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CHAPTER 18

Use of Force

A. GENERAL

1. Use of Force Issues Related to Counterterrorism Efforts

a. International Law and the Counter-ISIL Campaign

On April 1, 2016, State Department Legal Adviser Brian J. Egan delivered remarks at the annual meeting of the American Society of International Law ("ASIL") on international law, legal diplomacy, and the counter-ISIL campaign. Mr. Egan's remarks are excerpted below and available at https://2009-2017.state.gov/s/l/releases/remarks/255493.htm. Past expositions on this topic by U.S. government officials, and other U.S. government statements referenced by Mr. Egan, are available in: *Digest 2015* at 750-57 (Mr. Preston's ASIL remarks); *Digest 2014* at 725 (Article 51 notification to the UN); *Digest 2013* at 540-552 (President Obama's speech at the NDU; Attorney General Holder's letter to Congress; Presidential Policy Guidance or "PPG"); *Digest 2012* at 575-92 (Mr. Johnson's speech at Yale; Attorney General Holder's speech at Northwestern; Mr. Johnson's speech at Oxford); *Digest 2011* at 548-50 (Mr. Koh's ASIL remarks).

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I am here today to talk about some key international law aspects of the United States' ongoing armed conflict against ISIL. In so doing, I am following in the footsteps of others who have gone to some lengths in recent years to explain our government's positions on key aspects of the law of armed conflict. This includes, most prominently, President Obama in his 2013 speech at the National Defense University and his 2014 remarks at West Point. A number of Administration lawyers have also spoken on these topics, including my predecessor, Harold Hongju Koh; former Attorney General Holder; and former Defense Department General Counsels Jeh Johnson and

Stephen Preston. The Defense Department's promulgation of its Law of War Manual last year has also made a significant contribution to the public discourse on these issues.

Some have said, however, that our legal approach to the counter-ISIL conflict has been one of the "most discussed and least understood" topics of U.S. practice in recent years.

Thus, at the risk of disappointing you at the outset of this talk, I suspect and hope that much of what I will say today will not be surprising. I also hope, however, that these remarks will provide clarity and help you understand better the U.S. international law approach to these important and consequential operations.

International law matters a great deal in how we as a country approach counterterrorism operations. Prior to my confirmation, I served as a Deputy White House Counsel and Legal Adviser to the National Security Council for nearly three years. Based on my experience in that position, I can tell you that the President, a lawyer himself, and his national security team have been guided by international law in setting the strategy for counterterrorism operations against ISIL. I can attest personally that the President cares deeply about these issues, and that he goes to great lengths to be sure that he understands them.

To start from first principles—the United States complies with the international law of armed conflict in our military campaign against ISIL, as we do in all armed conflicts. We comply with the law of armed conflict because it is the international legal obligation of the United States; because we have a proud history of standing for the rule of law; because it is essential to building and maintaining our international coalition; because it enhances rather than compromises our military effectiveness; and because it is the right thing to do.

I do not mean to suggest that identifying and applying key international law principles to this fight is easy or without controversy. The United States is engaged in an armed conflict with a non-State actor that controls significant territory, in circumstances in which multiple States and non-State actors also have been engaging in military operations against this enemy, other groups, and each other for several years. These conflicts raise novel and difficult questions of international law that the United States is called to address literally on a daily basis in conducting operations.

Of course, international law is also vitally important to other States. And as the President's counterterrorism strategy has prioritized the development of partnerships with those who share our interests, I submit that it is increasingly important for the United States to engage in what I will call legal diplomacy with those countries with which we partner, as well as those with which we may not see eye to eye. Our ability to engage and work with partners can and often does turn on international legal considerations. We want to work with partners who will comply with international law, and our partners expect the same from us. In this way, international law serves as a critical enabler of international cooperation and joint action on a full range of matters, from the mundane to those that hit the front pages, such as the Iran nuclear deal, efforts to promote peace in Syria, maritime claims in the South China Sea, data privacy, and surveillance.

I will address three topics in my remarks. First, I will attempt to explain in greater detail the United States' international legal basis for using force against ISIL, and some of the key rules of the law of armed conflict that apply to our fight against ISIL. Second, I will address how law of armed conflict-related considerations arise in the context of "partnered" operations—an area in which legal diplomacy is particularly critical. Third, I will address the interplay between law and policy in the conduct of hostilities by the United States—specifically those undertaken under

the Presidential Policy Guidance that the President signed on May 22, 2013, known as the "PPG."

Jus ad bellum

I will begin with the United States' international law justification for resorting to the use of force, or the *jus ad bellum.*

As I mentioned a few minutes ago, the United States' armed conflict with ISIL is taking place in a complicated environment—one in which a non-State actor, ISIL, controls significant territory and where multiple States and non-State actors have been engaging in military operations against ISIL, other groups, and each other for several years. Unfortunately, this scenario is not unprecedented in today's world. Iraq and Syria resemble other countries where multiple armed conflicts may be going on simultaneously—countries like Yemen and Libya.

In such complex circumstances, States can potentially find themselves in more than one armed conflict or with multiple legal bases for using force. This complexity is why it is all the more important that we are clear and systematic in our thinking through how *jus ad bellum* principles for resorting to force apply to our actions and what uses of force those principles permit.

The U.N. Charter identifies the key international law principles that must guide State behavior when considering whether to resort to the use of force. Article 2(4) of the U.N. Charter provides in relevant part that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." Article 51 of the U.N. Charter, on the other hand, specifies that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs." Thus, the U.N. Charter recognizes the inherent right to resort to force in individual or collective self-defense. Similarly, the Charter does not prohibit an otherwise lawful use of force when undertaken with the consent of the State upon whose territory the force is to be used.

As a matter of international law, the United States has relied on both consent and self-defense in its use of force against ISIL. Let's start with ISIL's ground offensive and capture of Iraqi territory in June 2014 and the resulting decision by the United States and other States to assist with a military response. Beginning in the summer of 2014, the United States' actions in Iraq against ISIL have been premised on Iraq's request for, and consent to, U.S. and coalition military action against ISIL on Iraq's territory in order to help Iraq prosecute the armed conflict against the terrorist group.

Upon commencing air strikes against ISIL in Syria in September 2014, the United States submitted a letter to the U.N. Security Council explaining the international legal basis for our use of force in Syria in accordance with Article 51 of the U.N. Charter. As the letter explained, Iraq had made clear it was facing a serious threat of continuing attacks from ISIL coming out of safe havens in Syria and had requested that the United States lead international efforts to strike ISIL in Syria. Consistent with the inherent right of individual and collective self-defense, the United States initiated necessary and proportionate actions in Syria against ISIL. The letter also articulated the United States' position that Syria was unable or unwilling to effectively confront the threat that ISIL posed to Iraq, the United States, and our partners and allies.

Thus, although the United States maintains an individual right of self-defense against ISIL, it has not relied solely on that international law basis in taking action against ISIL. In Iraq, U.S. operations against ISIL are conducted with Iraqi consent and in furtherance of Iraq's own armed conflict against the group. And in Syria, U.S. operations against ISIL are conducted in individual self-defense and the collective self-defense of Iraq and other States.

To say a few more words about self-defense: First, the inherent right of individual and collective self-defense recognized in the U.N. Charter is not restricted to threats posed by States. Nor is the right of self-defense on the territory of another State against non-State actors, such as ISIL, something that developed after 9/11. To the contrary, for at least the past two hundred years, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors. As but one example, the oft-cited Caroline incident involved the use of force by the United Kingdom in self-defense against a non-State actor located in the United States. Although the precise wording of the justification for the exercise of self-defense against non-State actors may have varied, the acceptance of this right has remained the same.

Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have occurred, but also in response to imminent ones before they occur.

When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against a particular non-State actor, the United States analyzes a variety of factors, including those identified by Sir Daniel Bethlehem in the enumeration he set forth in the American Journal of International Law—the ASIL's own in-house publication—in 2012. These factors include the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.

In the view of the United States, once a State has lawfully resorted to force in self-defense against a particular armed group following an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group, provided that hostilities have not ended. Under the PPG, however, the concept of imminence plays an important role as a matter of policy in certain U.S. counterterrorism operations, even when it is not legally required.

I'd also like to say a few words on how State sovereignty and consent factor into the international legal analysis when considering the use of force. President Obama has made clear that "America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty." This is true of our operations against ISIL as it has been true in our non-international armed conflict against al-Qa'ida and associated forces.

Indeed, under the *jus ad bellum*, the international legal basis for the resort to force in self-defense on another State's territory takes into account State sovereignty. The international law of self-defense requires that such uses of force be necessary to address the threat giving rise to the right to use force in the first place. States therefore must consider whether unilateral actions in self-defense that would impinge on a territorial State's sovereignty are necessary or whether it might be possible to secure the territorial State's consent before using force on its territory against a non-State actor. In other words, international law not only requires a State to analyze whether it has a legal basis for the use of force against a particular non-State actor—which I'll call the "against whom" question—but also requires a State to analyze whether it has a legal

basis to use force against that non-State actor in a particular location—which I'll call the "where" question.

It is with respect to this "where" question that international law requires that States must either determine that they have the relevant government's consent or, if they must rely on self-defense to use force against a non-State actor on another State's territory, determine that the territorial State is "unable or unwilling" to address the threat posed by the non-State actor on its territory. In practice, States generally rely on the consent of the relevant government in conducting operations against ISIL or other non-State actors even when they may also have a self-defense basis to use force against those non-State actors, and this consent often takes the form of a request for assistance from a government that is itself engaged in an armed conflict against the relevant group. This is the case with respect to ISIL in Iraq.

Of course, the concept of consent can pose challenges in a world in which governments are rapidly changing, or have lost control of significant parts of their territory, or have shown no desire to address the threat. Thus, it sometimes can be a complex matter to identify the appropriate person or entity from whom consent should be sought. The U.S. Government carefully considers these issues when considering the question of consent.

In some cases, international law does not require a State to obtain the consent of the State on whose territory force will be used. In particular, there will be cases in which there is a reasonable and objective basis for concluding that the territorial State is unwilling or unable to effectively confront the non-State actor in its territory so that it is necessary to act in self-defense against the non-State actor in that State's territory without the territorial State's consent. For example, in the case of ISIL in Syria, as indicated in our Article 51 letter, we could act in self-defense without Syrian consent because we had determined that the Syrian regime was unable or unwilling to prevent the use of its territory for armed attacks by ISIL. This "unable or unwilling" standard is, in our view, an important application of the requirement that a State, when relying on self-defense for its use of force in another State's territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State.

The unable or unwilling standard is not a license to wage war globally or to disregard the borders and territorial integrity of other States. Indeed, this legal standard does not dispense with the importance of respecting the sovereignty of other States. To the contrary, applying the standard ensures that the sovereignty of other States is respected. Specifically, applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using its territory as a base for attacks and related operations against other States.

With respect to the "unable" prong of the standard, inability perhaps can be demonstrated most plainly, for example, where a State has lost or abandoned effective control over the portion of its territory from which the non-State actor is operating. This is the case with respect to the situation in Syria. By September 2014, the Syrian government had lost effective control of much of eastern and northeastern Syria, with much of that territory under ISIL's control.

Jus in bello

In the next few minutes I'd like to shed some light on the *jus in bello*—the legal rules we follow in carrying out the fight against ISIL. As a threshold matter, some of our foreign partners have asked us how we classify the conflict with ISIL and thus what set of rules applies. Because we are engaged in an armed conflict against a non-State actor, our war against ISIL is a non-international armed conflict, or NIAC. Therefore, the applicable international legal regime

governing our military operations is the law of armed conflict covering NIACs, most importantly, Common Article 3 of the 1949 Geneva Conventions and other treaty and customary international law rules governing the conduct of hostilities in non- international armed conflicts.

The rules applicable in NIACs have received close scrutiny since the September 11 attacks within the U.S. Government, in our courts in the context of ongoing litigation concerning detention and military commission prosecutions, and in the expanding and ever more sophisticated treatment that these issues receive in academia.

I would like to clarify briefly some of the rules that the United States is bound to comply with as a matter of international law in the conduct of hostilities during NIACs. In particular, I'd like to spend a few minutes walking through some of the targeting rules that the United States regards as customary international law applicable to all parties in a NIAC:

- First, parties must distinguish between military objectives, including combatants, on the one hand, and civilians and civilian objects on the other. Only military objectives, including combatants, may be made the object of attack.
- Insofar as objects are concerned, military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The United States has interpreted this definition to include objects that make an effective contribution to the enemy's war-fighting or war-sustaining capabilities.
- Feasible precautions must be taken in conducting an attack to reduce the risk of harm to civilians, such as, in certain circumstances, warnings to civilians before bombardments.
- Customary international law also specifically prohibits a number of targeting measures in NIACs. First, attacks directed against civilians or civilian objects as such are prohibited. Additionally, indiscriminate attacks, including but not limited to attacks using inherently indiscriminate weapons, are prohibited.
- Attacks directed against specifically protected objects such as cultural property and hospitals are also prohibited unless their protection has been forfeited.
- Also prohibited are attacks that violate the principle of proportionality—that is, attacks against combatants or other military objectives that are expected to cause incidental harm to civilians that would be excessive in relation to the concrete and direct military advantage anticipated.
- Moreover, acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

To elaborate further and correct some possible misunderstandings regarding who the United States targets as an enemy in its ongoing armed conflicts, I'd like to explain how the United States assesses whether a specific individual may be made the object of attack.

