies in the Global Coalition to question our commitment to defeating ISIS. And potential repeal of the 2001 AUMF without an immediate and appropriate replacement could raise question about the domestic legal basis for the United States’ full range of military activities against the Taliban, al-Qaida, and associated forces, including against ISIS, as well as our detention operations at Guantanamo Bay.

Second, any new authorization should not be time-constrained. Legislation which would arbitrarily terminate the authorization to use force would be inconsistent with a conditions-based approach and could unintentionally embolden our enemies with the goal of outlasting us. Any oversight mechanism in a new AUMF also would have to allow the United States the freedom to quickly move against our enemies without being constrained by a feedback loop.

Third, a new AUMF must not be geographically restricted. As is the case under the current AUMF, the administration would need to retain the statutory authority to use military force against an enemy that does not respect or limit itself based on geographic boundaries. As ISIS's fraudulent caliphate in Iraq and Syria has crumbled, it has tried to gain footholds in new locations.

As was discussed with the Senate during a closed defeat-ISIS briefing in July, the United States has a limited military presence in the Lake Chad Basin to support partners, including France, in their counterterrorism operations in the region. This information has also been conveyed to you in multiple periodic reports submitted to Congress consistent with the War Power Resolution. The collapse of ISIS's so-called caliphate in Iraq and Syria means it will attempt to burrow into new countries and find new safe havens. Our legal authorities for heading off a transnational threat like ISIS cannot be constrained by geographic boundaries. Otherwise, ISIS may re-establish itself and gain strength in vulnerable spaces.

The United States must retain the proper legal authorities to ensure that nothing restricts or delays our ability to respond effectively and rapidly to terrorist threats to the United States. Secretary Mattis and I, along with the rest of the administration, are completely aligned on this issue. We fully recognize the need for transparency with you as we respond to what will be a dynamic regional and global issue. We will ... continue to regularly update Congress and to make sure you and the American people understand our foreign policy goals, military operations, and national security objectives.

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

#### ***a. Montenegro Joins NATO***

On March 28, 2017, the Senate provided its advice and consent to ratification of the protocol to the North Atlantic Treaty allowing Montenegro to join NATO. See <https://www.congress.gov/treaty-document/114th-congress/12/resolution-text>. The President of the United States signed the U.S. instrument of ratification of the protocol for Montenegro's accession to NATO on April 11, 2017. On June 5, 2017, Under Secretary of State Thomas Shannon accepted Montenegro's instrument of accession to the North Atlantic Treaty. See State Department notice to the press, available at <https://www.state.gov/r/pa/prs/ps/2017/06/271540.htm>. Montenegro's prime minister, Dusko Markovic, deposited Montenegro's instrument of accession and Montenegro became the 29<sup>th</sup> NATO ally. Under Secretary Shannon's remarks at the ceremony for Montenegro's accession to NATO are available at <https://www.state.gov/p/us/rm/2017/271590.htm> and excerpted below.

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Over decades, the promise of NATO membership and broader Euro-Atlantic integration has advanced our security, our democratic values, and our respect for the rule of law. It has served as an incentive for nations to pursue difficult reforms. This policy has yielded clear results, and that is why NATO allies unanimously agreed to welcome Montenegro into the alliance.

Montenegro has taken NATO's guidance and mentorship to heart and implemented meaningful reforms including force structure transformation and modernization and upgrading operational capabilities. We greatly appreciate that Montenegro takes seriously the financial commitment it will undertake with NATO membership.

On May 25, NATO leaders met in Brussels and agreed that allies should develop national plans by the end of the year for implementing the 2014 Wales pledge to aim to reach 2 percent of GDP towards defense spending and 20 percent of defense budgets on necessary capabilities by 2024. Montenegro is on track to allocate 1.72 percent of its GDP in 2017, and its long-term defense development plan envisions reaching 2 percent by 2024.

Montenegro has been a reliable partner and force provider to NATO, the EU, and UN missions. It has contributed to NATO's operations in Afghanistan for six years and contributed over \$1 million in the last two years towards the sustainability of Afghan security forces. We also appreciate that Montenegro has been an active contributor to the 67-member defeat ISIS coalition. All NATO allies are members of the coalition, and on May 25, NATO leaders agreed that NATO would formally join the coalition and that NATO would do more in the fight against international terrorism. Montenegro should be commended in particular for asserting its sovereign right to choose its own alliances even in the face of concerted foreign pressure. As President Trump said in his February 28th remarks to a joint session of Congress, "America respects the right of all nations to chart their own path."

Montenegro's accession sends a strong message of strength to the region and makes clear to our allies that the United States remains as committed as ever to the principle of collective defense as enshrined in Article 5 of the Washington Treaty. In a strong demonstration of U.S. support for Montenegro's membership, the U.S. Senate voted overwhelmingly, 97-2, on March 28 to ratify Montenegro's accession protocol.

NATO's strength is based on not only on its military might, but also on our allies' shared commitment to the fundamental values enshrined in the Washington Treaty, democracy, individual liberty, and the rule of law. Montenegro's accession also affirms to other aspiring members that NATO's doors remain open to those countries willing and able to make the reforms necessary to meet NATO's high standards, and to accept the risks and responsibilities as well as the benefits of membership. Montenegro's accession is an important stepping stone toward our vision of a Europe whole, free, and at peace.

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**b. *Cabo Verde SOFA***

On September 25, 2017, delegations from the governments of the United States and the Republic of Cabo Verde met in Washington, D.C. and concluded a new Status of Forces Agreement ("SOFA"). See September 25, 2017 media note, available at

<https://www.state.gov/r/pa/prs/ps/2017/09/274414.htm>. The media note highlights the SOFA as follows:

This new Status of Forces Agreement illustrates the enduring strength of the U.S.-Cabo Verde security partnership in a strategically important region of West Africa. The agreement memorializes many existing aspects of our strong defense ties which have allowed us to work closely together over the years to address a wide range of challenges, such as maritime security, combatting illicit trafficking, and providing humanitarian assistance in the region.

**c. Agreement with Georgia**

On May 9, 2017, the United States and Georgia signed a General Security of Information Agreement (“GSOIA”). See State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/05/270754.htm>. Secretary Tillerson signed on behalf of the United States and Prime Minister Giorgi Kvirikashvili signed on behalf of Georgia. The media note describes the significance of the agreement:

The agreement represents a major milestone in security cooperation between the United States and Georgia. The GSOIA establishes a legal foundation for bilateral intelligence sharing and will strengthen counterterrorism cooperation between the United States and Georgia. This agreement will also enhance the Georgian military’s interoperability with the armed services of NATO member states. The GSOIA supports Georgia’s efforts to transform its military and paves the way for future security agreements between the United States and Georgia.

**4. International Humanitarian Law**

**a. *Civilians in Armed Conflict***

See Chapter 6.A.2.b for U.S. comments on the applicability of the International Covenant on Civil and Political Rights (“ICCPR”) in situations of armed conflict. See also Chapter 6.C.2 on children in armed conflict. And see Chapter 6.I for U.S. submissions to the Committee Against Torture on the Draft Revised General Comment on the implementation of Article 3 of the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment. And see Chapter 6.M.2 on protecting human rights while countering terrorism.

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

On June 23, 2017, U.S. Deputy Coordinator for Cyber Issues Michele G. Markoff delivered the explanation of position for the United States at the conclusion of the 2016-2017 UN Group of Governmental Experts (“GGE”) on developments in the field

of information and telecommunications in the context of international security. The U.S. explanation of position is excerpted below and available at <https://www.state.gov/s/cyberissues/releasesandremarks/272175.htm>.

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The UN GGE has had an honorable foundation since 2004. I'm sorry that, despite the efforts of the chair to facilitate the draft and the contributions of experts in the search for consensus, I believe the report falls short of our mandate and doesn't meet the standard that the previous GGEs have set for us.

Throughout the 2016-2017 GGE, I have sought clear and direct statements on how certain international law applies to States' use of [information and communication technologies, or] ICTs, including international humanitarian law, international law governing States' exercise of their inherent right of self-defense, and the law of State responsibility, including countermeasures. I sought such statements in the interests of international peace and security, based on my strong conviction that the framework of international law provides States with binding standards of behavior that can help reduce the risk of conflict by creating stable expectations of how States may and may not respond to cyber incidents they face. The final draft of the report insufficiently addresses these issues. I believe it would be a troubling and potentially destabilizing signal for this GGE to release a report that does not take a clear position on the applicability of these bodies of international law to States' use of ICTs, much less fulfill the mandate given to this Group by the UN General Assembly to study *how* international legal rules and principles apply to the use of ICTs.

Despite years of discussion and study, some participants continue to contend that it is premature to make such a determination and, in fact, seem to want to walk back progress made in previous GGE reports. I am coming to the unfortunate conclusion that those who are unwilling to affirm the applicability of these international legal rules and principles believe their States are free to act in or through cyberspace to achieve their political ends with no limits or constraints on their actions. That is a dangerous and unsupportable view, and it is one that I unequivocally reject.

During this GGE, I heard repeated assertions on the part of some participants that a discussion of certain bodies of international law, including the *jus ad bellum*, international humanitarian law, and the law of State responsibility, would be incompatible with the messages the Group should be sending regarding the peaceful settlement of disputes and conflict prevention. That is a false dichotomy that does not withstand scrutiny. A report that discusses the peaceful settlement of disputes and related concepts but omits a discussion of the lawful options States have to respond to malicious cyber activity they face would not only fail to deter States from potentially destabilizing activity, but also fail to send a stabilizing message to the broader community of States that their responses to such malicious cyber activity are constrained by international law.

I approached this GGE with optimism and have been encouraged by the productive and serious nature of much of the negotiations. It is unfortunate that the reluctance of a few participants to seriously engage on the mandate on international legal issues has prevented the Group from reaching consensus on a report that would further the goal of common

understandings among UN Member States on these important issues. This is particularly disappointing given the work this Group has done in this session to reach common understandings on the implementation of stabilizing measures, including voluntary, non-binding norms of responsible State behavior in cyberspace and confidence-building measures. But our work has been in vain, despite extraordinary efforts from the chair, and I look forward to continuing to work with others on these efforts that are so important to international peace and security. I call on all member states to take this seriously in the future and focus on international law.

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On October 23, 2017, Ms. Rachel Hicks delivered the U.S. statement at a UN First Committee thematic discussion on other disarmament measures and international security. The portion of her remarks addressing security of cyberspace is excerpted below and available at <https://www.state.gov/t/avc/rls/275061.htm>.

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It is a fundamental goal of the United States to create a climate in which all States can enjoy the benefits of cyberspace; all have incentives to cooperate and avoid conflict; and all have good reason not to disrupt or attack one another—a concept we call international cyber stability. We have sought to achieve this goal by nurturing a broad consensus on what constitutes responsible State behavior in cyberspace.

The United Nations Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security has served as a productive and groundbreaking expert-level venue to advance international stability in cyberspace. The consensus recommendations of the three UN GGE reports (2010, 2013, and 2015) have included affirmation of the applicability of existing international law to States' activities in cyberspace, support for certain voluntary norms of responsible State behavior in peacetime, and the implementation of practical CBMs. In addition, these three landmark and successful GGE reports have demonstrated the value of consensus-driven, expert-level negotiation on this topic within the UN. The failure to find consensus during the most recent round of GGE discussions demonstrates that there are challenging issues that we still need to confront. However, this inability to reach consensus does not make the existing GGE recommendations of the previous reports any less valid or important. We look forward to future discussions where we can focus on the important issues, particularly on those issues where we were unable to find consensus during the most recent GGE.

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## B. CONVENTIONAL WEAPONS

### 1. U.S. Response to Stockholm International Peace Research Institute

On September 1, 2017, the U.S. Department of Defense responded to a questionnaire from the Stockholm International Peace Research Institute (“SIPRI”) on the practice of the United States in the review of the legality of weapons, often referred to as the Article 36 review process (referring to Article 36 of the 1977 Additional Protocol I to the 1949 Geneva Conventions). Excerpts follow from the DoD response (with some footnotes omitted).

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#### *1. When and how was the review mechanism established ... ?*

As a matter of U.S. Department of Defense (DoD) policy, the intended procurement or acquisition of DoD weapons and weapon systems is reviewed for consistency with all applicable U.S. domestic law and the international legal obligations of the United States, including arms control obligations and the law of war.<sup>1</sup> DoD policy establishes a requirement for such reviews to be conducted by an authorized attorney, but DoD policy does not establish a particular formal procedure through which all of the reviews must be conducted.<sup>2</sup>

The regulations of particular DoD components, such as the Department of the Army, the Department of the Navy, and the Department of the Air Force, that implement the DoD policy requirement in each component’s respective area of responsibility establish procedures with varying degrees of specificity.<sup>3</sup> These procedures are supplemented by the normal procedures of

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<sup>1</sup> See DoD Directive 5000.01, *The Defense Acquisition System*, encl. 1, ¶E1.1.15 (May 12, 2003, certified current as of Nov. 20, 2007) (“The acquisition and procurement of DoD weapons and weapon systems shall be consistent with all applicable domestic law and treaties and international agreements (for arms control agreements, see DoD Directive 2060.1 (Reference (m)[]), customary international law, and the law of armed conflict (also known as the laws and customs of war).”); see also DoD Directive 3000.03E, *DoD Executive Agent for Non-Lethal Weapons (NLW), and NLW Policy*, ¶4 (Apr. 25, 2013) (“The GC, DoD ensures the review of the legality of NLW as provided in DoDDs 5145.01, 5000.01, and 2311.01E (References (g), (h), and (i)).”); encl. 2, ¶11 (“The Secretaries of the Military Departments and the Commander, USSOCOM, through the CJCS: . . . [r]equire, as appropriate, that a legal review of the acquisition of all NLW is conducted in accordance with Reference (h) and an arms control compliance review is completed in accordance with DoDD 2060.1 (Reference (l)).”); encl. 2, ¶13 (“In his or her capacity as the DoD EA for NLW, the CMC: . . . [e]nsures a legal review of the acquisition of all NLW is conducted in accordance with Reference (h) and an arms control compliance review is completed in accordance with Reference (l).”).

<sup>2</sup> See DoD Directive 5000.01, *The Defense Acquisition System*, encl. 1, ¶E1.1.15 (May 12, 2003, certified current as of Nov. 20, 2007) (“An attorney authorized to conduct such legal reviews in the Department shall conduct the legal review of the intended acquisition of weapons or weapons systems.”).

<sup>3</sup> See, e.g., Army Regulation 27-53, *Review of Legality of Weapons Under International Law*, ¶1 (Jan. 1, 1979) (“This regulation – . . . b. Prescribes procedures and assigns responsibilities for submission of weapon or weapon systems to The Judge Advocate General (TJAG) for legal review under international law.”); Secretary of the Navy Instruction 5000.2E, *Department of the Navy Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System*, ¶1 (Sept. 1, 2011) (“Purpose a. To issue mandatory procedures for Department of the Navy (DON) implementation of references (a), (b), (c), and (d) for major and non-major defense acquisition programs and major and non-major information technology (IT) acquisition programs.”); Air Force Instruction 51-402, *Legal Reviews of Weapons and Cyber Capabilities*, page 1 (Jul. 27, 2011) (“[This



the legal office of the attorney authorized to conduct the review, as well as the attorney's professional discretion. Thus, U.S. practice and procedures relating to the review of the legality of weapons are not conducted through a single, formal "review mechanism" as seems to be contemplated by this question and some of the questions that follow.

DoD policy does not establish a specific requirement to review the lawfulness of new "methods of warfare" that are studied, developed, or acquired. In practice, legal advice regarding new methods of warfare is given where appropriate. For example, an attorney reviewing the legality of the acquisition of a weapon would often review the legality of any new method of warfare that may be suggested for the use of that weapon.

Similarly, DoD policy establishes a responsibility for the heads of DoD components to make qualified legal advisers at all levels of command available to provide advice about law of war compliance during the planning and execution of military exercises and operations.<sup>4</sup> Also, certain senior operational commanders are required as a matter of DoD policy to ensure that all plans, policies, directives, and rules of engagement issued by them and their subordinate commands and components are reviewed by legal advisers to ensure their consistency with the law of war and DoD policy requirements related to the law of war's implementation.<sup>5</sup>

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*3. Who is responsible for carrying out the review? (special committee, an individual reviewer?)*

Pursuant to DoD policy, as reflected in DoD Directive 5000.01, an attorney authorized to conduct such legal reviews in the Department is to conduct the legal review of the intended acquisition of weapons or weapon systems.

In general, the Heads of DoD Components that acquire weapons or weapon systems (e.g., the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force) are required to ensure that DoD policy is implemented, including the requirement related to the legal review of the intended acquisition of weapons or weapon systems. The Heads of DoD Components may specify additional or more exacting requirements, consistent with DoD policy.

Within DoD, the legal review of weapons is one aspect of a much larger process of acquiring weapons. Rather than leading the acquisition process or directing other departments, sectors, and experts involved in the acquisition process, lawyers support the larger acquisition process by helping ensure that the acquisition is consistent with U.S. and applicable international law.

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Instruction] prescribes guidance and procedures for the review of Air Force weapons and cyber capabilities to ensure legality under domestic and international law including the Law of Armed Conflict (LOAC).").

<sup>4</sup> See DoD Directive 2311.01E, *DoD Law of War Program*, ¶5.7 (May 9, 2006, incorporating change 1, Nov. 15, 2010, certified current as of Feb. 22, 2011) ("The Heads of the DoD Components shall: . . . 5.7.3. Make qualified legal advisers at all levels of command available to provide advice about law of war compliance during planning and execution of exercises and operations; and institute and implement programs that comply with the reporting requirements established in section 6.").

<sup>5</sup> See DoD Directive 2311.01E, *DoD Law of War Program*, ¶5.11 (May 9, 2006, incorporating change 1, Nov. 15, 2010, certified current as of Feb. 22, 2011) ("The Commanders of the Combatant Commands shall: . . . 5.11.8. Ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.").

### 6. How does the review mechanism reach decisions?

DoD Directive 5000.01 requires that the acquisition of DoD weapons and weapon systems be consistent with all applicable domestic law and treaties and international agreements as well as with customary international law and the law of war. Past DoD directives and instructions also reflected this requirement. DoD Directive 2060.1 also requires that all DoD activities be fully compliant with arms control agreements of the United States.

For the Department of Defense, the initial focus of a legal review of the acquisition or procurement of a weapon is often on whether the weapon is illegal *per se*. A weapon may be illegal *per se* if a treaty to which the United States is a party or customary international law has prohibited its use in all circumstances.<sup>33</sup> For example, under Protocol (IV) on Blinding Laser Weapons, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), Oct. 13, 1995, the use of “blinding laser” weapons, *i.e.*, lasers specifically designed to cause permanent blindness to unenhanced vision, is prohibited, regardless of how they are used.<sup>34</sup>

Most weapons, however, are not illegal *per se*. That is, their use may be lawful in some circumstances, although unlawful in other circumstances, such as if the weapons are used to attack combatants placed *hors de combat*. Law of war issues related to targeting, however, generally are not determinative of the lawfulness of a weapon. For example, the issue of whether a weapon would be used consistent with the requirement that attacks may only be directed against military objectives might only be capable of determination when presented with the facts of a particular military operation. That said, weapons that are inherently indiscriminate are prohibited. In addition, certain weapons, such as mines, are subject to specific rules on their use in order to reduce the risk of harm to the civilian population.

In general, three questions should be considered when reviewing the acquisition of a weapon for consistency with U.S. law of war obligations: (1) whether the weapon’s intended use is calculated to cause superfluous injury; (2) whether the weapon is inherently indiscriminate; and (3) whether the weapon falls within a class of weapons that has been specifically prohibited. If, after considering these three questions, the weapon is not prohibited, the review should also consider whether there are legal restrictions on the weapon’s use that are specific to that weapon. Please refer to Chapter Six of the DoD Law of War Manual for a detailed discussion of these three questions and other rules related to weapons.

### 7. What kind of comments and recommendations is the weapon review authority empowered to make?

As noted above, an attorney authorized to do so provides his or her legal opinion as to whether the acquisition of the particular weapon is consistent with international law.