In many cases we are dealing with an enemy who does not wear uniforms or otherwise seek to distinguish itself from the civilian population. In these circumstances, we look to all available real-time and historical information to determine whether a potential target would be a lawful object of attack. To emphasize a point that we have made previously, it is not the case that all adult males in the vicinity of a target are deemed combatants. Among other things, the United States may consider certain operational activities, characteristics, and identifiers when determining whether an individual is taking a direct part in hostilities or whether the individual may formally or functionally be considered a member of an organized armed group with which

we are engaged in an armed conflict. For example, with respect to membership in an organized armed group, we may examine the extent to which the individual performs functions for the benefit of the group that are analogous to those traditionally performed by members of State militaries that are liable to attack; is carrying out or giving orders to others within the group to perform such functions; or has undertaken certain acts that reliably indicate meaningful integration into the group.

Partnerships and legal diplomacy

I'd like to turn next to discussing the international coalitions and other partnerships that are critical to the fight against ISIL and the legal diplomacy that helps facilitate and sustain those partnerships. Sixty-six partners are engaged as part of the coalition that is steadily degrading ISIL. In the course of building and maintaining that strong coalition, we have also sought to navigate legal differences and find common legal ground. Some of our allies and partners have different international legal obligations because of the different treaties to which they are party, and others may hold different legal interpretations of our common obligations. Legal diplomacy plays a key role in building and maintaining the counter-ISIL military coalition and fostering interoperability between its members. Legal diplomacy builds on common understandings of international law, while also seeking to bridge or manage the specific differences in any particular State's international obligations or interpretations.

Public explanations of legal positions are an important part of legal diplomacy. The United States is not alone in providing such public explanations. Over the last 18 months, for example, nine of our coalition partners have submitted public Article 51 notifications to the U.N. Security Council explaining and justifying their military actions in Syria against ISIL. Though the exact formulations vary from letter to letter, the consistent theme throughout these reports to the Security Council is that the right of self-defense extends to using force to respond to actual or imminent armed attacks by non-State armed groups like ISIL. Those States' military actions against ISIL in Syria and their public notifications are perhaps the clearest evidence of this understanding of the international law of self-defense.

More frequently, however, it is through private consultations that governments seek to understand each other's legal rationale for military operations. These private discussions help frame the public conversation on some of the central legal issues, and they are crucial to securing the vital cooperation of partners who want to understand our legal basis for acting. For example, there are times when the United States has sought the assistance of key allies in taking direct action against terrorist targets, but before these allies would aid us, the lawyers in their foreign ministries have sought a better understanding of the legal basis for our operations. The prompt, compelling, and—at times—very early morning explanations provided by our attorneys can be crucial to enabling such operations.

These conversations also go the other way. The U.S. commitment to upholding the law of armed conflict also extends to promoting law of armed conflict compliance by our partners. In the campaign against ISIL and beyond, coalitions and partnerships with other States and non-State actors are increasingly prominent features of current U.S. military operations. When others seek our assistance with military operations, we ensure that we understand their legal basis for acting. We also take a variety of measures to help our partners comply with the law of armed conflict and to avoid facilitating violations through our assistance. Examples of such measures include vetting and training recipients of our assistance and monitoring how our assistance is used.

Some have argued that the obligation in Common Article 1 of the Geneva Conventions to "ensure respect" for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same. As a matter of international law, we would look to the law of State responsibility and our partners' compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners.

Law and Policy

Finally, I'd like to touch on the interplay between law and policy when the United States takes lethal action in armed conflicts and how the United States often applies policy standards that exceed what the law of armed conflict requires.

As a matter of international law, the United States is bound to adhere to the law of armed conflict. In many cases, the United States imposes standards on its direct action operations that go beyond the requirements of the law of armed conflict. For example, the U.S. military may impose an upper limit as a matter of policy on the anticipated number of non-combatant casualties that is much lower than that which would be lawful under the rule that prohibits attacks that are expected to cause excessive incidental harm.

Additionally, although the United States is not a party to the 1977 Additional Protocol II to the 1949 Geneva Conventions and therefore not bound to comply with its provisions as a matter of treaty law, current U.S. practice is already consistent with the Protocol's provisions, which provide rules applicable to States parties in non-international armed conflict. This is a treaty that the Reagan Administration submitted to the Senate for its advice and consent to ratification, and every subsequent Administration has continued that support.

I'd like to focus my comments over the next few minutes on U.S. operations to capture or employ lethal force against terrorist targets outside areas of active hostilities. In addition to the law of armed conflict, these operations are governed by policy guidance issued by the President in 2013. This policy guidance, known as the PPG, reflects this Administration's efforts to strengthen and refine the process for reviewing and approving counterterrorism operations outside of the United States and "areas of active hostilities."

The phrase "areas of active hostilities" is not a legal term of art—it is a term specific to the PPG. For the purpose of the PPG, the determination that a region is an "area of active hostilities" takes into account, among other things, the scope and intensity of the fighting. The Administration currently considers Afghanistan, Iraq, and Syria to be "areas of active hostilities," which means that the PPG does not apply to operations in those States.

Substantively, the PPG imposes certain heightened policy standards that exceed the requirements of the law of armed conflict for lethal targeting. The President has done so out of a belief that implementing such heightened standards outside of hot battlefields is the right approach to using force to meet U.S. counterterrorism objectives and protect American lives consistent with our values.

Of course, the President always retains authority to take lethal action consistent with the law of armed conflict, even if the PPG's heightened policy standards may not be met. But in every case in which the United States takes military action, whether in or outside an area of active hostilities, we are bound to adhere as a matter of international law to the law of armed conflict. This includes, among other things, adherence to the fundamental law of armed conflict principles of distinction, proportionality, necessity, and humanity.

The Administration has already identified a number of the aspects in which the PPG imposes policy standards for the use of lethal force in counterterrorism operations that go beyond the requirements of the law of armed conflict. I'd like to focus on one key aspect here. The PPG establishes measures that go beyond the law of armed conflict in order to minimize risks to civilians to the greatest extent possible. In particular, the PPG establishes a threshold of "near certainty" that non-combatants will not be injured or killed. This standard is also higher than that imposed by the law of armed conflict, which contemplates that civilians will inevitably and tragically be killed in armed conflict.

In addition, with respect to lethal action, the PPG generally requires an assessment that capture of the targeted individual is not feasible at the time of the operation. The law of armed conflict does not itself impose any such "least restrictive means" obligation; instead, combatants may be targeted with lethal force at any time, provided that they are not "out of the fight" due to capture, surrender, illness, or injury.

I hope that this discussion of the PPG and other distinctions between law and policy has given you an understanding not only of the difference between the legal and policy constraints on U.S. lethal targeting, but also better appreciation of the lengths this government goes to in order to minimize harm to civilians outside of hot battlefields while also taking the direct action necessary to protect the United States, our partners, and allies.

Conclusion

In closing, I'll speak to a final aspect of legal diplomacy, one which my predecessors have emphasized in their public remarks as well. As Legal Adviser, one of my roles is to serve as a spokesperson for the U.S. Government on the importance and relevance of international law, and how the U.S. Government interprets, applies, and complies with international law. Part of our legal diplomacy is carried out with our foreign counterparts behind closed doors. But public legal diplomacy is a critical aspect of our work as well, as my predecessors—several of whom are in the audience today—have ably demonstrated.

It is not enough that we act lawfully or regard ourselves as being in the right. It is important that our actions be understood as lawful by others both at home and abroad in order to show respect for the rule of law and promote it more broadly, while also cultivating partnerships and building coalitions. Even if other governments or populations do not agree with our precise legal theories or conclusions, we must be able to demonstrate to others that our most consequential national security and foreign policy decisions are guided by a principled understanding and application of international law.

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b. 2013 Presidential Policy Guidance

As discussed in *Digest 2013* at 549-52, President Obama signed policy guidance (the "PPG") in 2013, establishing a framework for the use of force in counterterrorism operations outside the United States, which was described contemporaneously in a White House fact sheet. In 2016, the U.S. government released a redacted version of the 2013 PPG in connection with a Freedom of Information Act ("FOIA") action in U.S. district court. *ACLU v. Dept. of* Justice, No. 15-1954 (S.D.N.Y.). The released document is available at https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

2. Presidential Memorandum on Use of Force and Accompanying Report

On December 5, 2016, the President issued a memorandum, "Steps for Increased Legal and Policy Transparency Concerning the United States Use of Military Force and Related National Security Operations." Daily Comp. Pres. Docs. 2016 DCPD No. 00820, pp. 1-2. The memorandum is excerpted below.

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The United States has used military force and conducted related national security operations within legal and policy frameworks that are designed to ensure that such operations are lawful and effective and that they serve our interests and values. Consistent with my commitment to transparency, my Administration has provided to the public an unprecedented amount of information regarding these frameworks through speeches, public statements, reports, and other materials. We have attempted to explain, consistent with our national security and the proper functioning of the executive branch, when and why the United States conducts such operations, the legal basis and policy parameters for such operations, and how such operations have unfolded, so that the American people can better understand them.

In addition to the efforts we have made to date, there is still more work that can be done to inform the public. Thus, consistent with my Administration's previous efforts, by this memorandum I am directing national security departments and agencies to take additional steps to share with the public further information relating to the legal and policy frameworks within which the United States uses military force and conducts related national security operations. Accordingly, I hereby direct as follows:

Section 1. Report. National security departments and agencies shall prepare for the President a formal report that describes key legal and policy frameworks that currently guide the United States use of military force and related national security operations, with a view toward the report being released to the public.

Sec. 2. Keeping the Public Informed. On no less than an annual basis, the National Security Council staff shall be asked to, as appropriate, coordinate a review and update of the report described in section 1 of this memorandum, provide any updated report to the President, and arrange for the report to be released to the public.

Sec. 3. Definitions. For the purposes of this memorandum:

"National security departments and agencies" include the Departments of State, the Treasury, Defense, Justice, and Homeland Security, the Office of the Director of National Intelligence, the Central Intelligence Agency, and such other agencies as the President may designate.

"Related national security operations" include operations deemed relevant and appropriate by national security departments and agencies for inclusion in the report described in section 1 of this memorandum, such as detention, transfer, and interrogation operations.

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Pursuant to the December 5, 2016 Memorandum, the White House released its Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations ("Transparency Report"), available at https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf. The report consolidates administration positions on the legal and policy frameworks guiding the United States' use of military force and related national security operations. As summarized in a fact sheet on the report, available at https://obamawhitehouse.archives.gov/the-press-office/2016/12/05/fact-sheet-presidential-memorandum-legal-and-policy-transparency:

> Part One of the report focuses on frameworks for the use of U.S. military force overseas and U.S. military support for other nations' use of force. Topics include the domestic and international legal basis for the use of U.S. military force; the end of armed conflicts with non-state armed groups; working with others in an armed conflict; and the application of legal and policy frameworks to U.S. operations in key theaters (Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen).
>
> Part Two describes key legal and policy frameworks related to the conduct of hostilities. Topics include targeting; the capture of individuals in armed conflict; the detention of individuals in armed conflict; the prosecution of individuals through the criminal justice system and military commissions; and the transfer of armed conflict detainees.

Excerpts below (with endnotes omitted) from Part One of the report pertain to the U.S. legal bases for the use of military force and include discussion of the 2016 determination that al-Shabaab is covered by the 2001 Authorization for Use of Military Force ("AUMF"). Excerpts from Part Two of the report appear in section C, *infra*.

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Shortly after the September 11th attacks, Congress passed the Authorization for Use of Military Force (2001 AUMF). 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 intended to give 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 plainly covers al-Qa'ida, the "organization" that "planned, authorized, committed, [and] aided the terrorist attacks that occurred on September 11, 2001," as well as the Taliban, which "harbored" al-Qa'ida. Thus, in accordance with this statutory authorization, the United States commenced military operations against al-Qa'ida and the Taliban on October 7, 2001. The 2001 AUMF continues to provide the domestic legal authority for the United States to use military force against the terrorist threats identified above.

1. The Scope of the 2001 AUMF

All three branches of the U.S. Government have affirmed the ongoing authority conferred by the 2001 AUMF and its application to al-Qa'ida, to the Taliban, and to forces associated with those two organizations within and outside Afghanistan.

In March 2009, the Department of Justice filed a brief addressing the question of the scope of the government's detention authority under the 2001 AUMF in litigation over detention at Guantanamo Bay. The brief explained that the 2001 AUMF authorizes detention of enemy forces as an aspect of the authority to use force. With respect to the scope of detention authority under the 2001 AUMF, the brief explained that the 2001 AUMF authorized the detention of "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." The brief stated that, in applying that standard, "[p]rinciples derived from law-of-armed-conflict rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized" in the 2001 AUMF.

In the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Congress expressly affirmed "that the authority of the President to use all necessary and appropriate force pursuant to the [2001] Authorization for Use of Military Force includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war." In turn, subsection (b) of that Act defined a "covered person" as "any person" who either "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks" or "who was a part of or substantially supported al-Qa'ida, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."

Similarly, the Federal courts have issued rulings in the detention context that affirmed the President's authority to detain individuals who are part of al-Qa'ida, the Taliban, or associated forces, or who substantially supported those forces in the armed conflict against them.

2. Definition of "Associated Forces"

As noted in the previous sub-section, all three branches of government have recognized that the 2001 AUMF authorizes the use of force against "al-Qa'ida, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."

To be considered an "associated force" of al-Qa'ida or the Taliban for purposes of the authority conferred by the 2001 AUMF, an entity must satisfy two conditions. First, the entity must be an organized, armed group that has entered the fight alongside al-Qa'ida or the Taliban. Second, the group must be a co-belligerent with al-Qa'ida or the Taliban in hostilities against the United States or its coalition partners. Thus, a group is not an associated force simply because it aligns with al-Qa'ida or the Taliban or embraces their ideology. Merely engaging in acts of terror or merely sympathizing with al-Qa'ida or the Taliban is not enough to bring a group within the scope of the 2001 AUMF. Rather, a group must also have entered al-Qa'ida or the Taliban's fight against the United States or its coalition partners.

3. Application of the 2001 AUMF to Particular Groups and Individuals

Consistent with the above, the 2001 AUMF does not authorize the President to use force against every group that commits terrorist acts. Rather, the U.S. military is currently taking direct action against solely the following individuals and groups under the authority of the 2001

AUMF: al-Qa'ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa'ida or the Taliban in Afghanistan; AQAP; al-Shabaab; individuals who are part of al-Qa'ida in Libya; al-Qa'ida in Syria; and ISIL.

A determination was made at the most senior levels of the U.S. Government that each of the groups named above is covered by the 2001 AUMF only after a careful and lengthy evaluation of the intelligence concerning each group's organization, links with al-Qa'ida or the Taliban, and participation in al-Qa'ida or the Taliban's ongoing hostilities against the United States or its coalition partners. Moreover, the Administration also regularly briefs Congress about U.S. operations against these groups and the legal basis for these operations.

Although much of the intelligence underlying a determination that a group is covered by the 2001 AUMF is necessarily sensitive, many of these groups have made plain their continued allegiance and operational ties to al-Qa'ida. For example, this determination was made recently with respect to al-Shabaab because, among other things, al-Shabaab has pledged loyalty to al-Qa'ida in its public statements; made clear that it considers the United States one of its enemies; and been responsible for numerous attacks, threats, and plots against U.S. persons and interests in East Africa. In short, al-Shabaab has entered the fight alongside al-Qa'ida and is a co-belligerent with al-Qa'ida in hostilities against the United States, making it an "associated force" and therefore within the scope of the 2001 AUMF.

A particularly prominent group that the Administration has determined to fall within the ambit of the 2001 AUMF is the enemy force now called ISIL. As discussed below, Congress has expressed support for this action.

As the Administration has explained publicly, the 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004. The facts underlying this determination are as follows: a terrorist group founded by Abu Mu'sab al-Zarqawi—whose ties to Osama bin Laden dated from al-Zarqawi's time in Afghanistan and Pakistan before the September 11th attacks—conducted a series of terrorist attacks in Iraq beginning in 2003. These attacks prompted bin Laden to ask al-Zarqawi to merge his group with al-Qa'ida. In 2004, al-Zarqawi publicly pledged his group's allegiance to bin Laden, and bin Laden publicly endorsed al-Zarqawi as al-Qa'ida's leader in Iraq. For years afterwards, al-Zarqawi's group, which adopted the name al-Qa'ida in Iraq (AQI) when it merged with al-Qa'ida, conducted deadly terrorist attacks against U.S. and coalition forces. In response to these attacks, U.S. forces engaged in combat operations against the group from 2004 until U.S. and coalition forces left Iraq in 2011. The group has continued to plot attacks against U.S. persons and interests in Iraq and the region—including the brutal murder of kidnapped American citizens in Syria and threats to U.S. military personnel that are now present in Iraq at the invitation of the Iraqi Government.

The subsequent 2014 split between ISIL and current al-Qa'ida leadership does not remove ISIL from coverage under the 2001 AUMF. Although ISIL broke its affiliation with al-Qa'ida, the same organization continues to wage hostilities against the United States as it has since 2004, when it joined bin Laden's al-Qa'ida organization in its conflict against the United States. As AQI, ISIL had a direct relationship with bin Laden himself and waged that conflict in allegiance to him while he was alive. ISIL now claims that it—not al-Qa'ida's current leadership—is the true executor of bin Laden's legacy. There are rifts between ISIL and parts of the network bin Laden assembled, but some members and factions of al-Qa'ida-aligned groups have publicly declared allegiance to ISIL. At the same time, ISIL continues to denounce the United States as its enemy and to target U.S. citizens and interests. In these circumstances, the President is not divested of the previously available authority under the 2001 AUMF to continue

using force against ISIL—a group that has been subject to that AUMF for more than a decade—simply because of conflicts between the group and al-Qa'ida's current leadership. A contrary interpretation of the statute would allow an enemy force—rather than the President and Congress—to control the scope of the 2001 AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States.

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Excerpts below (with endnotes omitted) from Part One of the report pertain to the international law bases for the use of military force.

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The U.N. Charter identifies the key international law principles that must guide State behavior when considering whether to resort to the use of force, a question that is governed by the body of international law known as the *jus ad bellum*. In particular, Article 2(4) of the U.N. Charter provides in relevant part that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." Article 51 of the U.N. Charter, however, specifies that "[n]othing in this Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs."

Although a comprehensive discussion of when a State may resort to force on the territory of another State under international law is beyond the scope of this report, the United States generally recognizes three circumstances under which international law does not prohibit such a use of force: (1) use of force authorized by the U.N. Security Council acting under the authority of Chapter VII of the U.N. Charter; (2) use of force in self-defense; and (3) use of force in an otherwise lawful manner with the consent of the territorial State. Each of these three bases is described below and their application to the United States' current uses of military force is described in Part One, Section V.

The three international law bases for using force on the territory of another State are not mutually exclusive, and States may have more than one international legal basis for using force. The United States has relied on all three bases at various points during this Administration. Moreover, although this portion of the report is focused on the *jus ad bellum*, all U.S. military operations involving the use of military force under any of the justifications noted above are conducted consistent with the law of armed conflict, also known as the *jus in bello*.

A. U.N. Security Council Authorization

The U.N. Security Council may, under Chapter VII of the U.N. Charter, authorize the use of force as may be necessary to maintain or restore international peace and security. For example, during this Administration, the United States and other States have used force pursuant to a U.N. Security Council resolution under Chapter VII to protect civilian populated areas under threat of attack in Libya, to combat piracy in and off the coast of Somalia, and to support the International Security Assistance Force (ISAF) in Afghanistan.

B. The Inherent Right of Individual and Collective Self-Defense

1. Basic Principles

The U.N. Charter recognizes the inherent right of States to resort to force in individual or collective self-defense against an armed attack, subject to the customary international law

requirement that any use of force in self-defense must be limited to what is necessary and proportionate to address the threat.

2. Self-Defense Against Non-State Actors

The inherent right of self-defense is not restricted to threats posed by States. Even before the September 11th attacks, it was clear that the right of self-defense applies to the use of force against non-State actors on the territory of another State. For centuries, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors. As one example, the oft-cited *Caroline* incident involved the use of force by the United Kingdom in self-defense against a non-State actor located in the United States. Nearly two hundred years later, this right remains widely accepted. Moreover, States may use force in self-defense against non-State actors either individually or collectively; for example, the United States is currently using force against ISIL in Syria in the collective self-defense of Iraq (and other States).

3. Self-Defense in Response to Imminent Armed Attacks

Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have already occurred, but also in response to *imminent* attacks before they occur. When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against another State or on its territory, the United States analyzes a variety of factors. These factors include "the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage." Moreover, "the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent." Finally, as is now increasingly recognized by the international community, the traditional conception of what constitutes an "imminent" attack must be understood in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.

4. Self-Defense and "Unable or Unwilling"

Under international law, a State may use force on the territory of another State in self-defense only if it is necessary to do so in order to address the threat giving rise to the right to use force in the first instance. States therefore must consider whether actions in self-defense that would impinge on another State's sovereignty are necessary, which entails assessing whether the territorial State is able and willing to mitigate the threat emanating from its territory and, if not, whether it would be possible to secure the territorial State's consent before using force on its territory against a non-State actor.

In some cases, international law does not require a State to obtain the consent of the State on whose territory force will be used against a non-State armed group. Under international law, States may defend themselves, in accordance with the inherent right of individual and collective self-defense, when they face actual or imminent armed attacks by a non-State armed group and the use of force is necessary because the government of the State where the threat is located is unable or unwilling to prevent the use of its territory by the non-State actor for such attacks. In particular, there will be cases in which there is a reasonable and objective basis for concluding

that the territorial State is unable or unwilling to confront effectively a non-State actor in its territory so that it is necessary to act in self-defense against the non-State actor in that State's territory without its consent.

As the Executive Branch has said previously, this "unable or unwilling" standard, in the circumstances here, is "an important application of the requirement that a State, when relying on self-defense for its use of force in another State's territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State." Through this legal basis for action, customary international law recognizes that a State may defend itself against a non-State actor that is able to launch attacks from within another State's territory.

The unable or unwilling standard is not a license to wage war globally or to disregard the borders and territorial integrity of other States. Indeed, this legal standard does not dispense with the importance of respecting the sovereignty of other States. To the contrary, applying the standard ensures that the sovereignty of other States is respected. Specifically, applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using the State's territory as a base for attacks and related operations against other States. With respect to the "unable" prong of the standard, inability perhaps can be demonstrated most plainly where, for example, a State has lost or abandoned effective control over the portion of its territory where the armed group is operating. With respect to the "unwilling" prong of the standard, unwillingness might be demonstrated where, for example, a State is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group.

5. Application of the *Jus ad Bellum* in an Ongoing Armed Conflict

Once a State has lawfully resorted to force in self-defense against a particular actor in response to an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is occurring or imminent prior to every subsequent action taken against that group, provided that hostilities have not ended. In addition, in armed conflicts with non-State actors that are prone to shifting operations from country to country, the United States does not view its ability to use military force against a non-State actor with which it is engaged in an ongoing armed conflict as limited to "hot" battlefields. This does not mean the United States can strike wherever it chooses: the use of force in self-defense in an ongoing armed conflict is limited by respect for States' sovereignty and the considerations discussed above, including the customary international law requirements of necessity and proportionality when force could implicate the rights of other States.

C. Consent to Use Force in an Otherwise Lawful Manner

Another circumstance in which the use of force on the territory of another sovereign does not violate international law is when undertaking an otherwise lawful use of force with the consent of a territorial State. The provision of such consent need not be made public. The United States has relied on State consent in various military operations. In many cases, consent operates in conjunction with the right of self-defense in an ongoing armed conflict. In operations against ISIL, for example, the United States has relied on both its right of self-defense and the consent of certain territorial States.

The concept of consent can pose challenges in certain countries where governments are rapidly changing, have lost control of significant parts of their territory, or have shown no desire to address the threat. Thus, it sometimes can be a complex matter to identify the appropriate person or entity from whom consent should be sought and the form such consent should take. The U.S. Government carefully considers these issues when examining the question of consent.

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3. International Humanitarian Law

a. Civilians in Armed Conflict

On January 19, 2016, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, delivered remarks at the UN Security Council on the protection of civilians in armed conflict. Her remarks are excerpted below and available at http://2009-2017-usun.state.gov/remarks/7102.

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…[W]e have to talk about protection of civilians regardless of whether or not peacekeepers are deployed in a particular area. And it reminds us, above all, of the growing disregard for granting humanitarian access—which used to be a principle that was observed as a general rule, even though there were always exceptions—the disregard for international humanitarian law, and most fundamentally and most disturbingly, the apparent disregard for human life. That is what we're dealing with—a numbing that would allow people to inflict that kind of harm willfully on civilians and on children.

More than 4 million Syrians now live in areas where the UN struggles to deliver assistance. Time and again, the Syrian regime has promised to uphold its most basic responsibilities to its citizens. Time and again, they've agreed to allow life-saving aid to reach starving people. And time and again, the Syrian regime has failed to follow through. Throughout last year, Damascus did not even bother to respond to more than half of UN requests to deliver assistance across conflict lines. And those countries in the UN who have influence over the Syrian regime, who are partnering with them now in the conflict, who are coming in some places to their rescue: please use that influence to get them, in the first instance to respond to UN requests, and above all to grant those requests.

The UN estimates that if the regime approved the outstanding requests—those are the requests outstanding just today—1.4 million people would receive assistance. And it bears stressing that while we all have rightly talked about the use of starvation as a weapon of war here today, that use of food as a weapon of war is happening right alongside other horrific tactics—barrel bombs, chemical weapons use, and systematic torture against civilians by the regime. Of course, when it comes to ISIL, some of the most barbaric and gruesome tactics that we have ever seen employed—including the use of children to execute their parents; including the summoning of civilians, as we saw over the weekend in Deir Az Zour—somewhere between 100 and 300

people executed in cold blood; the sexual enslavement of women like Nadiya, whom we heard from in December at our session on human trafficking.

Where is the sanctity of life? Where is the respect for the human dignity of the person in conflict today? Yemen, South Sudan, Central African Republic, Burundi, the list goes on and on. Civilians are not just going unprotected, but are often coming under deliberate attack.