If it is determined during a legal review that the weapon is not prohibited, the attorney authorized to conduct the review should also consider whether there are legal restrictions on the weapon’s use that are specific to that type of weapon. If any specific restrictions apply, then the weapon’s intended concept of employment should be reviewed for consistency with those

<sup>33</sup> DoD Law of War Manual, § 6.1.1 (Legality of the Weapon Itself (Per Se) Distinguished From the Legality of the Use of the Weapons) (June 2015, Updated Dec. 2016) (“A weapon may be illegal *per se* if a treaty to which the United States is a Party or customary international law has prohibited its use in all circumstances.”).

<sup>34</sup> DoD Law of War Manual, § 6.1.1 (Legality of the Weapon Itself (Per Se) Distinguished From the Legality of the Use of the Weapons) (June 2015, Updated Dec. 2016) (“For example, the use of ‘blinding laser’ weapons is prohibited, regardless of how they are used.”).

restrictions. The advice that is offered as part of the review of the weapon could be useful because, when authorizing or using such weapon, the responsible commander and weapon system operator is required to use such a weapon consistent with any applicable prohibitions and restrictions in the law of war.

The attorney who reviewed the legality of the weapon also may find it appropriate to advise whether other measures should be taken that would assist in ensuring compliance with law of war obligations related to the type of weapon being acquired or procured. For example, it may be appropriate to advise on the need for training programs and other practical measures, such as promulgating doctrine or rules of engagement related to the type of weapon.

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*Does customary international law require the review of the legality of weapons, means, and methods of warfare?*

The United States views the review of the legality of weapons, means, and methods of warfare as a best practice for the implementation of customary and treaty law relating to weapons, means, and methods of warfare, but does not consider customary law to require these reviews as such.

In our view, there is insufficient State practice and *opinio juris* to conclude that there exists, under customary law, an obligation to review the legality of weapons for consistency with customary law. First, the provision in the 1977 Additional Protocol I to the 1949 Geneva Conventions relating to the review of the legality of new weapons was a new provision at the time of its adoption. One scholar has observed that, even including States Parties to the 1977 Additional Protocol I, “relatively few states are believed to have systems for the legal review of weapons.”<sup>163</sup> Furthermore, a 2006 ICRC study states that only Australia, Belgium, the Netherlands, Norway, Sweden, the United States, France, the United Kingdom, and Germany are known to have instituted processes for the legal review of weapons.<sup>164</sup> In our view, the limited State practice of which we are aware does not constitute the general and consistent practice required for the formation of customary law, even assuming that such practice was done out of a sense of legal obligation.

Although legal reviews are not required as such under customary international law, there are customary international law rules relating to weapons. The DoD Law of War Manual discusses a number of customary international law rules relating to weapons. For example, the prohibition on weapons calculated to cause superfluous injury and the prohibition on inherently indiscriminate weapons are described as based in customary international law. Similarly, the DoD Law of War Manual notes that the United States has determined that the prohibition on the use in war of asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices is part of customary international law.

In our view, conducting a legal review of a weapon, or a means or method of warfare, is a best practice for the implementation of substantive legal rules (whether treaty or customary), but a State (or non-State armed group) does not violate customary international law by failing to conduct such a review.

*Is information about your State’s process of reviewing the legality of weapons public?*

<sup>163</sup> WILLIAM H. BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* 341 (2009).

<sup>164</sup> International Committee of the Red Cross, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, page 5, fn. 8 (Jan. 2006).

DoD and its components have issued a number of publicly available directives, instructions, and manuals relating to the legal review of the acquisition of weapons and weapon systems. These include:

- DoD Directive 5000.01, *The Defense Acquisition System*, (May 12, 2003, certified current as of Nov. 20, 2007);
- DoD Directive 3000.03E, *DoD Executive Agent for Non-Lethal Weapons (NLW), and NLW Policy*, (Apr. 25, 2013);
- DoD Directive 3000.09, *Autonomy in Weapon Systems*, (Nov. 21, 2012);
- Department of Defense Law of War Manual, § 6.2 (DoD Policy of Reviewing the Legality of Weapons) (June 2015, updated Dec. 2016);
- Army Regulation 27-53, *Review of Legality of Weapons Under International Law*, (Feb. 1, 1979);
- Secretary of the Navy Instruction 5000.2E, *Department of the Navy Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System*, (Sep. 1, 2011); and
- Air Force Instruction 51-402, *Legal Reviews of Weapons and Cyber Capabilities*, (July 27, 2011).

As noted in our introduction to this questionnaire, we intend to make public the information we have provided in this questionnaire.

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## 2. Convention on Certain Conventional Weapons

On November 10, 2017, the United States submitted a working paper to the Group of Governmental Experts on lethal autonomous weapons systems (“LAWS”), established by the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (the “Convention on Certain Conventional Weapons”). U.N. Doc. No. CCW/GGE.1/2017/WP.6. Excerpts follow from the U.S. submission (omitting some parts consistent with the response to the SIPRI questionnaire, excerpted *supra*).

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1. The United States acknowledges both the challenges and opportunities presented by emerging technologies in the area of lethal autonomous weapons systems (LAWS). As an overall matter, we believe that the law of war (also called international humanitarian law) provides a robust and appropriate framework for the regulation of all weapons in relation to armed conflict.

2. This working paper seeks to contribute to the meetings of the Group of Governmental Experts (GGE) on Lethal Autonomous Weapons Systems (LAWS) in Geneva between November 13-17, 2017, by providing the views of the United States on: (i) the legal review of weapons with autonomous functions in acquisition or development; (ii) the potential of weapon systems with autonomous functions to improve the implementation of law of war principles in military operations; and (iii) legal accountability regarding weapons with autonomous functions.

## **II. Legal review of weapons with autonomous functions in acquisition or development**

3. The United States views the review of the legality of weapons as a best practice for implementing customary and treaty law relating to weapons and their use in armed conflict. The United States is not a party to the 1977 Additional Protocol I to the 1949 Geneva Conventions and therefore is not bound by that instrument, but we note that Article 36 of that Protocol creates an obligation for its Parties with respect to the study, development, acquisition, or adoption of a “new” weapon, means, or method of warfare.

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7. Law of war issues related to targeting generally are not determinative of the lawfulness of a weapon. A legal review of a weapon should consider whether the weapon is “inherently indiscriminate,” *i.e.*, whether the weapon is capable, under any set of circumstances and in particular the intended concept of employment, of being used in accordance with the principles of distinction and proportionality. Nevertheless, most targeting issues (*e.g.*, whether a weapon would be used consistent with the requirement that attacks may only be directed against military objectives) are only capable of determination when presented with the facts of a particular military operation.

8. Weapons that use autonomy in target selection and engagement seem unique in the degree to which they would allow consideration of targeting issues during the weapon’s development. For example, if it is possible to program how a weapon will function in a potential combat situation, it may be appropriate to consider the law of war implications of that programming. In particular, it may be appropriate for weapon designers and engineers to consider measures to reduce the likelihood that use of the weapon will cause civilian casualties.

9. Under DoD policy, autonomous and semi-autonomous weapons systems go through “rigorous hardware and software verification and validation (V&V) and realistic system developmental and operational test and evaluation (T&E).” Although rigorous testing and sound development of weapons are not required by the law of war as such, these good practices can support the implementation of law of war requirements. Rigorous and realistic testing standards and procedures can ensure that commanders and national security policy makers can have a reasonable expectation of the likely effects of employing the weapon in different operational contexts. In addition, such practices can help reduce the risk of unintended combat engagements, such as weapons malfunctions that could inadvertently cause harm to civilians.

## **III. Compliance with the law of war in using weapon systems with autonomous functions**

10. The law of war rules on conducting attacks (*e.g.*, the rules relating to distinction and proportionality) impose obligations on States and other parties to a conflict, and it is for individual human beings, commensurate with their role within the State or party to the conflict, to ensure compliance with those obligations when employing any weapon or weapons system, including autonomous or semi-autonomous weapons systems. For example, DoD policy

recognizes that “[p]ersons who authorize the use of, direct the use of, or operate autonomous and semi-autonomous weapon systems must,” among other requirements, “do so ... in accordance with the law of war.”

11. It is not the case that the law of war requires that a weapon, even a semi-autonomous or autonomous weapon, make legal determinations. For example, the law of war does not require that a weapon determine whether its target is a military objective, but rather that the weapon be capable of being employed consistent with the principle of distinction. Similarly, the law of war does not require that a weapon make proportionality determinations, such as whether an attack is expected to result in incidental harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage expected to be gained.

12. The law of war does not require weapons to make legal determinations, even if the weapon (*e.g.*, through computers, software, and sensors) may be characterized as capable of taking some form of action or decision in a given moment in the absence of direction by a human being, such as whether to fire the weapon or to select and engage a target. Relatively rudimentary autonomous weapons, such as homing missiles, have been employed for many years, and there has never been a requirement that such weapons themselves determine that legal requirements are met.

13. Rather, it is persons who must comply with the law of war by employing weapons in a discriminate and proportionate manner. For example, even if the weapon autonomously selects and engages targets, its use would be precluded when the use of the weapon would be expected to result in incidental harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage expected to be gained.

14. In addition, the obligation to take feasible precautions in order to reduce the risk of harm to civilians and other persons or objects protected from being made the object of attack must be considered when using weapon systems with advanced autonomous functions. For example, depending on the circumstances, it might be feasible to monitor the operation of the weapon system and to stop its operation in the event that it malfunctioned or the circumstances change. As another example, it might be appropriate to consider whether it is possible to program or build mechanisms into the weapon that would reduce the risk of civilian casualties while in no way decreasing the military advantages offered by the weapon. A best practice in this regard may be found in the requirements in DoD policy for the interface between people and machines for autonomous and semi-autonomous weapons to: (1) be readily understandable to trained operators; (2) provide traceable feedback on system status; and (3) provide clear procedures for trained operators to activate and deactivate system functions. These requirements to improve human-machine interfaces assist operators in making accurate judgments regarding the use of force.

15. The ability of weapons to make decisions or assessments of issues that would be considered under law of war can be viewed as an additional feature that improves the ability of human beings to implement legal requirements rather than as an effort to replace a human being’s responsibility and judgment under the law.

#### **IV. Potential for autonomy in weapon systems to improve the implementation of law of war principles in military operations**

16. In many cases, the use of autonomy in weapon systems could enhance the way law of war principles are implemented in military operations.

17. For example, very basic applications of autonomy allow some munitions to self-deactivate or to self-destruct, which helps reduce the risk these weapons may pose to the civilian population after the munitions have served their military purpose.