Let me briefly suggest three areas in which we—and by we I mean the Security Council, the UN, and we each as Member States—can and must seek immediate improvements.

The first should be straightforward, it is on the transmission of information. When UN staff, leaders, and experts—or when any of us as Member States, through our partners on the ground—recognize looming threats or anticipate potential crises, they or we must immediately inform the Council. When something shocks the conscience—of someone who works for an NGO or for the UN or for a Member State—come forward. Again, jump up and down, sound the alarm. The Council must also hear immediately from the Department of Peacekeeping Operations when peacekeeping contingents that are tasked with protecting civilians do not fulfil that component of their mandate, as has been documented happens too often. In that instance, we in the Council can try to use our leverage—our leverage in capital in terms of our bilateral ties, and our leverage as a Council—to ensure that appropriate action is taken. Building upon the Secretary-General's Implementation Report on the High-Level Independent Panel on Peace Operations, DPKO should also work to more systematically bring to the Council's attention the most pressing protection challenges and strategies needed to address them. Shine the spotlight back on us rather than internalizing the constraints that may well exist, but put it back on the Council where it belongs.

The second area is peacekeeping performance and accountability. With nearly all peacekeepers now mandated to protect civilians, they represent one of our most powerful tools in this effort, even if they can't be and aren't everywhere. It is incumbent upon the Council to ensure that all contingents are appropriately prepared and sufficiently trained and equipped, and that they are held accountable if they fail to uphold their mandate. From the outset, we must ensure that the mission planning process takes full account of the protection of civilians; this priority should inform strategy development and resource allocation. We must also ensure that the troops being deployed are adequately prepared.

Others have touched upon the importance of the Kigali principles and we share the appreciation for the initiative taken by Rwanda. The United States is prioritizing support for troop-contributing countries that have committed to the Kigali principles or who have otherwise demonstrated a commitment to fully implementing mission mandates. Once deployed, the UN's leadership must be prepared to replace any contingents that are not effectively protecting civilians—and certainly also any that would harm civilians, including through sexual exploitation and abuse. The additional 50,000 soldiers and police pledged at the September peacekeeping summit give the UN new choices and the ability to replace failing units—this option must be exercised. And in this regard we welcome the UN decision to remove the DRC peacekeepers from the Central African Republic as an important signal of zero tolerance on abuse. Full accountability is needed across this and other missions for all the allegations that have surfaced.

Third and finally, Mr. President, this Council and this organization must also recognize that its responsibility for the protection of civilians is not limited to those countries hosting peacekeeping missions. From Madaya to Burundi, when civilians come under threat, the Council must consider every appropriate action at its disposal. We may disagree on what the perfect tool

is, but we must agree that we need to open up the toolbox and try to put as many tools in place as have a chance at achieving influence. This could include sustained bilateral pressure, the development of mediation and peacekeeping options, the consideration of sanctions against those who are perpetrators or organizers of attacks against civilians or attacks against peacekeepers. Think of how many peacekeepers were attacked in 2015 and ask how many of those who attacked UN peacekeepers—the very people sent by this Council—were ever held accountable. Ever. And look at that record over a decade. The answer is a show of the impunity that the perpetrators against peacekeepers feel, and you can imagine if that is the case for those coming from Member States of this United Nations sent by the Council, what it is like for the average civilian that has been attacked.

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On May 3, 2016, Ambassador Michele J. Sison, U.S. Deputy Representative to the United Nations, delivered the U.S. explanation of vote at the adoption of UN Security Council Resolution 2286 on the protection of civilians in armed conflict. Ambassador Sison's statement is excerpted below and available at https://2009-2017-usun.state.gov/remarks/7258.

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Let me, first of all, express my deep appreciation and respect for the critical work and life-saving work that the International Committee of the Red Cross and Médecins Sans Frontières do around the world. We also thank the penholders of this unanimously adopted resolution for focusing this Council's attention on the importance of protecting medical personnel and access to medical care in armed conflict. At the outset, it is important to be clear: all those who are engaged exclusively in medical work must be respected and protected as civilians, regardless of their affiliation. The United States strongly supports efforts to safeguard access to medical care in situations of armed conflict. We also support efforts to increase awareness of the international laws that provide legal protection for medical personnel, as well as medical facilities and transportation in conflict situations.

I would like to focus my comments today on practical ways of protecting medical care in conflict, the human consequences of attacks, and Syria—where we see the most egregious examples of attacks on medical facilities and personnel. But first, let me take a moment to state up front, that the United States deeply regrets the tragic and mistaken attack on the Médecins Sans Frontières hospital in Kunduz, Afghanistan last October. I would like to echo the words of President Obama, and once again express our profound condolences for the Afghan medical professionals and other civilians killed and injured in the tragic attack. U.S. forces are prohibited from targeting protected medical facilities, and U.S. forces are committed to complying with the international humanitarian law principles that protect hospitals and medical staff caring for patients, including wounded combatants in conflict zones.

As you are aware, the Pentagon, following a six-month investigation of the incident in Kunduz, has disciplined 16 service members for mistakes that led to the tragedy, including the suspension of an officer from command. The disciplinary action taken highlights the seriousness with which we take this incident. This tragedy was the direct result of human error, compounded by systems and procedural failures, and U.S. forces will learn from this incident, study what went wrong, and will take the necessary steps to prevent any such tragic incidents in the future.

As some in this room may remember, one of the worst recorded cases of assault on the wounded and sick occurred in November 1991 in the Croatian town of Vukovar. The same day ICRC secured agreement on the neutral status of the hospital, 300 patients and their relatives were forced onto buses: the bodies of 200 of them were later found in a mass grave, and 51 are still missing today. Despite the outcry that this event generated over 20 years ago, we have seen similar instances of targeted violence against patients and medical workers in countless conflicts since then. Unfortunately, many instances occurred only last month.

Nowhere has the increasing trend of attacks on medical personnel, facilities, and transportation been more apparent than in Syria, where such attacks are overwhelmingly carried out by the regime. The Commission of Inquiry recently reported that the targeting of hospitals and medical personnel, as well as denial of access to medical care, remain ingrained features of the Syrian conflict. Last week, Under-Secretary General Stephen O'Brien told the Council that the presence of a hospital or health facility is now perceived by neighbors to be a threat to their safety. For instance, of the 33 hospitals open in Aleppo city in 2010, fewer than 10 are reportedly still functioning. Just last week, we all heard the report of the horrific attack by the Syrian regime on Al-Quds hospital in Aleppo—a hospital supported by both MSF and ICRC. Reports suggest that at least 27 people died in the attack, including one of the last pediatricians in Aleppo City, as the Secretary-General and others have noted, along with a dentist and a nurse.

The Al-Quds attack came the day after the Syrian Civil Defense station in the town of Al-Atareb, Aleppo province, was struck five times, tragically killing five members of the Civil Defense—a humanitarian and first responder group most commonly known as the "White Helmets". Both of these attacks came a week after targeted attacks on a cardiologist in Hama—Dr. Hasan al-Araj—and another physician in Zabadani, Dr. Mohammed al-Khous. It is clear that the regime has been targeting medical facilities and personnel.

We are also concerned by the report of today's attack on the al-Dabit hospital, on which we are still gathering information, and we are saddened by the deaths resulting from this attack. I regret to say that all of these attacks on medical workers and facilities took place in April alone. To date in Syria, according to several organizations, over 725 physicians in the country have been killed, and over 350 attacks on medical facilities have taken place—the vast majority of them at the hands of the regime. In fact, from January through March of this year—including during an agreed cessation of hostilities—Physicians for Human Rights documented 13 attacks on medical facilities and the deaths of 25 medical personnel. Syrian government forces were responsible for 12 of the attacks and 24 of the deaths.

Allies of the Asad regime—including Russia—have an urgent responsibility to press the regime to fulfill its commitments under UN Security Council Resolution 2254—to stop attacking civilians, medical facilities, and first responders, and to abide fully by the cessation of hostilities. ISIL, too, has directed multiple bombings of medical centers, including the triple bombing of a clinic in Tel Tamer in Hasakah province that killed more than 50 civilians on December 10th of last year.

And we are also deeply concerned by the devastating toll of the crisis in Yemen. Throughout the Yemen conflict, we have urged all sides to take all feasible steps to avoid harm to civilians to comply with obligations under international humanitarian law, including with regard to the protection of medical personnel and facilities. We continually remind the parties in Yemen of their obligations under international humanitarian law not to direct attacks against protected hospitals or places where the sick and wounded are present. Impartial humanitarian organizations must be allowed to continue their critical work saving lives free from threats from armed groups.

Let me conclude by saying that we commend the tireless work of OCHA and ICRC to promote practical ways that parties to armed conflicts can better protect medical personnel and facilities through the establishment of deconfliction systems. Establishing humanitarian deconfliction systems allows humanitarian organizations to submit geolocation data to parties to the conflict. Parties to any conflict share the responsibility for ensuring that such data is effectively incorporated into no-strike lists. For the United States, one result of the Kunduz investigation was to set out a number of operational improvements that have been made as a result of this accident, including the preloading of key information regarding targets onto aircraft systems.

However, we must all do more to improve the protection of medical personnel and hospitals in armed conflict. In Syria, specifically, we call again on Russia and other allies of the Syrian regime to use all their influence to stop the regime's deliberate targeting of medical professionals and facilities. With the deeply concerning increase in violence in Aleppo, we support the UK recommendation for an open meeting on the situation there.

We look forward to the Secretary-General's recommendations on preventive measures. We hope this can be an occasion, in the lead up to the World Humanitarian Summit, for us to recommit collectively to the core principles of international humanitarian law, including those that protect medical personnel and hospitals.

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On July 7, 2016, President Obama issued Executive Order 13732, "United States Policy on Pre- and Post-Strike Measures To Address Civilian Casualties in U.S. Operations Involving the Use of Force." 81 Fed. Reg. 44,485 (July 7, 2016). Excerpts follow from E.O. 13732.

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Section 1. *Purpose.* … As a Nation, we are steadfastly committed to complying with our obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality.

The protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and

enhance the legitimacy and sustainability of U.S. operations critical to our national security. As a matter of policy, the United States therefore routinely imposes certain heightened policy standards that are more protective than the requirements of the law of armed conflict that relate to the protection of civilians.

Civilian casualties are a tragic and at times unavoidable consequence of the use of force in situations of armed conflict or in the exercise of a state's inherent right of self-defense. The U.S. Government shall maintain and promote best practices that reduce the likelihood of civilian casualties, take appropriate steps when such casualties occur, and draw lessons from our operations to further enhance the protection of civilians.

Sec. 2. *Policy.* In furtherance of U.S. Government efforts to protect civilians in U.S. operations involving the use of force in armed conflict or in the exercise of the Nation's inherent right of self-defense, and with a view toward enhancing such efforts, relevant departments and agencies (agencies) shall continue to take certain measures in present and future operations.

(a) In particular, relevant agencies shall, consistent with mission objectives and applicable law, including the law of armed conflict:

(i) train personnel, commensurate with their responsibilities, on compliance with legal obligations and policy guidance that address the protection of civilians and on implementation of best practices that reduce the likelihood of civilian casualties, including through exercises, pre-deployment training, and simulations of complex operational environments that include civilians;

(ii) develop, acquire, and field intelligence, surveillance, and reconnaissance systems that, by enabling more accurate battlespace awareness, contribute to the protection of civilians;

(iii) develop, acquire, and field weapon systems and other technological capabilities that further enable the discriminate use of force in different operational contexts;

(iv) take feasible precautions in conducting attacks to reduce the likelihood of civilian casualties, such as providing warnings to the civilian population (unless the circumstances do not permit), adjusting the timing of attacks, taking steps to ensure military objectives and civilians are clearly distinguished, and taking other measures appropriate to the circumstances; and

(v) conduct assessments that assist in the reduction of civilian casualties by identifying risks to civilians and evaluating efforts to reduce risks to civilians.

(b) In addition to the responsibilities above, relevant agencies shall also, as appropriate and consistent with mission objectives and applicable law, including the law of armed conflict:

(i) review or investigate incidents involving civilian casualties, including by considering relevant and credible information from all available sources, such as other agencies, partner governments, and nongovernmental organizations, and take measures to mitigate the likelihood of future incidents of civilian casualties;

(ii) acknowledge U.S. Government responsibility for civilian casualties and offer condolences, including *ex gratia* payments, to civilians who are injured or to the families of civilians who are killed;

(iii) engage with foreign partners to share and learn best practices for reducing the likelihood of and responding to civilian casualties, including through appropriate training and assistance; and

(iv) maintain channels for engagement with the International Committee of the Red Cross and other nongovernmental organizations that operate in conflict zones and encourage such organizations to assist in efforts to distinguish between military objectives and civilians, including by appropriately marking protected facilities, vehicles, and personnel, and by providing updated information on the locations of such facilities and personnel.

Sec. 3. *Report on Strikes Undertaken by the U.S. Government Against Terrorist Targets Outside Areas of Active Hostilities.* (a) The Director of National Intelligence (DNI), or such other official as the President may designate, shall obtain from relevant agencies information about the number of strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities from January 1, 2016, through December 31, 2016, as well as assessments of combatant and non-combatant deaths resulting from those strikes, and publicly release an unclassified summary of such information no later than May 1, 2017. By May 1 of each subsequent year, as consistent with the need to protect sources and methods, the DNI shall publicly release a report with the same information for the preceding calendar year.