18. More advanced applications of autonomy may facilitate greater precision in guidance of bombs and missiles against military objectives, reducing the likelihood of inadvertently striking civilians and civilian objects as compared to the use of unguided bombs and missiles to achieve the same desired result.

19. Similarly, autonomous functions allow defensive systems to select and engage incoming enemy projectiles, such as mortars, artillery shells, and rockets. These defensive systems can provide military commanders more time to decide on how to respond to the threat. For example, directing “counter-battery fire” against the origin of the enemy projectiles has been a common response to such attacks, and the additional time afforded by autonomous defensive systems could allow military commanders more time to consider and execute a more deliberate and precise response.

20. These applications of autonomy illustrate a fundamental feature of the law of war — the law of war often reflects the convergence of military and humanitarian interests.

21. Autonomy can be used in weapon systems to create more capabilities. Commanders can use additional capabilities to increase the efficiency of military operations — more precisely applying force and causing less unintended destruction. Improving efficiency is done for sound military reasons — to allow fewer resources to accomplish more military purposes. But the same capabilities that reduce wasteful or incorrect applications of military force, such as incidents of “friendly fire,” can also reduce the risk of civilian casualties.

22. For example, militaries might develop weapons with advanced technologies, such as smart grenade launchers, to give their soldiers new advantages in countering the use of cover by enemy fighters to avoid small arms fire. By reducing the need for even greater applications of force such as artillery or air bombardments, these weapons have potentially long-term benefits by reducing the effects of larger explosive weapons in populated areas or the presence of explosive remnants of war.

23. These types of “smart” weapons might create additional options for commanders — allowing attacks to be conducted in circumstances where the use of “dumb” weapons would cause significant or excessive civilian casualties. This, however, should not be construed as necessarily requiring States to use “smart” weapons when available rather than “dumb” weapons.

24. It is expected that further developments in autonomous and semi-autonomous weapon systems will allow military forces to apply force more precisely and with less collateral damage than would be possible with existing systems.

#### **V. Legal accountability and weapons with autonomous functions**

25. Machines are not States or persons under the law. Questions of legal accountability are questions of how existing and well-established principles of State and individual responsibility apply to States and persons who use weapon systems with autonomous functions.

26. As a general principle, States are responsible for the acts of persons forming part of their armed forces. It follows that States are responsible for the uses of weapons with autonomous functions by persons forming part of their armed forces as well as other such acts that may be attributable to a State under the law of State responsibility. States, in ensuring accountability for such conduct, may use a variety of mechanisms, including investigations, individual criminal liability, civil liability, and internal disciplinary measures.

27. As with all decisions to employ weapon systems, persons are responsible for their individual decisions to use weapons with autonomous functions. For example, persons who use weapons with autonomous functions to violate the prohibition on targeting the civilian population may be held responsible for such violations.

28. The responsibilities of any particular individual belonging to a State or a party to the conflict may depend on that person's role in the organization or military operations. As a general matter, the persons who are responsible for implementing a party to a conflict's obligation are those persons with the authority to make the necessary decisions and judgments required by that international obligation. For example, a party to a conflict has the obligation to take feasible precautions to reduce the risk to civilians, such as providing warnings before attacks. The determination of whether it is feasible to provide such a warning would be made by the relevant commander in charge of the attack.

29. As noted above, advanced applications of autonomy in weapon systems can allow for issues that would normally only be presented in the context of the use of the weapon system to be presented in the context of the development of the weapon system. Persons who engage in wrongdoing in the development and testing of a weapon could be held accountable, at least under principles and rules of accountability in domestic law.

30. Intentional wrongdoing involving weapons is clearly prohibited. In the absence of intentional wrongdoing, assessments of accountability may be more complex. Mere accidents or equipment malfunctions are not violations of the law of war, even if civilians are killed or injured as a result of those malfunctions. The standard of care or regard that is due in conducting military operations with regard to the protection of civilians is a complex question to which the law of war does not provide a simple answer. This standard must be assessed based on the general practice of States and common standards of the military profession in conducting operations.

31. A general principle of accountability, which is reflected in the law of war, is that decision-makers must be judged based on the information available to them at the time and not on the basis of information that subsequently comes to light. Thus, for example, in assessing whether a commander's decision to use weapons with autonomous functions was reasonable in a particular context, whether the commander acted in good faith based on the information available to him or her at the time would need to be considered. In this regard, training on the weapon system and rigorous testing of the weapon system can help commanders be advised of the likely effects of employing the weapon system. These measures, found in DoD policy, can help promote good decision-making and accountability.

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As referenced in the U.S. submission excerpted above, the Group of Governmental Experts ("GGE") on LAWS met in Geneva in November 2017. Attorney-Adviser Charles Trumbull of the U.S. Department of State, Office of the Legal Adviser, delivered the opening statement for the United States on November 15, 2017. His statement is excerpted below and available at <https://geneva.usmission.gov/2017/11/15/u-s-opening-statement-at-ccw-meeting-of-group-of-governmental-experts-on-lethal-autonomous-weapons-systems/>.



\* \* \* \*

The United States welcomes the establishment of this GGE. ... The CCW is uniquely suited to hold these discussions, given its focus on international humanitarian law (IHL) and given that delegations of High Contracting Parties routinely include members with military, technical, and policy experience.

... We believe that this substantive review of the technological, military, and legal/ethical considerations associated with emerging technologies relevant to LAWS is a valuable contribution to the work of the CCW. ...[M]any governments, including that of the United States, are still trying to understand more fully the ways that autonomy will be used by their societies, including by their militaries. These are complex issues, and we need to continue to educate ourselves.

One thing is clear: any development or use of LAWS must be fully consistent with IHL, including the principles of humanity, distinction, and proportionality. For this reason, the United States places great importance on the weapon review process in the development and acquisition of new weapon systems. This is a critical measure in ensuring that weapon systems can dependably be used in a manner that is consistent with IHL. We continue to believe that best practices for reviewing weapon systems that use autonomy are an especially productive area for continued discussions, as a number of other delegations have also suggested.

The United States also continues to believe that advances in autonomy and machine learning can facilitate and enhance the implementation of IHL, including the principles of distinction and proportionality. One of our goals is thus to understand better how this technology can continue to be used to reduce the risk to civilians and friendly forces in armed conflict. On this issue, we refer other delegations to the United States working paper.

The United States is committed to playing an active and constructive role in this GGE, including by sharing our experience in addressing issues related to autonomy in weapon systems.

...

It remains premature, however, to consider where these discussions might or should ultimately lead. For this reason, we do not support the negotiation of a political or legally binding document at this time. The issues presented by LAWS are complex and evolving, as new technologies and their applications continue to be developed. We must be cautious not to make hasty judgments about the value or likely effects of emerging or future technologies. As history shows, our views of new technologies may change over time as we find new uses and ways to benefit from advances in technology. In particular, we want to encourage innovation and progress in furthering the objects and purposes of the Convention. We should therefore proceed with deliberation and patience.

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Also on November 15, 2017, Lieutenant Colonel John Cherry delivered the U.S. intervention on “Appropriate Levels of Human Judgment over the Use of Force” at the meeting of the GGE on LAWS in Geneva. The U.S. Statement on the subject is excerpted below and available at <https://geneva.usmission.gov/2017/11/16/u-s-statement-at-ccw-gge-meeting-intervention-on-appropriate-levels-of-human-judgment-over-the-use-of-force/>.

\* \* \* \*

[The Chair's] paper asks whether potential LAWS could be accommodated under existing chains of military command and control. We believe the answer to this question is yes.

As with all weapons systems, commanders must authorize the use of lethal force against an appropriate targeted military objective. That authorization is made within the bounds established by the rules of engagement and international humanitarian law (IHL) based on:

- The commander's understanding of the tactical situation, informed by his or her training and experience
- The weapon's system performance, informed by extensive weapons testing as well as operational experience; and
- The employment of tactics, techniques, and procedures for that weapon

In all cases, the commander is accountable and has the responsibility for authorizing weapon release in accordance with IHL. Humans do, and must, play a role in authorizing lethal force.

States will not develop and field weapons that they cannot control. Uncontrollable weapons are not militarily useful. So, although the thought of uncontrollable weapons or machines may be prevalent in popular imagination we do not think that this is a realistic issue for States to consider for their work in the CCW.

Rather than focusing on the controllability of the weapon system, the United States has used the phrase "appropriate levels of human judgment over the use of force" in these discussions. This standard is used in U.S. Department of Defense policy concerning the use of autonomy in weapon systems, which requires that autonomous and semi-autonomous weapon systems "be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force."

In our view, ensuring "appropriate levels of human judgment over the use of force" more accurately frames the question that States should consider:

- First, this formulation focuses on human beings to whom IHL applies, rather than suggesting a new requirement that machines make legal determinations. As we discussed in one of our working papers, IHL does not require that a weapon determine whether the target is a military objective, but rather that the weapon be capable of being employed consistent with the principle of distinction by a human operator.

- Second, the "appropriate levels of human judgment over the use of force" also reflects the fact that there is not a fixed, one-size-fits-all level of human judgment or the same "minimum level of control" that should be applied to every weapon system. Different weapons systems and different operational contexts mean that the appropriate level of human judgment can differ across weapon systems and even across different functions in a weapon system. Some functions might be better done by a computer than a human being, while other functions should be performed by humans.

\* \* \* \*

## C. DETAINEES

### *Hamidullin*

As discussed in *Digest 2016* at 856-65, the U.S. Court of Appeals heard argument on the briefs submitted in *Hamidullin*, No. 15-4788, in December 2016. In 2017, the court ordered supplemental briefing on the question of whether the district court possessed jurisdiction to decide, in the first instance, whether Hamidullin qualifies as a prisoner of war under the Third Geneva Convention. The U.S. filed two briefs on that issue. The brief filed on July 11, 2017 is excerpted below (with footnotes omitted) and available at <https://www.state.gov/s/l/c8183.htm>. The brief argues that the district court properly determined that Hamidullin did not qualify as a prisoner of war (“POW”) under the Third Geneva Convention (“GPW”).

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\* \* \* \*

The district court’s ruling was fully consistent with Army Regulation 190-8 (AR 190-8). Section 1-6 of that regulation implements GPW Article 5 by specifying procedures a military tribunal applies for determining the legal status of detainees under the GPW. As a threshold matter, Section 1-6 of AR 190-8 has no application to prisoners like Hamidullin who are captured in non-international armed conflicts. But in any event, the GPW and AR 190-8 do not call for a competent tribunal for every individual captured combatant, but only when there is “doubt” as to an individual’s “legal status” under the GPW to receive POW privileges. *See* AR 190-8 ¶ 1-5a(2) (providing that detainees should receive the protections of the GPW “until some other legal status is determined by competent authority”). Hamidullin’s legal status has been determined by a “competent authority” within the meaning of the Regulation because the President—the highest “competent authority” on the subject—conclusively determined in 2002 that Taliban detainees such as Hamidullin do not qualify for POW status. Nothing in AR 190-8 suggests that an individualized military adjudication for a particular detainee is required to determine his status when the Executive Branch has already determined that the relevant armed conflict was non-international and that, even when the conflict was initially deemed an international armed conflict, the Taliban as a group could not qualify for POW status under the GPW’s stringent criteria. In light of these prior determinations, the protections provided to POWs under the GPW and AR 190-8 do not apply to Hamidullin as a matter of law because he has never disputed that he is a part of Taliban forces. Thus, Hamidullin was not entitled to the Executive Branch process outlined in Section 1-6 of AR 190-8, or any other process, until he raised the combatant immunity defense that the district court properly adjudicated, and rejected, on the merits.

Even if a military process under AR 190-8 should have been applied in Hamidullin’s case, he would not be entitled to a reversal of his conviction because AR 190-8 does not extend any substantive rights. In addition, the district court’s adjudication of Hamidullin’s assertion of combatant immunity, pursuant to all the procedural protections in Article III courts, afforded Hamidullin any right to a “competent tribunal” that he may have had.

## ARGUMENT

### I. The District Court Had Jurisdiction To Determine That Hamidullin Was Not a Lawful Combatant

A federal district court has jurisdiction in a criminal case under 18 U.S.C. § 3231 when the United States charges a defendant with “offenses against the laws of the United States.” *See United States v. Cotton*, 535 U.S. 625, 630-31 (2002).

That jurisdiction includes authority to resolve a defendant’s assertion of a defense to the charges. ...

In this case, the district court had jurisdiction to determine whether Hamidullin qualified as a POW under the GPW for the purpose of adjudicating Hamidullin’s assertion of combatant immunity. The district court’s adjudication of that question is consistent with several other district court decisions that have likewise exercised jurisdiction to decide that a defendant could not assert a combatant immunity defense because he fought for an organization that did not satisfy the GPW’s criteria. *See, e.g., United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (rejecting combatant immunity defense raised by defendant who fought with the Taliban against U.S. troops in Afghanistan); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003) (rejecting combatant immunity defense raised by defendant charged with supporting al Qaeda and other insurgent groups); *United States v. Pineda*, 2006 WL 785287, at \*3 (D.D.C. Mar. 28, 2006) (rejecting combatant immunity defense raised by defendants who attacked U.S. surveillance aircraft in Colombia on behalf of the FARC); *United States v. Hausa*, 2017 WL 2788574, at \*6 & n.6 (E.D.N.Y. Jun. 27, 2017) (holding that lawful combatant immunity defense did not apply to defendant who plotted attacks on U.S. forces in Afghanistan on behalf of al Qaeda); *cf. United States v. Yunis*, 924 F.2d 1086, 1097-99 (D.C. Cir. 1991) (noting that the district court adjudicated whether defendant’s militia complied with the GPW’s criteria for purposes of defense to criminal charges); *United States v. Noriega*, 808 F. Supp. 791, 796 (S.D. Fla. 1992) (holding that the question of POW status, when properly presented, may be decided by federal courts). There does not appear to have been a prior Executive Branch tribunal convened under the procedures of AR 190-8 in any of those cases, yet none of them suggests that the absence of such process would prevent the court from adjudicating combatant immunity as a defense to criminal charges.

### II. The District Court’s Ruling Was Consistent With AR 190-8

Section 1-6 of AR 190-8 is part of the Department of Defense’s implementation of GPW Article 5. In general, AR 190-8 provides procedures for determining detainees’ legal status under the GPW. Hamidullin contends (Br. 19- 20) that, under Article 5 and AR 190-8, all persons claiming POW status must be deemed POWs until a military tribunal determines otherwise pursuant to procedures set forth in the Regulation. Presumptive POW protections apply, however, in international armed conflicts only if “doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy,” meet GPW Article 4’s definition of POWs. 6 U.S.T. at 3324, 75 U.N.T.S. at 142. Hamidullin’s contention ignores the GPW’s plain terms, which do not extend POW protection to those detained in non-international armed conflicts or to members of organizations that do not meet the Article 4 standards. *See Gov’t Br. 20-46.*

The process and interim status in AR 190-8 are provided “[i]n accordance with Article 5, GPW.” AR 190-8, ¶ 1-6(a). Under the GPW, these processes are unavailable when (1) the conflict in which the prisoner was captured is a non-international armed conflict; or (2) the opposing armed force(s) in the conflict do not satisfy Article 4’s criteria. If, on the other hand, a

prisoner is captured in an *international* armed conflict and there has been no determination that the opposing force fails to satisfy the Article 4 criteria, then a tribunal described in AR 190-8 may be convened to determine whether an individual detainee is in fact a member of a group covered by Article 4 and whether his individual circumstances entitle him to POW status as a member of that force. But nothing in the Regulation empowers a tribunal of mid-level officers to revisit the Executive Branch's determinations regarding the non-international character of the armed conflict or whether the opposing force satisfies the Article 4 criteria. Those overall determinations are properly made by the Commander-in-Chief or other higher authorities in the Executive Branch, not by the potentially varying opinions of field grade officers in AR 190-8 tribunals.

**A. AR 190-8 Does Not Apply to Hamidullin Because He Was Captured in a Non-International Armed Conflict**

Under GPW Article 2, POW protections, combatant immunity, and the right to a determination of POW status by a competent tribunal apply only in international armed conflicts. By 2009, when the events of this case occurred, the conflict in Afghanistan was not an international armed conflict. *See* Gov't Br. 27-31. Because Hamidullin was captured during the course of a non-international armed conflict, there is no "doubt" about his POW status for a tribunal under Article 5 and AR 190-8 to resolve. Indeed, Hamidullin could not possibly benefit from such a tribunal because the Regulation does not authorize a tribunal of three mid-level officers to decide overarching questions, such as the appropriate classification of the conflict, that properly belong to higher authorities within the Executive Branch.

**B. AR 190-8 Does Not Apply to Hamidullin Because POW Status Is Only Available to Members of Forces That Satisfy Article 4's Criteria**

Even if the conflict in Afghanistan in 2009 had been an international armed conflict, Hamidullin could not qualify as a POW because the Taliban did not meet the Article 4 requirements. The relevant subsection, Article 4(A)(2), provides that members of militias or volunteer corps are eligible for POW status only if *the group in question* displays "a fixed distinctive sign," "carr[ies] arms openly," and "conduct[s] [its] operations in accordance with the laws and customs of war." 6 U.S.T. at 3320, 75 U.N.T.S. at 138. The President, as Commander-in-Chief, has found, *inter alia*, that Taliban fighters systematically failed to follow the laws of war, and hence did not qualify as lawful combatants. *See* White House Press Secretary Announcement of President Bush's Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002) ("President's Determination"). The President's Determination satisfies AR 190-8 with respect to all Taliban detainees, because it means that their status has already been "determined by competent authority." *See Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006) ("The President found that [petitioner] was not a prisoner of war under the Convention. Nothing in [Army Regulation 190-8], and nothing [petitioner] argues, suggests that the President is not a 'competent authority' for these purposes.").

Hamidullin contends (Br. 19-20) that AR 190-8 and Article 5 entitle him to an individual consideration of his POW status based on his own battlefield conduct. But neither AR 190-8 nor the GPW requires individual determinations for each Taliban detainee. In the context of the war in Afghanistan, Hamidullin's disqualification from lawful combatant status turns on the overall characteristics of the Taliban, not his individual conduct, as well as on the characterization of the conflict as a non-international armed conflict. *See* DOD Law of War Manual § 4.27.3 (2016) (explaining that "if there was no doubt that the armed group to which a person belongs fails to

qualify for POW status, then the GPW would not require a tribunal to adjudicate the person's claim to POW status by virtue of membership in that group"). The same is true of past conflicts, in which the United States has made group status determinations of captured enemy combatants. ... And "the accepted view" of Article 4 is that "if the group does not meet the [Article 4] criteria ... the individual member cannot qualify for privileged status as a POW." W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int'l L. 39, 62 (1977). Consistent with that "accepted view," the federal courts that have faced combatant immunity claims have focused on the fact that the overall military organization, not the individual defendant or his particular unit, did not satisfy the criteria. See *Lindh*, 212 F. Supp. 2d at 552 n.16, 558 n.39 (noting that "[w]hat matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so"); *Pineda*, 2006 WL 785287, at \*3 ("Even if the Geneva Convention did apply, the Court is unpersuaded that the defendant would qualify as a prisoner of war because FARC fails to meet the Geneva Convention's definition of a lawful combatant"); *Hausa*, 2017 WL 2788574, at \*6 & n.6 (holding that lawful combatant immunity defense did not apply to defendant because al Qaeda did not satisfy Article 4's criteria); *Arnaout*, 236 F. Supp. 2d at 917-18 (same). Thus, the procedures specified in AR 190-8, which focus on determining a detainee's "legal status" with respect to the privileges of POWs, do not apply because the relevant legal status of all Taliban detainees has already been determined categorically by a "competent authority" within the meaning of the Regulation.

Hamidullin's argument conflicts with the purposes of the GPW. Article 4's requirements serve important humanitarian purposes by maintaining a clear distinction between civilians and combatants and by providing incentives for compliance with the laws of armed conflict. But accepting Hamidullin's argument would afford the privilege of combatant immunity to Taliban fighters even though the Taliban has consistently defied the laws of war. See *Al-Warafi v. Obama*, 716 F.3d 627, 632 (D.C. Cir. 2013) ("Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention."); DoD Law of War Manual § 4.3.1 ("States have been reluctant to conclude treaties to afford unprivileged enemy belligerents the distinct privileges of POW status or the full protections afforded civilians.").