(b) The annual report shall also include information obtained from relevant agencies regarding the general sources of information and methodology used to conduct these assessments and, as feasible and appropriate, shall address the general reasons for discrepancies between post-strike assessments from the U.S. Government and credible reporting from nongovernmental organizations regarding non-combatant deaths resulting from strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities.

(c) In preparing a report under this section, the DNI shall review relevant and credible post-strike all-source reporting, including such information from nongovernmental sources, for the purpose of ensuring that this reporting is available to and considered by relevant agencies in their assessment of deaths.

(d) The Assistant to the President for National Security Affairs may, as appropriate, request that the head of any relevant agency conduct additional reviews related to the intelligence assessments of deaths from strikes against terrorist targets outside areas of active hostilities.

Sec. 4. *Periodic Consultation.* In furtherance of the policies and practices set forth in this order, the Assistant to the President for National Security Affairs, through the National Security Council staff, will convene agencies with relevant defense, counterterrorism, intelligence, legal, civilian protection, and technology expertise to consult on civilian casualty trends, consider potential improvements to U.S. Government civilian casualty mitigation efforts, and, as appropriate, report to the Deputies and Principals Committees, consistent with Presidential Policy Directive 1 or its successor. Specific incidents will not be considered in this context, and will continue to be examined within relevant chains of command.

Sec. 5. *General Provisions.* …

(d) The policies set forth in this order are consistent with existing U.S. obligations under international law and are not intended to create new international legal obligations; nor shall anything in this order be construed to derogate from obligations under applicable law, including the law of armed conflict.

* * * *

b. Additional Protocols to the Geneva Conventions

On October 10, 2016, Emily Pierce, Counselor for the U.S. Mission to the United Nations, addressed the 71st Session of the UN General Assembly Sixth Committee on the status of the Additional Protocols to the Geneva Conventions of 1949. Ms. Pierce's remarks are excerpted below and available at https://2009-2017-usun.state.gov/remarks/7533.

* * * *

The United States has long been a strong proponent of the development and implementation of international humanitarian law, which we often also refer to as the law of war or the law of armed conflict, and we recognize the vital importance of compliance with its requirements during armed conflict. President Obama has consistently reaffirmed the need for nations to work together within a rule of law framework in addressing the numerous security challenges currently confronting States; as he stated in his address to the U.N. General Assembly in September, "binding ourselves to international rules … enhances our security." Accordingly, the United States continues to ensure that all of our military operations that are conducted in connection with armed conflict comply with international humanitarian law, as well as all other applicable international and domestic law.

As we reported in the last discussion of this agenda item in this Committee two years ago, the United States announced its intent to seek the U.S. Senate's advice and consent to ratification of Additional Protocol II, and this treaty is pending before the Senate for its advice and consent. An extensive interagency review found that U.S. military practice was consistent with the Protocol's provisions, and we believe it remains so today. Although the United States continues to have significant concerns with many aspects of Additional Protocol I, Article 75 of that Protocol sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict. The U.S. Government has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and we expect all other nations to adhere to these principles as well.

The United States is committed to complying with its obligations under the law of armed conflict, including those obligations that address the protection civilians. The protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force. As a matter of policy, the United States therefore routinely imposes certain heightened policy standards that are more protective of civilians than would otherwise be required under the law of armed conflict. Some examples of best practices that are taken to enhance the protection of civilians are in Executive Order 13732 on United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, which was issued by President Obama in July of this year.

I'd also like to take this opportunity to discuss the ongoing international initiative on strengthening compliance with international humanitarian law and to provide an update on our views following the 32nd International Conference of the Red Cross and Red Crescent held in December of last year. Over the past four years, the United States has been a strong supporter of creating a new forum to facilitate substantive, non-politicized discussion between States about international humanitarian law, and we believe that remains a worthy—and achievable—goal. It will be essential, however, to ensure that the forum's modalities guard against politicization, such as by focusing discussions on best practices rather than violations, and ensuring that States report on their own practice rather than the practice of other States. We look forward to the further development of this initiative—as well as the initiative on strengthening protections for persons deprived of their liberty during armed conflict. Although the United States recognizes the progress States have made in improving the implementation of international humanitarian law over the past decades, more can and should be done to promote best practices.

We would also briefly like to signal our strong support for ongoing work in the Montreux Document Forum, which was launched in December 2014 and which held its second plenary meeting in January 2016. We are looking forward to the third plenary meeting next year, and we will continue to engage in the Montreux Document Forum to support regular dialogue on outreach regarding and implementation of the Montreux Document.

These various initiatives offer opportunities for States to engage in substantive discussions regarding good practices for strengthening implementation of international humanitarian law. We look forward to continuing to work with the International Committee of the Red Cross, with the United Nations, and with our other partners around the world in these endeavors.

* * * *

c. Legal Adviser's Letter on Enhanced Interrogation Techniques

On June 13, 2016, the Department of State released, in response to a Freedom of Information Act ("FOIA") request, the February 9, 2007 letter from then State Department Legal Adviser John B. Bellinger, III to the Department of Justice Office of Legal Counsel. The letter provides the views of the Legal Adviser on the Justice Department's draft opinion on "enhanced interrogation techniques." Excerpts follow from the letter, as released pursuant to FOIA, which is available at https://www.state.gov/s/l/c8183.htm.

* * * *

I am writing to provide State Department reactions to the Office of Legal Counsel's draft opinion on "enhanced interrogation techniques" ("EITs"). As you will see from our comments, I have focused primarily on the Common Article 3 analysis contained on pages 46-70 of the draft opinion, given the State Department's role and expertise in interpreting treaties. But I have also offered comments on the other sections of the OLC analysis, to the extent that our research on the Common Article 3 section suggested different approaches there. In addition, in light of the fact that this opinion interprets the Geneva Conventions—treaties that directly impact the treatment provided by and to U.S. forces—I believe it is important for DOD to review this draft opinion.

At the outset, I must express concern about the draft opinion's conclusion that the EITs in question are consistent with Common Article 3 of the Geneva Conventions. As I will explain below, the EITs that involve nudity and prolonged sleep deprivation would appear to be prohibited by Common Article 3. Further, the opinion does little to identify or analyze the safeguards that must, in my view, be in place to ensure that any of the remaining techniques can be administered in a manner that does not violate U.S. obligations under Common Article 3.

General Methodological Concerns: Rules of Treaty Interpretation

We have a basic disagreement about the methodology used by the draft opinion to give meaning to the prohibition contained in Common Article 3. In particular, we believe that the opinion relies too heavily on U.S. law to guide our interpretation of treaty terms. The opinion cites but fails to apply with appropriate weight the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties ("VCLT"). The rules contained in Article 32 of the VCLT, which, while not binding, the United States consistently has applied in its treaty practice for decades, provide that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. … A State may, of course, implement its treaty obligations in its domestic law, and this often requires efforts to interpret treaty language in a way that makes sense within that State's legal regime. But the general relevance of domestic law for interpreting a treaty is to show what a state party had in mind during treaty negotiations; to examine state practice under the treaty (if the domestic law does in fact represent state practice under the treaty); or to establish a general principle of law common to major legal systems, to fill in a gap in a treaty that contemplates the use of "background principles."

As I will explain in more detail below, the draft opinion fails to rely on these well-accepted norms of treaty interpretation, and in their place substitutes novel theories concerning the relevance of domestic law to support controversial conclusions about the meaning and applicability of Common Article 3. As a general matter, we do not believe that we can state unilaterally that paragraphs 1(a) and 1(c) of Common Article 3 prohibit only those activities prohibited by our Fifth Amendment. The opinion's effort to interpret Common Article 3 primarily by reference to U.S. domestic laws is inconsistent with traditional U.S. treaty practice, is unlikely to be viewed as objective legal analysis, and, in our view, ultimately leads to incorrect conclusions.

Nudity and Sleep Deprivation

We are not prepared at this point to conclude that the nudity (or nudity in combination with extended sleep deprivation) techniques as described in the OLC draft analysis are consistent, under any circumstances, with the Common Article 3 obligation in paragraph 1(c) to prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment" and with the requirement of humane treatment.

Outrages upon personal dignity. We disagree in several critical respects with the opinion's interpretation of the legal standard that flows from the prohibition against committing "outrages upon personal dignity, in particular humiliating and degrading treatment" that are contained in paragraph 1(c) of Common Article 3.

First, we disagree with the weight the opinion places on interpreting this standard by turning to our "domestic legal tradition." As noted above, this interpretive approach is inconsistent with traditional treaty interpretation rules. …[T]he opinion relies heavily on our domestic legal tradition to conclude that the [Detainee Treatment Act's or] DTA's "shocks the conscience" standard is the appropriate contextual standard and …a "substantial factor" in determining that the program is not a violation of paragraph 1(c). …We do not believe that Congress endorsed such "equivalency"…

Setting aside …the "shocks the conscience" standard, what is the proper interpretation of paragraph 1(c)? We agree with the opinion's conclusions that "humiliating and degrading" treatment must rise to the level of an "outrage upon personal dignity" to be proscribed; we agree that some measure of contextual analysis may be appropriate in determining whether a particular act would be prohibited; and we agree that the acts covered by this prohibition must be, as Pictet

describes, those acts "which world opinion finds particularly revolting—acts which were committed frequently during the Second World War." All of these conclusions may safely be drawn through an interpretation of the plain meaning of the language in question, interpreted in light of the object and purpose of the Geneva Conventions, and taking into account the *travaux preparatoires*.

We further agree that the ICTY *Aleksovski* case cited in the draft opinion stands for the proposition that one should evaluate a reasonable person's reaction to the act in determining if it would be an "outrage." But the opinion fails to note …the need to take into account the cultural background of the victims "when assessing whether the conduct amounted to an outrage upon personal dignity.…" In a World War II trial in an Australian military court, defendants were convicted of violating the 1929 Geneva Conventions for cutting off the hair and beards of Sikh Indians and of making them smoke cigarettes. Thus, the *Aleksovski* court recognized that both subjective and objective elements are relevant.

Applying the "objective" standard from *Aleksovski*, we believe that nudity in any circumstances, and most certainly nudity combined with shackling a person in order to prevent sleep, would be viewed as inconsistent with paragraph 1(c) of Common Article 3. We believe that the reasonable person, as well as world opinion, would consider such acts to constitute humiliation and degradation of a level to be considered an outrage upon personal dignity. We believe that the world would find these acts particularly revolting. The public reaction to the images at Abu Ghraib of an individual standing naked with a sack over his head or of individual detainees naked in handcuffs was incredibly hostile and a reliable indicator of public opinion. We have little reason to believe that the public reaction to an image of an individual standing in a detainee facility wearing only a diaper, with his hands shackled in front of him, deeply fatigued, would be more favorable, even if this treatment (unlike the abuse at Abu Ghraib) occurred pursuant to a carefully regulated, limited program that existed for clear reasons.

Descriptions in the draft itself advance the conclusion that an objective person would find the technique of nudity to be an outrage upon personal dignity. The draft acknowledges that the purpose behind the use of nudity is to "cause embarrassment," "induce psychological discomfort," and to "exploit the detainee's fear of being seen naked." For an average person, there is little difference between doing an act to make an individual feel vulnerable and embarrassed, and doing an act to humiliate that individual.

Application of the "subjective" cultural background test of the *Aleksovski* case only deepens our concern, because it is highly likely that the subjects of these EITs will be Muslim males. It is our understanding that many Muslim men are particularly uncomfortable with nudity, even between men, and that it is highly disturbing for a Muslim man to have a woman see him naked, as might occur with these EITs. The draft opinion fails to discuss any potentially relevant cultural norms that would affect a court's assessment of the EITs.

In this connection, we note that the most recent draft of the OLC opinion now identifies in the section on the War Crimes Act a directly relevant congressional exchange suggesting bipartisan concerns among several Senators that nakedness and sleep deprivation would be grave breaches of Common Article 3 and thus criminal offenses. …

The OLC draft opinion concludes that, in view of another set of comments by legislators stating that the [Military Commissions Act or] MCA prescribed only general standards, not specific techniques, this aspect of the legislative history is not particularly illuminating. We do not read these two sets of statements as necessarily inconsistent: it is possible for legislators to agree that the MCA does not list particular techniques that are or are not acceptable, and also for

some of those legislators to conclude that certain techniques nevertheless would not be permissible under the legal standards contained in the law…

Humane treatment. We are concerned that the draft opinion's discussion of what constitutes "humane treatment" may construe that requirement too narrowly. In particular, the Commentary to Article 27 of the Fourth Geneva Convention, which requires High Contracting Parties to treat protected persons humanely at all times, states:

> What constitutes humane treatment follows logically from the principles explained in [paragraph 1 of Article 27 – "respect for their persons, their honor, . . . their religious convictions and practices, and their manners and customs"], and is further confirmed by the list of what is incompatible with it. In this connection the paragraph under discussion mentions as an example . . . any act of violence or intimidation inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values (insults, exposing people to public curiosity, etc.). . . . The requirement of humane treatment and the prohibition of certain acts incompatible with it are general and absolute in character . . . . They are valid 'in all circumstances' and 'at all times', and apply, for example, to cases where a protected person is the legitimate object of strict measures, since the dictates of humanity and measures of security or repression even when they are severe, are not necessarily incompatible.