Nothing in AR 190-8 supports Hamidullin's attempt to claim immunity for the Taliban by invoking the same rules that they systematically violate.

The determination of whether the Taliban in general satisfy the Article 4 criteria is properly made by the Commander-in-Chief rather than by mid-level officers in individual AR 190-8 tribunals. Neither the Regulation nor the GPW can plausibly be construed to require the government to bring Taliban detainees before a military tribunal empowered to grant POW status when the President has already determined that no such detainee qualifies. And such a construction would be an extraordinary usurpation of the President's authority to direct the armed conflict in which the United States remains engaged.

The fact that Taliban detainees do not merit tribunals under AR 190-8 or Article 5 does not mean that there is no Executive Branch process afforded to individual Taliban fighters detained in the Afghanistan conflict. The Executive Branch has applied in Afghanistan administrative tribunals to examine cases of individual detainees to ensure that their detention remains lawful and appropriate. See *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 227 (D.D.C. 2009) (noting that the status of detainees in Afghanistan is reviewed periodically by detainee

review boards that review “all relevant information reasonably available,” including a written statement by the detainee if he chooses to submit one). Because these tribunals have been conducted in the context of non-international armed conflict where none of the detainees could qualify as POWs, these tribunals do not determine potential POW status but rather determine whether a detainee was in fact a person who joined hostile forces or engaged in hostilities. *Id.* Hamidullin has made no claim that this process was inadequate, nor could he, since he does not dispute that he was a Taliban fighter and could lawfully be detained under the law of war.

The Executive’s determinations regarding the character of the conflict, the status of the Taliban, and the proper application of the GPW and AR 190-8 are entitled to great deference by this Court. These determinations constitute a classic exercise of the President’s war powers and his authority over foreign affairs that also implicates his exclusive authority to determine whether a foreign government merits recognition. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (“Recognition is a topic on which the Nation must speak ... with one voice .... That voice must be the President’s.”) (internal quotation marks and citations omitted); *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1512 (2017) (courts give “‘great weight’ to ‘the Executive Branch’s interpretation of a treaty.’”) (citation omitted); *Lindh*, 212 F. Supp. 2d at 556 (recognizing that deference was appropriate in considering the application of the GPW to the Taliban).

### **III. Even if the Government Violated AR 190-8, That Would Not Entitle Hamidullin to Reversal of His Conviction**

Even if a military tribunal under AR 190-8 should have been convened in Hamidullin’s case, he would not be entitled to a reversal of his conviction. *See United States v. Caceres*, 440 U.S. 741 (1979) (executive department’s violation of its own regulation did not warrant an exclusionary remedy in a criminal trial). AR 190-8 does not extend any substantive rights; instead, it merely establishes internal policies. *See* AR 190-8 ¶ 1-1(a); *cf. United States v. Jackson*, 327 F.3d 273, 295 (4th Cir. 2003) (internal Justice Department policies “do not vest defendants with any personal rights”). The Army regulation neither limits the district court’s jurisdiction nor creates rights for enemy combatants that can be enforced in civilian courts. *See, e.g.,* DoD Directive 2310.01E, DoD Detainee Program, August 19, 2014, Incorporating Change 1, May 24, 2017, ¶ 1.d. (noting that the Directive “[i]s not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law”).<sup>5</sup> Neither the regulation nor any related legislation creates such rights.

In addition, the district court’s adjudication of Hamidullin’s assertion of combatant immunity, following extensive briefing and testimony from multiple experts, satisfied any requirement in AR 190-8 for a determination of status by a competent tribunal. The district court can function as a “competent tribunal” under the GPW when such matters arise within its jurisdiction, and Article III courts provide at least as much substantive and procedural protections as the process specified in AR 190-8. *See Hamdan*, 415 F.3d at 43 (holding that a criminal prosecution before a military commission satisfied any entitlement to a “competent tribunal” under AR 190-8). For that reason, even assuming that the failure to adjudicate Hamidullin’s POW status before a military tribunal under AR 190-8 amounted to a procedural error, that error was harmless in light of the district court’s substantive determination—subject to this Court’s review—that Hamidullin did not qualify for that status.

On July 18, 2017, the United States filed a supplemental response brief in *Hamidullin*. That brief is excerpted below and available at <https://www.state.gov/s/l/c8183.htm>.

\* \* \* \*

The district court in this case correctly rejected Hamidullin’s claim that, as a Taliban fighter, he was immune from prosecution for attacking U.S. and coalition forces in Afghanistan. Hamidullin now contends that Army Regulation 190-8 (AR 190-8) stripped the district court of jurisdiction to decide that question until a military tribunal determined that he was not entitled to prisoner-of-war (POW) status under the Third Geneva Convention (GPW). As explained below, Hamidullin’s argument is inconsistent with the plain terms of AR 190-8. Nothing in that regulation requires that a tribunal determine the legal status of detainees in non-international armed conflicts or where a competent Executive Branch authority has determined that the opposing force does not satisfy the GPW criteria for its members to qualify as POWs. Hamidullin’s interpretation of AR 190-8 also conflicts with applicable case law and subsequent Department of Defense (DoD) regulations. And Hamidullin’s reading of the regulation would undermine the consistent legal framework that the United States and its coalition partners have long relied on in prosecuting the ongoing armed conflict in Afghanistan.

Hamidullin provides no sound reason or authority supporting his assertion that AR 190-8 implicates the district court’s subject-matter jurisdiction. Accordingly, the district court properly adjudicated Hamidullin’s combatant immunity claims. The district court proceeding, with all of the procedural protections available to criminal defendants in Article III courts, satisfied any right to a “competent tribunal” Hamidullin may have under AR 190-8.

#### ARGUMENT

##### I. **AR 190-8 Does Not Require a Military Tribunal To Determine the Legal Status of Taliban Members Detained in this Non-International Armed Conflict**

Hamidullin’s argument—that AR 190-8 precluded the district court’s jurisdiction unless and until a military tribunal ruled that Hamidullin was not a prisoner of war—is inconsistent with the plain terms of the Regulation itself. AR 190-8, which applies to detainees “in the custody of U.S. Armed Forces,” ¶1-1a, requires a military tribunal only when there is “doubt” as to an individual’s “legal status” under the GPW to receive POW privileges, and not as to each and every captured combatant. *See id.* ¶¶ 1-5(a)(2) (“All persons taken into custody by U.S. forces will be provided with the protections” afforded POWs “*until some other legal status is determined by competent authority.*”) (emphasis added), 1-6(a) (requiring a status determination by a competent tribunal only when “doubt arises as to whether a person [taken into custody] belongs to any of the categories enumerated in Article 4, GPW”). In the case of Hamidullin and other Taliban detainees, there is no such doubt. “Competent authorit[ies]” at the highest levels of the Executive Branch have conclusively determined that Taliban detainees such as Hamidullin do not “belong to any of the categories enumerated in Article 4” because (1) the conflict against the Taliban in 2009 was not an international armed conflict; and (2) the Taliban flagrantly and systematically violate the Article 4 criteria. *See Gov’t Br. 20-46; Gov’t Supp. Br. 6-14.* Those determinations are sufficient to resolve any “doubt” as to Hamidullin’s status, and nothing in AR 190-8 requires convening a tribunal to revisit those determinations in each individual case.



Hamidullin's argument conflicts with case law. In support of the extraordinary proposition that the President is not a "competent authority" under AR 190-8, Hamidullin cites a single district court case, *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), which held that the petitioner could not be tried by a military commission until a tribunal under AR 190-8 determined that he was not a prisoner of war. But that decision was unanimously reversed on appeal. *Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006). And for good reason. The D.C. Circuit, citing the President's categorical determination, explicitly rejected the petitioner's reliance on AR 190-8 and held that "[n]othing in the regulations, and nothing [the petitioner] argues, suggests that the President is not a 'competent authority' for these purposes." *Hamdan*, 415 F.3d at 43 (D.C. Cir. 2005). In addition, numerous district courts have adjudicated defendants' combatant immunity claims without suggesting that a prior determination by a military tribunal was a prerequisite for the court's jurisdiction. *See, e.g., United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003); *United States v. Pineda*, 2006 WL 785287, at \*3 (D.D.C. Mar. 28, 2006); *United States v. Hausa*, 2017 WL 2788574, at \*6 & n.6 (E.D.N.Y. Jun. 27, 2017); *United States v. Shakur*, 690 F. Supp. 1291, 1298 (S.D.N.Y. 1988).

Hamidullin's interpretation of AR 190-8, which was issued in 1997, also conflicts with more recent Defense Department directives that govern the current armed conflict. *See, e.g., DoD Directive 2310.01E, DoD Detainee Program*, August 19, 2014, Incorporating Change 1, May 24, 2017.1 That Directive makes clear that a presumption of POW status, and the requirement of a tribunal in cases of doubt, applies only "[d]uring international armed conflict." *See id.* ¶ 3(h); *see also DoD Law of War Manual* § 4.27.2 (2016) (same). The Directive also reaffirms the established principle that "unprivileged belligerents" who fight on behalf of "enemy non-state armed group[s]," such as the Taliban, are not entitled to combatant immunity. *See id.*, Part II (defining "unprivileged belligerent"). Thus, even assuming AR 190-8 could be construed to require tribunals even where the Executive Branch has determined that the conflict is non-international and that the members of the relevant armed group are categorically ineligible for POW status, any such requirement has been superseded by more recent DoD directives establishing that tribunals are not required in these circumstances. *See Schwaner v. Dep't of Army*, 370 F. Supp. 2d 408, 414 (E.D. Va. 2004), *aff'd sub nom. Schwaner v. Dep't of Army, Fort Eustis, Va.*, 119 F. App'x 565 (4th Cir. 2005) ("Army regulations must be in accord with directives promulgated by the Department of Defense."); *Casey v. United States*, 8 Cl. Ct. 234, 239 (1985) ("To the extent that Army regulations conflict with those of the Department of Defense, the service regulations must give way.").

The Executive Branch's determinations regarding the status of Taliban detainees are consistent with Congress's actions in this area. In the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Congress expressly affirmed the Executive Branch's authority to detain Taliban members who engaged in hostilities against U.S. or coalition forces and to transfer such detainees to civilian custody for trial in Article III courts. *See* 2012 NDAA, Pub. L. No. 112-81, §§ 1021, 1029, 125 Stat. 1562, 1569 (2011). Nothing in the 2012 NDAA suggests that any Taliban members may be lawful combatants immune from prosecution, still less that they must be presumed to be such until a military tribunal determines otherwise.