Pictet, Commentary to GCIV at 204-05. While this discussion does not provide detailed guidance about what constitutes humane treatment, it does suggest that the requirements exceed the provision of the basic necessities of life and the prohibitions found elsewhere in Common Article 3.

A statement in the Report on U.S. Practice, submitted to the ICRC in 1997 as it developed its Customary International Humanitarian Law Study, further supports this conclusion. …The submission stated, "It is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5, and 6 AP II." …

I am especially concerned about the opinion's conclusions that the use of extended periods of sleep deprivation, and the techniques used to achieve that sleep deprivation, constitute "humane treatment." As we understand it, the detainee will be forced to stand, shackled, for prolonged periods of time, in a position the opinion acknowledges will produce muscle stress. Although the detainee is not allowed to hang by his wrists from the chains, he may periodically collapse from exhaustion and be pulled awake by his shackles. I think it is unlikely that forcing a detainee to stay awake for up to 96 hours at a time under these conditions would be viewed as humane, and as not humiliating and degrading.

Remaining EITs and Need for Safeguards

We are also unable to concur that the remaining EITs would in all cases be consistent with the prohibitions contained in Common Article 3. …Past OLC opinions addressing DOD interrogation techniques have stressed the importance of procedural safeguards, including the need for safeguards that take into account factors such as the detainee's emotional and physical

strengths and weaknesses and that require interrogators or doctors to assess whether a detainee is medically and operationally suitable for interrogation, considering all techniques to be used in combination. …[I]t is imperative that OLC provide clear legal guidance on the safeguards necessary to ensure that techniques, when used individually or in combination, do not violate Common Article 3. …The current draft does not offer this level of analysis.

Practice of Treaty Partners and International Tribunals

I believe that the practice of our treaty partners and the decisions of international tribunals provide a clear indication that the world would disagree with the interpretations of Common Article 3 contained in the draft opinion.

Treaty partners. The discussion of the meaning of Common Article 3's terms fails to reflect that our treaty partners almost certainly would disagree with the conclusion that each of the EITs complies with Common Article 3. The view of our European treaty partners would flow both from relevant court cases …and from an increasing lack of tolerance in Europe and elsewhere for activities that might appear to contravene the individual dignity and humanity of an individual. …

The experience of the United Kingdom, our closest ally and a government keenly attuned to the need to combat terrorism aggressively, is instructive. The UK was …the defendant in the 1972 *UK v. Ireland* case, based on its use of five aggressive interrogation techniques (including bread and water diets and deprivation of sleep) on IRA members. …Despite this conclusion [of the majority of the court in the case that the techniques could be used in conformity with Common Article 3], the Prime Minister stated that his government "decided that the techniques which the Committee examined will not be used in future as an aid to interrogation." Thus, despite their clear value to the UK in its efforts to defeat the IRA, the UK apparently has not used these techniques for thirty years.

[Redacted paragraph]

Foreign Tribunals. As a related matter, I believe that the opinion must discuss in greater detail the facts and conclusions of the Israeli Supreme Court and European Court of Human Rights cases that analyze the legality of similar interrogation techniques. …

With regard to the ECHR case, the draft opinion suggests that the UK presented the ECHR with no rationale for the use of techniques such as sleep deprivation. But, as described above, this is not correct—it is clear that the UK believed that it needed to use such techniques against members of the IRA, a terrorist group, to gather information that the UK had been unable to obtain using more limited interrogation techniques. This rationale is, of course, similar to our rationale for the need for EITs.

I do not argue with the fact that the underlying legal standards that applied to the UK in that case …are slightly different than CA3's prohibition on "cruel treatment." But in interpreting their CA3 obligations, European allies will be influenced by the ECHR's interpretation of relevant terms. This includes the ECHR's description of "inhuman or degrading treatment" in the *UK v. Ireland* case, in which the ECHR stated . . . that treatment is degrading when it is such as to arouse in a person "feelings of fear, anguish and inferiority capable of humiliating and debasing him" and "possibly breaking [his] physical or moral resistance."…

With regard to the Israel Supreme Court case, the current draft relies heavily on the fact that the Court concluded that the Israeli General Security Service was not authorized to use physical means of interrogation. But the Court only reached that issue after it had evaluated the various interrogation techniques and concluded that the techniques were not "reasonable." …Thus, when the Court concludes that the technique of intentionally depriving an individual of

sleep for a prolonged period of time to tire him out or "break" him is not within the scope of a "reasonable" interrogation, some may read the Court's opinion as shedding light on what activity constitutes cruel, inhuman, or degrading treatment…

In view of the UK experience and these court cases, I request that the opinion include a sentence that states, "Notwithstanding the difference in legal standards, the State Department believes that it is highly likely that foreign courts and international tribunals would consider certain of these EITs—at a minimum, nudity and prolonged sleep deprivation—to be violations of Common Article 3." This could mean that CIA personnel who administer EITs would be more likely to be sought for criminal process in foreign countries, as discussed below.

Contemporary context. The opinion invokes an interpretive tool to "reconcile the residual imprecision of Common Article 3 with its application to the novel conflict against al Qaeda. When treaty drafters purposely employ vague and ill-defined language, such language can reflect a decision to provide flexibility to state parties as they confront circumstances unforeseen at the time of the treaty's drafting." …We are unaware of a legal basis for this method of treaty interpretation. One cannot retroactively interpret the object and purpose of Common Article 3 as providing "flexibility and discretion for the Executive Branch…" under that Article. …Since the Supreme Court has concluded that the conflict with al Qaeda falls within the terms of Article 3, the imperfect fit of al Qaeda into that Article is no longer relevant in interpreting what that Article means.

To the extent that DOJ chooses to retain this interpretive method in its opinion, a reliance on contemporary circumstances cannot focus exclusively on the U.S. view of those circumstances. That is, the opinion fails to explain that contemporary views by treaty partners of the importance of Common Article 3 may have changed as well; certain behavior that might have been viewed in 1950 as consistent with Common Article 3 may be seen as inconsistent with that Article in 2007.

Legal Risks

We think it would be useful for the opinion to assess risks of civil or criminal liability in foreign tribunals. As noted above, we do not think foreign tribunals would agree with this opinion's conclusions about Common Article 3, and we do not think these tribunals would defer to U.S. interpretations of that provision. There have been increasing numbers of criminal investigations in European countries of U.S. officials for various activities, including alleged renditions. We therefore cannot say that the risk of criminal exposure overseas of U.S. officials involved in this program, including CIA officers, is insubstantial. …[W]e would recommend that the opinion assess the degree to which the U.S. Government might be susceptible to claims by other states for mistreating their nationals…

* * * * *

In addition to these more specific concerns, I have an overarching concern about this opinion. While it does a careful job analyzing the precise meanings of relevant words and phrases, I am concerned that the opinion will appear to many readers to have missed the forest for the trees. Will the average American agree with the conclusion that a detainee, naked and shackled, is not being subject to humiliating and degrading treatment? At the broadest level, I believe that the opinion's careful parsing of statutory and treaty terms will not be considered the better interpretation of Common Article 3 but rather a work of advocacy to achieve a desired outcome.

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d. Applicability of international law to conflicts in cyberspace

On November 10, 2016, Department of State Legal Adviser Brian J. Egan delivered remarks on international law and stability in cyberspace at Berkeley Law School. His remarks are excerpted below and available at https://2009-2017.state.gov/s/l/releases/remarks/264303.htm.

* * * *

… The remarkable reach of the Internet and the ever-growing number of connections between computers and other networked devices are delivering significant economic, social, and political benefits to individuals and societies around the world. In addition, an increasing number of States and non-State actors are developing the operational capability and capacity to pursue their objectives through cyberspace. Unfortunately, a number of those actors are employing their capabilities to conduct malicious cyber activities that cause effects in other States' territories. Significant cyber incidents—including many that are reportedly State-sponsored—frequently make headline news.

In light of this, it is reasonable to ask: could we someday reach a tipping point where the risks of connectivity outweigh the benefits we reap from cyberspace? And how can we prevent cyberspace from becoming a source of instability that could lead to inter-State conflict?

I don't think we will reach such a tipping point, but how we maintain cyber stability in order to preserve the continued benefits of connectivity remains a critical question. And international law, I would submit, is an essential element of the answer.

Existing principles of international law form a cornerstone of the United States' strategic framework of international cyber stability during peacetime and during armed conflict. The U.S. strategic framework is designed to achieve and maintain a stable cyberspace environment where all States and individuals are able to realize its benefits fully, where there are advantages to cooperating against common threats and avoiding conflict, and where there is little incentive for States to engage in disruptive behavior or to attack one another.

There are three pillars to the U.S. strategic framework, each of which can help to ensure stability in cyberspace by reducing the risks of misperception and escalation. The first is global affirmation of the applicability of existing international law to State activity in cyberspace in both peacetime and during armed conflict. The second is the development of international consensus on certain additional voluntary, non-binding norms of responsible State behavior in cyberspace during peacetime, which is of course the predominant context in which States interact. And the third is the development and implementation of practical confidence-building measures to facilitate inter-State cooperation on cyber-related matters. I'll address two of these pillars—international law and voluntary, non-binding norms—in greater detail today.

International Law

In September 2012, my predecessor, Harold Koh, delivered remarks on "International Law in Cyberspace" at U.S. Cyber Command's Legal Conference. It says a lot about where we were four years ago that the first two questions Koh addressed in his speech were as fundamental as: "Do established principles of international law apply to cyberspace?" and "Is cyberspace a

law-free zone, where anything goes?" (So as not to leave you hanging, the answers to those questions are an emphatic "yes" and "no" respectively!)

We have made significant progress since then. One prominent forum in which these issues are discussed is the United Nations (UN) Group of Governmental Experts (GGE) that deals with cyber issues in the context of international security. The GGE is a body established by the UN Secretary-General with a mandate from the UN General Assembly to study, among other things, how international law applies to States' cyber activities, with a view to promoting common understandings. In 2013, the 15-State GGE recognized the applicability of existing international law to States' cyber activities. Just last year, the subsequent UN GGE on the same topic, expanded to include 20 States, built on the 2013 report and took an additional step by recognizing the applicability in cyberspace of the inherent right of self-defense as recognized in Article 51 of the UN Charter. The 2015 GGE report also recognized the applicability of the law of armed conflict's fundamental principles of humanity, necessity, proportionality, and distinction to the conduct of hostilities in and through cyberspace. With other recent bilateral and multilateral statements, including that of the leaders of the Group of Twenty (G20) States in 2015, we have seen an emerging consensus that existing international law applies to States' cyber activities.

Recognizing the applicability of existing international law as a general matter, however, is the easy part, at least for most like-minded nations. Identifying how that law applies to specific cyber activities is more challenging, and States rarely articulate their views on this subject publicly. The United States already has made some efforts in this area, including by setting forth views on the application of international law to cyber activities in Koh's 2012 speech and also in the U.S. submission to the 2014–15 UN GGE, both of which are publicly available in the Digest of U.S. Practice in International Law. The U.S. Department of Defense also has presented its views on aspects of this topic in its publicly available Law of War Manual. But more work remains to be done.

Increased transparency is important for a number of reasons. Customary international law, of course, develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*. Faced with a relative vacuum of public State practice and *opinio juris* concerning cyber activities, others have sought to fill the void with their views on how international law applies in this area. The most prominent and comprehensive of these efforts is the Tallinn Manual project. Although this is an initiative of the NATO Cooperative Cyber Defence Centre of Excellence, it is neither State-led nor an official NATO project. Instead, the project is a non-governmental effort by international lawyers who first set out to identify the international legal rules applicable to cyber warfare, which led to the publication of "Tallinn Manual 1.0" in 2013. The group is now examining the international legal framework that applies to cyber activities below the threshold of the use of force and outside of the context of armed conflict, which will result in the publication of a "Tallinn Manual 2.0" by the end of this year.

I commend the Tallinn Manual project team on what has clearly been a tremendous and thoughtful effort. The United States has unequivocally been in accord with the underlying premise of this project, which is that existing international law applies to State behavior in cyberspace. In this respect, the Tallinn Manuals will make a valuable contribution to underscoring and demonstrating this point across a number of bodies of international law, even if we do not necessarily agree with every aspect of the Manuals.

States must also address these challenging issues. Interpretations or applications of international law proposed by non-governmental groups may not reflect the practice or legal views of many or most States. States' relative silence could lead to unpredictability in the cyber realm, where States may be left guessing about each other's views on the applicable legal framework. In the context of a specific cyber incident, this uncertainty could give rise to misperceptions and miscalculations by States, potentially leading to escalation and, in the worst case, conflict.

To mitigate these risks, States should publicly state their views on how existing international law applies to State conduct in cyberspace to the greatest extent possible in international and domestic forums. Specific cyber incidents provide States with opportunities to do this, but it is equally important—and often easier—for States to articulate public views outside of the context of specific cyber operations or incidents. Stating such views publicly will help give rise to more settled expectations of State behavior and thereby contribute to greater predictability and stability in cyberspace. This is true for the question of what legal rules apply to cyber activity that may constitute a use of force, or that may take place in a situation of armed conflict. It is equally true regarding the question of what legal rules apply to cyber activities that fall below the threshold of the use of force and take place outside of the context of armed conflict.

Although many States, including the United States, generally believe that the existing international legal framework is sufficient to regulate State behavior in cyberspace, States likely have divergent views on specific issues. Further discussion, clarification, and cooperation on these issues remains necessary. The present task is for States to begin to make public their views on how existing international law applies.

In this spirit, and building on Harold Koh's remarks in 2012 and the United States' 2014 and 2016 submissions to the UN GGE, I would like to offer some additional U.S. views on how certain rules of international law apply to States' behavior in cyberspace, beginning first with cyber operations during armed conflict, and then turning to the identification of voluntary, non-binding norms applicable to State behavior during peacetime.

Cyber Operations in the Context of Armed Conflict

Turning to cyber operations in armed conflict, I would like to start with the U.S. military's cyber operations in the context of the ongoing armed conflict with the Islamic State of Iraq and the Levant (ISIL). As U.S. Defense Secretary Ashton Carter informed Congress in April 2016, U.S. Cyber Command has been asked "to take on the war against ISIL as essentially [its] first major combat operation […] The objectives there are to interrupt ISIL command-and-control, interrupt its ability to move money around, interrupt its ability to tyrannize and control population[s], [and] interrupt its ability to recruit externally."

The U.S. military must comply with the United States' obligations under the law of armed conflict and other applicable international law when conducting cyber operations against ISIL, just as it does when conducting other types of military operations during armed conflict. To the extent that such cyber operations constitute "attacks" under the law of armed conflict, the rules on conducting attacks must be applied to those cyber operations. For example, such operations must only be directed against military objectives, such as computers, other networked devices, or possibly specific data that, by their nature, location, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Such

operations also must comport with the requirements of the principles of distinction and proportionality. Feasible precautions must be taken to reduce the risk of incidental harm to civilian infrastructure and users. In the cyber context, this requires parties to a conflict to assess the potential effects of cyber activities on both military and civilian infrastructure and users.

Not all cyber operations, however, rise to the level of an "attack" as a legal matter under the law of armed conflict. When determining whether a cyber activity constitutes an "attack" for purposes of the law of armed conflict, States should consider, among other things, whether a cyber activity results in kinetic or non-kinetic effects, and the nature and scope of those effects, as well as the nature of the connection, if any, between the cyber activity and the particular armed conflict in question.

Even if they do not rise to the level of an "attack" under the law of armed conflict, cyber operations during armed conflict must nonetheless be consistent with the principle of military necessity. For example, a cyber operation that would not constitute an "attack," but would nonetheless seize or destroy enemy property, would have to be imperatively demanded by the necessities of war. Additionally, even if a cyber operation does not rise to the level of an "attack" or does not cause injury or damage that would need to be considered under the principle of proportionality in conducting attacks, that cyber operation still should comport with the general principles of the law of war.

Other international legal principles beyond the rules and principles of the law of armed conflict that I just discussed are also relevant to U.S. cyber operations undertaken during armed conflict. As then-Assistant to the President for Homeland Security and Counterterrorism John Brennan said in his September 2011 remarks at Harvard Law School, "[i]nternational legal principles, including respect for a State's sovereignty […], impose important constraints on our ability to act unilaterally […] in foreign territories." It is to this topic—the role played by State sovereignty in the legal analysis of cyber operations—that I'd like to turn now.

Sovereignty and Cyberspace

In his remarks in 2012, Harold Koh stated that "States conducting activities in cyberspace must take into account the sovereignty of other States, including outside the context of armed conflict." I would like to build on that statement and offer a few thoughts about the relevance of sovereignty principles to States' cyber activities.

As an initial matter, remote cyber operations involving computers or other networked devices located on another State's territory do not constitute a per se violation of international law. In other words, there is no absolute prohibition on such operations as a matter of international law. This is perhaps most clear where such activities in another State's territory have no effects or de minimis effects.

Most States, including the United States, engage in intelligence collection abroad. As President Obama said, the collection of intelligence overseas is "not unique to America." As the President has also affirmed, the United States, like other nations, has gathered intelligence throughout its history to ensure that national security and foreign policy decision makers have access to timely, accurate, and insightful information. Indeed, the President issued a directive in 2014 to clarify the principles that would be followed by the United States in undertaking the collection of signals intelligence abroad.

Such widespread and perhaps nearly universal practice by States of intelligence collection abroad indicates that there is no per se prohibition on such activities under customary international law. I would caution, however, that because "intelligence collection" is not a defined term, the absence of a per se prohibition on these activities does not settle the question of

whether a specific intelligence collection activity might nonetheless violate a provision of international law.

Although certain activities—including cyber operations—may violate another State's domestic law, that is a separate question from whether such activities violate international law. The United States is deeply respectful of other States' sovereign authority to prescribe laws governing activities in their territory. Disrespecting another State's domestic laws can have serious legal and foreign policy consequences. As a legal matter, such an action could result in the criminal prosecution and punishment of a State's agents in the United States or abroad, for example, for offenses such as espionage or for violations of foreign analogs to provisions such as the U.S. Computer Fraud and Abuse Act. From a foreign policy perspective, one can look to the consequences that flow from disclosures related to such programs. But such domestic law and foreign policy issues do not resolve the independent question of whether the activity violates international law.

In certain circumstances, one State's non-consensual cyber operation in another State's territory could violate international law, even if it falls below the threshold of a use of force. This is a challenging area of the law that raises difficult questions. The very design of the Internet may lead to some encroachment on other sovereign jurisdictions. Precisely when a non-consensual cyber operation violates the sovereignty of another State is a question lawyers within the U.S. government continue to study carefully, and it is one that ultimately will be resolved through the practice and *opinio juris* of States.

Relatedly, consider the challenges we face in clarifying the international law prohibition on unlawful intervention. As articulated by the International Court of Justice (ICJ) in its judgment on the merits in the Nicaragua Case, this rule of customary international law forbids States from engaging in coercive action that bears on a matter that each State is entitled, by the principle of State sovereignty, to decide freely, such as the choice of a political, economic, social, and cultural system. This is generally viewed as a relatively narrow rule of customary international law, but States' cyber activities could run afoul of this prohibition. For example, a cyber operation by a State that interferes with another country's ability to hold an election or that manipulates another country's election results would be a clear violation of the rule of non-intervention. For increased transparency, States need to do more work to clarify how the international law on non-intervention applies to States' activities in cyberspace.

Some may ask why it matters where the international community draws these legal lines. Put starkly, why does it matter whether an activity violates international law? It matters, of course, because the community of nations has committed to abide by international law, including with respect to activities in cyberspace. International law enables States to work together to meet common goals, including the pursuit of stability in cyberspace. And international law sets binding standards of State behavior that not only induce compliance by States but also provide compliant States with a stronger basis for criticizing—and rallying others to respond to—States that violate those standards. As Harold Koh stated in 2012, "[i]f we succeed in promoting a culture of compliance, we will reap the benefits. And if we earn a reputation for compliance, the actions we do take will earn enhanced legitimacy worldwide for their adherence to the rule of law." Working to clarify how international law applies to States' activities in cyberspace serves those ends, as it does in so many other critical areas of State activity.

Before leaving the topic of sovereignty, I'd like to address one additional related issue involving a State's control over cyber infrastructure and activities within, rather than outside, its territory. In his 2012 speech, Koh observed that "[t]he physical infrastructure that supports the

Internet and cyber activities is generally located in sovereign territory and is subject to the jurisdiction of the territorial State." However, he went on to emphasize that "[t]he exercise of jurisdiction by the territorial State, however, is not unlimited; it must be consistent with applicable international law, including international human rights obligations."

I want to underscore this important point. Some States invoke the concept of State sovereignty as a justification for excessive regulation of online content, including censorship and access restrictions, often undertaken in the name of counterterrorism or "countering violent extremism." And sometimes, States also deploy the concept of State sovereignty in an attempt to shield themselves from outside criticism.

So let me repeat what Koh made clear: Any regulation by a State of matters within its territory, including use of and access to the Internet, must comply with that State's applicable obligations under international human rights law.

There is no doubt that terrorist groups have become dangerously adept at using the Internet and other communications technologies to propagate their hateful messages, recruit adherents, and urge followers to commit violent acts. This is why all governments must work together to target online criminal activities—such as illicit money transfers, terrorist attack planning and coordination, criminal solicitation, and the provision of material support to terrorist groups. U.S. efforts to prevent the Internet from being used for terrorist purposes also focus on criminal activities that facilitate terrorism, such as financing and recruitment, not on restricting expressive content, even if that content is repugnant or inimical to our core values.

Such efforts must not be conflated with broader calls to restrict public access to or censor the Internet, or even—as some have suggested—to effectively shut down entire portions of the Web. Such measures would not advance our security, and they would be inconsistent with our values. The Internet must remain open to the free flow of information and ideas. Restricting the flow of ideas also inhibits spreading the values of understanding and mutual respect that offer one of the most powerful antidotes to the hateful and violent narratives propagated by terrorist groups.

That is why the United States holds the view that use of the Internet, including social media, in furtherance of terrorism and other criminal activity must be addressed through lawful means that respect each State's international obligations and commitments regarding human rights, including the freedom of expression, and that serve the objectives of the free flow of information and a free and open Internet. To be sure, the incitement of imminent terrorist violence may be restricted. However, certain censorship and content control, including blocking websites simply because they contain content that criticizes a leader, a government policy, or an ideology, or because the content espouses particular religious beliefs, violates international human rights law and must not be engaged in by States.

State Responsibility and the "Problem of Attribution" in Cyberspace

I have been talking thus far about States' activities and operations in cyberspace. But as many of you know, it is often difficult to detect who or what is responsible for a given cyber incident. This leads me to the frequently raised and much debated "problem of attribution" in cyberspace.

States and commentators often express concerns about the challenge of attribution in a technical sense—that is, the challenge of obtaining facts, whether through technical indicators or all-source intelligence, that would inform a State's determinations about a particular cyber incident. Others have raised issues related to political decisions about attribution—that is,

considerations that might be relevant to a State's decision to go public and identify another State as the actor responsible for a particular cyber incident and to condemn that act as unacceptable. These technical and policy discussions about attribution, however, should be distinguished from the legal questions about attribution. In my present remarks, I will focus on the issue of attribution in the legal sense.

From a legal perspective, the customary international law of state responsibility supplies the standards for attributing acts, including cyber acts, to States. For example, cyber operations conducted by organs of a State or by persons or entities empowered by domestic law to exercise governmental authority are attributable to that State, if such organs, persons, or entities are acting in that capacity.

Additionally, cyber operations conducted by non-State actors are attributable to a State under the law of state responsibility when such actors engage in operations pursuant to the State's instructions or under the State's direction or control, or when the State later acknowledges and adopts the operations as its own.

Thus, as a legal matter, States cannot escape responsibility for internationally wrongful cyber acts by perpetrating them through proxies. When there is information—whether obtained through technical means or all-source intelligence—that permits a cyber act engaged in by a non-State actor to be attributed legally to a State under one of the standards set forth in the law of state responsibility, the victim State has all of the rights and remedies against the responsible State allowed under international law.

The law of state responsibility does not set forth explicit burdens or standards of proof for making a determination about legal attribution. In this context, a State acts as its own judge of the facts and may make a unilateral determination with respect to attribution of a cyber operation to another State. Absolute certainty is not—and cannot be—required. Instead, international law generally requires that States act reasonably under the circumstances when they gather information and draw conclusions based on that information.

I also want to note that, despite the suggestion by some States to the contrary, there is no international legal obligation to reveal evidence on which attribution is based prior to taking appropriate action. There may, of course, be political pressure to do so, and States may choose to reveal such evidence to convince other States to join them in condemnation, for example. But that is a policy choice—it is not compelled by international law.

Countermeasures and Other "Defensive" Measures

I want to turn now to the question of what options a victim State might have to respond to malicious cyber activity that falls below the threshold of an armed attack. As an initial matter, a State can always undertake unfriendly acts that are not inconsistent with any of its international obligations in order to influence the behavior of other States. Such acts—which are known as acts of retorsion—may include, for example, the imposition of sanctions or the declaration that a diplomat is persona non grata.

In certain circumstances, a State may take action that would otherwise violate international law in response to malicious cyber activity. One example is the use of force in self-defense in response to an actual or imminent armed attack. Another example is that, in exceptional circumstances, a State may be able to avail itself of the plea of necessity, which, subject to certain conditions, might preclude the wrongfulness of an act if the act is the only way for the State to safeguard an essential interest against a grave and imminent peril.

In the time that remains, however, I would like to talk about a type of State response that has received a lot of attention in discussions about cyberspace: countermeasures. The customary international law doctrine of countermeasures permits a State that is the victim of an internationally wrongful act of another State to take otherwise unlawful measures against the responsible State in order to cause that State to comply with its international obligations, for example, the obligation to cease its internationally wrongful act. Therefore, as a threshold matter, the availability of countermeasures to address malicious cyber activity requires a prior internationally wrongful act that is attributable to another State. As with all countermeasures, this puts the responding State in the position of potentially being held responsible for violating international law if it turns out that there wasn't actually an internationally wrongful act that triggered the right to take countermeasures, or if the responding State made an inaccurate attribution determination. That is one reason why countermeasures should not be engaged in lightly.