Hamidullin's sweeping interpretation of AR 190-8 would undermine the legal framework that the United States and its coalition partners apply to the ongoing armed conflict in Afghanistan. The United States and its partners currently apply the legal framework for non-international armed conflicts and treat the Taliban as a non-state insurgent group whose members

may lawfully be prosecuted in criminal courts for insurgent activity. *See* Letter Pursuant to F.R.A.P. 28(j) (filed Dec. 14, 2016) (noting that the Afghan government, with the support of the United States and its allies, has tried thousands of Taliban insurgents in criminal courts). Hamidullin's reading of AR 190-8 would disrupt that consistent approach, and instead require different panels of mid-level officers to determine independently in each individual case whether the conflict is international or non-international and whether individual Taliban fighters might be eligible for POW status (and thus immune from prosecution in any criminal court), even though those questions have already been resolved at the Executive Branch's highest levels. That could result in the military affording different legal status to similarly situated detainees. It would also conflict with the legal approach applied by the United States' coalition partners, including the Afghan government, which do not afford prisoner-of-war status to any Taliban members. Thus, Hamidullin's broad construction of AR 190-8 would substantially limit the President's authority to apply a consistent legal framework in an ongoing armed conflict, with substantial, real-world effects on current and future military operations. *See Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military ... affairs.”).

Hamidullin's reading of AR 190-8 requires the Executive Branch to afford privileges, including GPW Article 5 tribunals and presumptive POW status, that apply only in international armed conflicts. That position would effectively require the Executive Branch to presume that the United States in 2009 (and continuing today) was in an armed conflict *against Afghanistan*. But in the eyes of the United States and the international community, the United States is fighting *in partnership with* the universally recognized and legitimate Government of Afghanistan to oppose insurgent groups unlawfully rebelling against it. Adopting Hamidullin's arguments would usurp the exclusively executive power to determine whether a foreign group should be recognized as a lawful belligerent. *See, e.g., Baker v. Carr*, 369 U.S. 186, 212 (1962) (“[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called ‘a republic of which we know nothing.’ ... Similarly, recognition of belligerency abroad is an executive responsibility.”). Hamidullin provides no persuasive reason why this Court should adopt a construction of the military's regulations that is so directly at odds with the Executive Branch's judgment in conducting the armed conflict in Afghanistan.

## **II. AR 190-8 Does Not Implicate the District Court's Subject-Matter Jurisdiction**

Even if Hamidullin were correct in arguing that AR 190-8 required a military tribunal to determine whether he is entitled to POW status, it would not affect the district court's subject-matter jurisdiction. The Supreme Court has made clear that even *statutory* procedural requirements are generally nonjurisdictional unless the statute makes clear that Congress intended the provision to limit the court's jurisdiction. *See United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (“[W]e have repeatedly held that procedural rules... cabin a court's power only if Congress has ‘clearly state[d]’ as much.”). That principle applies with even stronger force to the military regulation at issue here. Hamidullin cites no case in which a military regulation has been construed to limit the district courts' broad jurisdiction over “all offenses against the laws of the United States.” 18 U.S.C. § 3231.

Hamidullin's contrary arguments are unpersuasive. Hamidullin relies ... on ¶ 3-7(b) of AR 190-8, which states that prisoners-of-war should not be tried in civil courts “unless a member of the U.S. Armed Forces would be so tried.” But Hamidullin's premise—that he is entitled to this protection as a prisoner of war—is incorrect. And contrary to Hamidullin's claim that a

member of the U.S. Armed Forces must be tried by court-martial rather than in an Article III court for conduct analogous to Hamidullin's (Supp. Br. 11), federal district courts have concurrent jurisdiction with military courts, under 18 U.S.C. § 3231, over violations of the laws of the United States committed by military personnel. *See United States v. Walker*, 552 F.2d 566, 567 (4th Cir. 1977).

Hamidullin relies ... on statutes requiring an Attorney General certification for hate crimes or juvenile prosecutions. But AR 190-8 is not a statute, and nothing in the Regulation explicitly purports to limit federal courts' jurisdiction. Regardless of whether the statutes requiring certifications in hate-crime and juvenile prosecutions have sufficiently clear statements to be deemed jurisdictional, AR 190-8 imposes no jurisdictional limits here.

The doctrine of "primary jurisdiction" likewise provides no support to Hamidullin's claims. As Hamidullin concedes (Supp. Br. 13 & n.3), that doctrine does not implicate subject-matter jurisdiction; rather, the doctrine simply reflects the district court's discretion to refer matters that fall particularly within an agency's expertise for a determination by that agency. In this case, there was no need for such a referral because the military authorities, including the Commander-in-Chief, have already resolved the questions at issue. Moreover, the district court had the benefit of military expertise through testimony from senior military experts, including Colonel (retired) Hays Parks, who explained why the conflict in Afghanistan was properly characterized as non-international and why Taliban members do not qualify for combatant immunity. *See Gov't Br. 7-9*.

The district court proceedings in this case satisfied any requirements for a "competent tribunal" that may apply. There is no need for a remand to a military tribunal when Hamidullin has already had the opportunity to raise his combatant immunity claims in district court, with the benefit of all the procedural protections afforded to criminal defendants in Article III courts, including an independent Article III judge, the assistance of counsel and an expert provided at government expense, and the right to appeal to this Court. Those protections go far beyond the process available in military tribunals convened under AR 190-8, where detainees have no right to counsel, no right to a decision-maker independent of the U.S. military, and no right to appeal. The remand to a military tribunal that Hamidullin now seeks would serve no purpose except delay.

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In September, one of the judges on the original panel of the U.S. Court of Appeals for the Fourth Circuit assigned to decide the case retired and a new judge was assigned to the case. The court requested additional supplemental briefing for the new panel. The panel held oral argument on December 5, 2017.\* Excerpts follow from the September 11, 2017 supplemental brief, also available at <https://www.state.gov/s/l/c8183.htm>.

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\* Editor's note: The Court of Appeals issued its decision in 2018. *Digest 2018* will discuss the decision.

Hamidullin is not a lawful combatant entitled to immunity from criminal prosecution for attacking U.S. soldiers and Afghan police officers. Two independent reasons support that conclusion. First, prisoner-of-war (POW) protections under the Third Geneva Convention (GPW), including combatant immunity, apply only in the context of an international armed conflict within the meaning of GPW Article 2. At the time of Hamidullin's attack, the armed conflict between the Taliban and Haqqani Network on one side, and the Afghan government and coalition partners (including the United States) on the other, was not an international armed conflict because it was not a conflict between two or more States. Second, even if Hamidullin had been captured in an international armed conflict, he would not qualify for combatant immunity because the Taliban and Haqqani Network do not satisfy the requirements in GPW Article 4(A)(1), (2), or (3) that an armed force must meet for its members to be entitled to immunity. The Taliban and Haqqani Network do not satisfy the criteria because, among other things, they systematically and flagrantly violate the laws and customs of war.

**I. By 2009, the Afghanistan Conflict Was Non-International**

The POW protections under the GPW apply in armed conflicts “which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” GPW art. 2, ¶ 1. Accordingly, as explained in detail in the government's response brief, POW protections and combatant immunity apply only in *international* armed conflicts, and, at the time of Hamidullin's attack, the conflict between the United States and the Taliban was *non-international*. See Gov't Br. 27-31; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (noting that the conflict with al Qaeda is a “conflict not of an international character”); *United States v. Shakur*, 690 F. Supp. 1291, 1298 (S.D.N.Y. 1988) (holding that the GPW did not apply to defendants who asserted combatant immunity based on affiliation with a provisional government that was not a “High Contracting Party” under Article 2). Even assuming the Taliban was responsible for Afghanistan's obligations as a “High Contracting Party” when the conflict began in 2001, by 2009 the internationally recognized and legitimate government of Afghanistan led by Hamid Karzai was responsible for Afghanistan's obligations as a “High Contracting Party,” and the Taliban was a non-State insurgent group unlawfully rebelling against it. JA 314-15.

Hamidullin does not dispute that by 2009 the Taliban was not recognized as a State and did not *de facto* govern Afghanistan. Instead, he contends that the Taliban *was the de facto* government in 2001 when hostilities with the United States began, and, as such, the Taliban must be treated as a State in an international armed conflict with the United States until hostilities cease. However, as explained below, Hamidullin's premise—that an international armed conflict cannot become a non-international armed conflict without an intervening cessation of hostilities—is incorrect.

Hamidullin cites no case and provides no convincing rationale in support of his extraordinary contention that a conflict's nature is fixed forever, such that an international conflict can never become non-international, regardless of changes in the parties' status. See DoD Law of War Manual § 3.1 (2016) (“[A]n international armed conflict may change into a non-international armed conflict.”). Hamidullin's argument is inconsistent with the views of the United States and its coalition partners, the Supreme Court of the United Kingdom, the International Committee of the Red Cross (ICRC), and many law-of-war experts. Those authorities have recognized that the conflict in Afghanistan was initially an international conflict, but, after the Karzai government was recognized, the conflict between the new government (assisted by the U.S.-led coalition) and the Taliban insurgency became a non-international armed

conflict. *See, e.g.*, JA 314-15 (testimony of Col. Hays Parks); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 19, 32 (2016) (White House Report) (stating that the United States is currently engaged only in non-international armed conflicts); *Serdar Mohammed v. Ministry of Defence*, 2017 UKSC 2, ¶ 322 (Jan. 17, 2017) (Lord Reed, dissenting) (recognizing as “common ground” that the conflict in Afghanistan in 2006 was non-international); ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 10 (2011) (explaining that the conflict in Afghanistan “must be classified as non-international . . . (even though that armed conflict was initially international in nature) . . . [because] all the state actors are on the same side”) (emphasis added); Laurie R. Blank, *Complex Legal Frameworks and Complex Operational Challenges: Navigating the Applicable Law Across the Continuum of Military Operations*, 26 *Emory Int'l L. Rev.* 87, 126 (2012) (explaining that after “the establishment of the Karzai government, it was generally recognized that the conflict became a non-international armed conflict between the Karzai government and the United States on one side and insurgent Taliban forces on the other.”).

Thus, contrary to Hamidullin’s argument, a conflict that was initially international may become non-international when a new government is recognized and multi-national forces assist it in combating an insurgency fighting under the aegis of the former regime. That pattern represents the governing legal framework for the post-9/11 armed conflicts in both Afghanistan and Iraq, as numerous authorities have recognized. *See, e.g.*, *Serdar Mohammed*, 2017 UKSC 2, ¶ 244 (“Although the conflict in Iraq began as an international armed conflict . . . a multi-national force . . . remained there after that war had concluded and a new Iraqi Government had been established, so as to assist the Iraqi Government in combating insurgents. . . . Similarly, when an international security assistance force . . . assisted the Government of Afghanistan in its struggle against the Taliban, that also was a non-international armed conflict.”); David Wallace, Amy McCarthy, Shane R. Reeves, *Trying to Make Sense of the Senseless: Classifying the Syrian War Under the Law of Armed Conflict*, 25 *Mich. St. Int'l L. Rev.* 555, 584–85 (2017) (explaining that the 2003 invasion of Iraq was initially an “international armed conflict,” but that when the United States passed control to an interim Iraqi government in 2004, “the ongoing hostilities became a non-international armed conflict”). None of these authorities suggest that an intervening break in hostilities is required before an international conflict can become non-international, particularly where, as in both Afghanistan and Iraq, a new government achieves international recognition, governs the country as a matter of fact, and then, with assistance of international forces, fights against insurgent members of the former regime.

Hamidullin contends (Opening Br. 24-26) that a State should not lose its immunity merely because the opposing State decides not to recognize it. But the conclusion that the conflict was non-international in 2009 does not rest only on the fact that the United States did not recognize the Taliban. Rather, in 2009, *no country* recognized the Taliban, it was not the *de facto* government, and there has been no argument that it satisfied the international law criteria for statehood. Instead, the world had long since recognized the Karzai government as the sole, legitimate government of Afghanistan, and that government *de facto* controlled Afghanistan’s major population centers, despite the Taliban’s indiscriminate, brutal targeting of all persons, civilian or military, tied to the government.

Hamidullin provides no convincing rationale for his purported requirement that “once an international conflict, always an international conflict.” Combatant immunity is a privilege reserved for members of forces acting under the authority of States, and it makes no sense to

construe the GPW to require States to afford such immunity to non-state insurgent groups like the Taliban merely because the group previously controlled parts of a State. Hamidullin's interpretation would require the United States and its coalition partners to treat lawless Taliban insurgents, many of whom are responsible to no one but themselves, JA 220, as if they were regular forces responsible to and controlled by a recognized State. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring) ... And the Taliban as a group would be particularly unworthy beneficiaries of Hamidullin's proposed extension of combatant immunity to insurgent forces. As the record below establishes, the Taliban committed major atrocities while it controlled parts of Afghanistan, it lost the scant international recognition it had previously attained after the September 11 attacks, and it has continued flouting the laws of war to this day. ...

## **II. Hamidullin Is Not Entitled to Combatant Immunity Because the Taliban Do Not Comply with the Requirements of GPW Article 4**

Even assuming that the conflict in Afghanistan was international as of 2009, the district court correctly held that Hamidullin was not entitled to immunity because the Taliban did not satisfy the criteria in GPW Article 4 that a military organization must meet for its members to qualify as lawful combatants. The relevant subsection, Article 4(A)(2), provides that members of militias or volunteer corps that belong to a party to the armed conflict (*i.e.*, that are acting under the authority of a State) are eligible for POW status only if the group in question (1) is commanded by a person responsible for his or her subordinates; (2) displays "a fixed distinctive sign;" (3) "carr[ies] arms openly;" and (4) "conduct[s] [its] operations in accordance with the laws and customs of war." GPW art. 4(A)(2).

Hamidullin does not dispute that the Taliban has consistently acted in flagrant defiance of the laws of armed conflict. Instead, Hamidullin contends (Reply Br. 22-23) that this does not matter because he did not personally violate the laws of armed conflict during the attacks for which he was convicted. As our prior filings explain ..., the relevant inquiry focuses on the overall characteristics of the Taliban, not the personal conduct of individual Taliban members. That conclusion is supported by the GPW's text, which refers to organizations, not individuals. *See* GPW art. 4(A)(1) (referring to "armed forces"); *id.* art. 4(A)(3) (same); *id.* art. 4(A)(2) (referring to "militias" and "other volunteer corps"). In addition, the federal courts that have faced combatant immunity claims have focused on the fact that the overall military organization, not the individual defendant or his particular unit, did not satisfy the criteria. ...

## **III. Extending Combatant Immunity to the Taliban Would Have Significant and Deleterious Effects on Ongoing Military Operations in Afghanistan**

Hamidullin contends ... that the district court's refusal to extend combatant immunity to the Taliban amounts to a "radical conceit" because it implies that "only one side of an ongoing war is authorized to shoot." But there is nothing novel or "radical" about the principle that the combatant immunity defense does not protect members of forces that neither act under the authority of a State nor comply with the laws of war. Indeed, that principle is firmly rooted in the customary international law of war. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 30-31 (1942); *Lindh*, 212 F. Supp. 2d at 553-54 & n.24. The Taliban has not accepted or applied the provisions of the GPW, but has instead openly flouted them by systematically defying the laws of armed conflict. As a result, the GPW's protections do not extend to them. *See Al-Warafi v. Obama*, 716 F.3d 627, 632 (D.C. Cir. 2013) ("Without compliance with the requirements of the Geneva Conventions, the Taliban's personnel are not entitled to the protection of the Convention.").

Hamidullin's claim boils down to a demand that Taliban and Haqqani Network members

be treated as if they were a legitimate State's regular armed forces that conducts operations in compliance with the laws of war. But they are not a legitimate State's regular armed force and fail to comply with the laws of war, as the district court found with overwhelming support in the record. *See, e.g.*, JA 227-49. For example, they target and kill civilians, including through suicide bombings using the mentally handicapped and children, JA 233-34, 242-43, summarily execute POWs and police officers, including through beheadings, JA 227-29, and target Afghan voters and cut off fingers when voters seek to select a legitimate government through peaceful means, JA 236, 245-46. As the U.S. State Department reported, 67% of all civilian casualties in 2009 were attributed to the Taliban, JA 242, and indeed, the Haqqani Network has been less discriminate than the Taliban in targeting civilians and much more brutal, JA 223. Thus, the "radical conceit" in this case is Hamidullin's contention that this Court should extend combatant immunity to a fighter belonging to a brutal non-State insurgent group (the Taliban) and a terrorist organization (the Haqqani Network), overriding the express terms of the GPW and the specific, wartime determination of the Commander-in-Chief.

Extending combatant immunity to non-State groups who flout the laws of war would discourage States from joining and honoring the GPW, undermining the important humanitarian purposes it is designed to serve. Adopting Hamidullin's arguments would also usurp the exclusively Executive power to determine whether a foreign group should be recognized as a lawful belligerent. *See The Prize Cases*, 67 U.S. 635, 670 (1862) (whether to recognize enemy belligerents is "a question to be decided by [the President], and this Court must be governed by [his] decisions"); *Baker v. Carr*, 369 U.S. 186, 212 (1962) ("recognition of belligerency abroad is an executive responsibility" that "defies judicial treatment"); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015) ("The Executive has exclusive and unreviewable authority to recognize foreign sovereigns."). Here, the Executive Branch, acting with the agreement of Congress, has specifically determined that members of the Taliban are not entitled to POW protections, including combatant immunity, and that, accordingly, they may properly face prosecution in Article III courts for attacks on U.S. forces. To be sure, the judicial branch must render its own decision on the availability of immunity to criminal charges here. But a joint judgment of the political branches in this arena is entitled to the utmost deference from this Court. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

Finally, affording combatant immunity to the Taliban would significantly undermine the consistent legal framework that the United States and its coalition partners have long relied on in conducting the ongoing armed conflict in Afghanistan. The United States and its partners currently apply the legal framework for non-international armed conflicts in Afghanistan and treat the Taliban as a non-State insurgent group whose members may lawfully be prosecuted in Afghan or U.S. criminal courts for insurgent activity. *See* White House Report at 19. The government of Afghanistan, supported by the United States, has conducted thousands of criminal prosecutions of Taliban members for insurgent activity, and that process is a vital part of the effort to defeat the insurgency and to bring increased stability and peace to Afghanistan. *See* David Kris, *Law Enforcement as an Effective Counterterrorism Tool—Pragmatism and Perception*, National Security Investigations and Prosecutions § 24:7 (2016) (describing the U.S. military's goal of transferring detention and prosecution responsibilities for insurgents to Afghan civilian authorities) (citing General Stanley McChrystal, then Commander, Int'l Sec. Assistance Force (ISAF), Joint News Briefing with Ambassador Mark Sedwill, NATO Representative in Afghanistan (Mar. 17, 2010); U.S. Dep't of Defense, *Report on Progress Toward Security and*

*Stability in Afghanistan*, 74 (Oct. 2014) (explaining that the United States and Afghanistan have created “an enduring National Security Court with Afghan judges, prosecutors, defense counsel, and criminal investigators . . . to prosecute Afghans who were detained by U.S. forces under the law of war . . . The court has tried more than 7,200 cases [as of September 30, 2014] and achieved a 75 percent overall conviction rate.”). The unprecedented expansion of the combatant immunity doctrine Hamidullin advocates here would call into question whether, consistent with international law, the Afghan government could continue to use its domestic criminal justice system to prosecute Taliban insurgents, thereby implicating the legitimacy of ongoing U.S. wartime operations.

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**Cross References**

*Terrorism*, **Ch. 3.B.1.**

*Effect of armed conflict on treaties*, **Ch. 4.A.2.**

*ICCPR: application during armed conflict*, **Ch. 6.A.2.**

*Work of the ILC on protection of the environment in relation to armed conflicts*, **Ch. 7.C.1.**

*Petition before IACHR by Guantanamo detainee*, **Ch. 7.E.1.d.**

*Hearings on Guantanamo before the IACHR*, **Ch. 7.E.2.**

*Preserving cultural heritage in armed conflict*, **Ch. 14.C.2.**

*Terrorism sanctions*, **Ch. 16.A.6.**

*Syria conflict*, **Ch. 17.B.2.**

*ISIS and atrocities*, **Ch. 17.C.2.**