Additionally, under the law of countermeasures, measures undertaken in response to an internationally wrongful act performed in or through cyberspace that is attributable to a State must be directed only at the State responsible for the wrongful act and must meet the principles of necessity and proportionality, including the requirements that a countermeasure must be designed to cause the State to comply with its international obligations—for example, the obligation to cease its internationally wrongful act—and must cease as soon as the offending State begins complying with the obligations in question.

The doctrine of countermeasures also generally requires the injured State to call upon the responsible State to comply with its international obligations before a countermeasure may be taken—in other words, the doctrine generally requires what I will call a "prior demand." The sufficiency of a prior demand should be evaluated on a case-by-case basis in light of the particular circumstances of the situation at hand and the purpose of the requirement, which is to give the responsible State notice of the injured State's claim and an opportunity to respond.

I also should note that countermeasures taken in response to internationally wrongful cyber activities attributable to a State generally may take the form of cyber-based countermeasures or non-cyber-based countermeasures. That is a decision typically within the discretion of the responding State and will depend on the circumstances.

Voluntary, Non-Binding Norms of Responsible State Behavior in Peacetime

In the remainder of my remarks, I'd like to discuss very briefly another element of the United States' strategic framework for international cyber stability: the development of international consensus on certain additional voluntary, non-binding norms of responsible State behavior in cyberspace that apply during peacetime.

Internationally, the United States has identified and promoted four such norms:

First, a State should not conduct or knowingly support cyber-enabled theft of intellectual property, trade secrets, or other confidential business information with the intent of providing competitive advantages to its companies or commercial sectors.

Second, a State should not conduct or knowingly support online activity that intentionally damages critical infrastructure or otherwise impairs the use of critical infrastructure to provide service to the public.

Third, a State should not conduct or knowingly support activity intended to prevent national computer security incident response teams (CSIRTs) from responding to cyber incidents. A State also should not use CSIRTs to enable online activity that is intended to do harm.

Fourth, a State should cooperate, in a manner consistent with its domestic and international obligations, with requests for assistance from other States in investigating cyber crimes, collecting electronic evidence, and mitigating malicious cyber activity emanating from its territory.

These four U.S.-promoted norms seek to address specific areas of risk that are of national and/or economic security concern to all States. Although voluntary and non-binding in nature, these norms can serve to define an international standard of behavior to be observed by responsible, like-minded States with the goal of preventing bad actors from engaging in malicious cyber activity. If observed, these measures—which can include measures of self-restraint—can contribute substantially to conflict prevention and stability. Over time, these norms can potentially provide common standards for responsible States to use to identify and respond to behavior that deviates from these norms. As more States commit to observing these norms, they will be increasingly willing to condemn the malicious activities of bad actors and to join together to ensure that there are consequences for those activities.

It is important, however, to distinguish clearly between international law, on the one hand, and voluntary, non-binding norms on the other. These four norms identified by the United States, or the other peacetime cyber norms recommended in the 2015 UN GGE report, fall squarely in the voluntary, non-binding category. These voluntary, non-binding norms set out standards of expected State behavior that may, in certain circumstances, overlap with standards of behavior that are required as a matter of international law. Such norms are intended to supplement existing international law. They are designed to address certain cyber activities by States that occur outside of the context of armed conflict that are potentially destabilizing. That said, it is possible that if States begin to accept the standards set out in such non-binding norms as legally required and act in conformity with them, such norms could, over time, crystallize into binding customary international law. As a result, States should approach the process of identifying and committing to such non-binding norms with care.

In closing, I wanted to highlight a few points. First, cyberspace may be a relatively new frontier, but State behavior in cyberspace, as in other areas, remains embedded in an existing framework of law, including international law. Second, States have the primary responsibility for identifying how existing legal frameworks apply in cyberspace. Third, States have a responsibility to publicly articulate applicable standards. This is critical to enable an accurate understanding of international law, in the area of cyberspace and beyond. I hope that these remarks have furthered this goal of transparency, and highlighted the important role of international law, and international lawyers, in this important and dynamic area.

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On December 23, 2015, the UN General Assembly adopted a resolution (U.N. Doc. A/RES/70/237) requesting the establishment of a further Group of Governmental Experts ("GGE") on Developments in the Field of Information and Telecommunications in the Context of International Security with a mandate to continue to study, among other things, how international law applies to the use of information and

communications technologies by States. In October 2016, the United States submitted the following paper to the 2016–17 GGE. See *Digest 2014* at 732-40 for the 2014 U.S. submission to the GGE.

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I. Overall Purpose of the Report

Since 2009, the United Nations Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (GGE) has served as a productive and groundbreaking expert-level venue for discussing international cyber stability issues. The consensus recommendations of the three GGE reports (2010, 2013, 2015) have provided guidance for States on the applicability of international law to States' use of information and communications technologies (ICTs), the stabilizing role of voluntary, non-binding norms of responsible State behavior in peacetime, and the importance of confidence-building measures (CBMs). These reports reflect an emerging strategic framework of international cyber stability, designed to achieve and maintain a peaceful cyberspace environment where all States are able to fully realize its benefits, where there are advantages to cooperating against common threats and avoiding conflict, and where there is little incentive for States to engage in disruptive behavior or to attack one another.

The GGE plays a pivotal role in promoting this framework, but the GGE's recommendations must be implemented in order to preserve international cyber stability. To achieve the mandate set out for this Group, and to provide a substantive contribution that builds upon previous GGE reports, the current Group should address how to achieve widespread observation and implementation of existing consensus recommendations. This can be facilitated through a new GGE report that provides greater clarity on certain recommendations in past GGE reports and practical guidance to States on steps they can take to implement those recommendations.

II. Existing and Potential Threats

The existing and emerging threats outlined in the 2015 GGE report remain accurate and relevant to the Group's work. This Group should continue to focus on the potential for low-probability, high-risk State-on-State conflict that could pose the most significant threat to international peace and security.

III. International Law

The U.S. submission to the 2014–15 GGE set out some basic principles of international law that apply to State behavior in cyberspace and provided some considerations that States may take into account when determining how such principles apply to States' use of ICTs in specific situations they may confront. That submission addressed in greatest detail the *jus ad bellum* (the body of law that addresses, *inter alia*, uses of force triggering a State's right to use force in self-defense) and the *jus in bello* (the body of law governing, *inter alia*, the conduct of hostilities in the context of armed conflict, also known as international humanitarian law (IHL) or the law of armed conflict). It also described how international law concerning, among other things, human rights and State responsibility, including countermeasures, applies to State behavior in cyberspace. The U.S. submission to the 2014–15 GGE is attached as an annex, as the topics addressed therein continue to merit discussion by this Group. The sub-sections that follow set

out some additional views regarding how international law applies to States' use of ICTs. They should be read in conjunction with the 2014–15 submission.

i. Sovereignty Principles

In considering what this Group may wish to address as part of its mandate to continue to study how international law applies to States' use of ICTs, it will be critical to achieve a balance in terms of the international legal rules and principles discussed in the report. The 2015 GGE report contained numerous affirmations of the applicability of principles of State sovereignty, including sovereign equality and the principle of non-intervention.[1] Acknowledging the applicability of these principles is important, and the United States has affirmed that State sovereignty, among other longstanding international legal principles, must be taken into account in the conduct of activities in cyberspace.[2] As the 2015 GGE report notes, one implication of that principle is that "States have jurisdiction over the ICT infrastructure located within their territory."[3] The exercise of such jurisdiction by the territorial State, however, is not unlimited; it must be consistent with applicable international law, including international human rights obligations. This Group's report should clarify that concept.

ii. Self-Defense, Countermeasures, and International Humanitarian Law

Although this Group cannot cover all international law that is potentially applicable to States' use of ICTs, as noted above, it must ensure that any report strikes an appropriate balance in its discussion of various international legal rules and principles. In particular, this Group could make a helpful contribution by providing guidance on aspects of international law that apply to a State's response to malicious cyber activity, including the international legal constraints that might apply to such a response. For example, this Group should expand on the statement in paragraph 28(c) of the 2015 GGE report to make clear to the international community that any use of force by a State in the exercise of its inherent right of self-defense must be limited, in the cyber context just as it is in any other context, to that which is necessary and proportionate to respond to an actual or imminent armed attack.[4] Additionally, this Group could make a helpful contribution by addressing in more detail how the doctrine of countermeasures applies to States' use of ICTs. The U.S. submission to the 2014-15 GGE offers an example of how this Group could provide guidance to States on this subject.[5]

This Group also should do more to reassure the international community that the applicability of IHL to States' use of ICTs in situations of armed conflict is *not* in question.[6] It clearly applies, and a robust affirmation of its applicability furthers the general purpose of that body of law: to regulate the conduct of hostilities so as to minimize their effects on civilians and avoid unnecessary suffering. Embracing the humanitarian principles of IHL is in no way inconsistent with our common commitment to the pursuit of peace.

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[1] Report of the 2014–15 Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (July 22, 2015) (the "2015 GGE Report"), UN Doc. A/70/174, paras. 26, 27, and 28(b).

[2] *See, e.g.*, *United States Submission to the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (2014–15)* (the "2014–15 U.S. GGE Submission"), pp. 6–7.

[3] 2015 GGE Report, para. 28(a).

[4] *See* 2014–15 U.S. GGE Submission, pp. 2–4.

[5] *See* 2014–15 U.S. GGE Submission, p. 8.

[6] *See* 2014–15 U.S. GGE Submission, pp. 4–6.

iii. Attribution and the Law of State Responsibility

Attribution plays an important role in States' responses to malicious cyber activities as a matter of international law. It is crucial, however, to distinguish legal attribution from attribution in the technical and political senses. States and commentators often express concerns about the challenge of attribution in a *technical* sense—that is, the challenge in light of certain characteristics of cyberspace of obtaining facts, whether through technical indicators or all-source intelligence, that would inform a State's policy and legal determinations about a particular cyber incident. Others have raised issues related to *political* decisions about attribution—that is, considerations that might be relevant to a State's decision to go public and identify another State as the actor responsible for a particular cyber incident and to condemn a particular cyber act as unacceptable. The discussion in this sub-section sets aside those technical and political issues and focuses instead on the issue of attribution under international law.

From a legal perspective, the law of State responsibility supplies the standards for attributing acts, including cyber acts, to States. For example, cyber operations conducted by organs of a State or by persons or entities empowered by domestic law to exercise elements of governmental authority are attributable to that State. Additionally, cyber operations conducted by non-State actors are attributable to a State under the law of State responsibility when such operations are engaged in pursuant to the State's instructions or under the State's direction or control, or when the State later acknowledges and adopts the operations as its own. Thus, as a legal matter, States cannot escape responsibility for internationally wrongful cyber acts by perpetrating them through proxies. When there is information—whether obtained through technical means or all-source intelligence—that permits attribution of a cyber act of an ostensibly non-State actor to a State under one of the standards set forth in the law of State responsibility, the victim State has all of the rights and remedies against the responsible State permitted to it under international law.

It is important to note that the law of State responsibility does not set forth burdens or standards of proof for attribution. Such questions may be relevant for judicial or other types of proceedings, but they do not apply as an international legal matter to a State's determination about attribution of internationally wrongful cyber acts for purposes of its response to such acts, including by taking unilateral, self-help measures permissible under international law, such as countermeasures. In that context, a State acts as its own judge of the facts and may make a unilateral determination with respect to attribution of a cyber operation to another State. Absolute certainty is not required. Instead, international law generally requires that States act reasonably under the circumstances.

Finally, it is important to note that there is no international legal obligation to reveal evidence on which attribution is based. There may, of course, be political pressure to do so, and States may choose to reveal such evidence to convince other States to join them in condemnation, for example. But that is a policy choice—it is not compelled by international law.

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B. CONVENTIONAL WEAPONS

1. Unmanned Aerial Vehicles

On October 5, 2016, the State Department issued as a fact sheet on the joint declaration reached by the United States and 44 other nations on the export and subsequent use of armed or strike-enabled unmanned aerial vehicles ("UAVs"). The fact sheet is excerpted below and available at http://2009-2017.state.gov/r/pa/prs/ps/2016/10/262812.htm.

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As a world leader in the development and deployment of military UAVs, the United States seeks to promote efforts to ensure the responsible export and subsequent use of this rapidly expanding technology. In February 2015, the United States announced the **U.S. Export Policy for Unmanned Aerial Systems**, which put in place stringent conditions on the U.S. sale or transfer of military UAVs. In the 2015 policy, we also stated our intent to "work with other countries to shape international standards for the sale, transfer, and subsequent use of military UAVs."

This Joint Declaration reflects a logical next step in this process by:

Establishing broad international consensus that, as with other weapon systems, the use of armed or strike-enabled UAVs is subject to international law, including both the law of armed conflict and international human rights law, as applicable;

Committing to the responsible export of armed or strike-enabled UAVs in line with existing relevant international arms control and disarmament norms, as well as consistent with multilateral export control and nonproliferation regimes;

Acknowledging the benefits of transparency on the export of armed or strike-enabled UAVs including reporting of military exports through existing mechanisms, where appropriate; and

Pledging continued international dialogue about the export and use of armed or strike-enabled UAVs in light of the rapid development and proliferation of UAV technology, and welcoming additional countries to join the Joint Declaration.

This Joint Declaration will serve as the basis for discussions on a more detailed set of international standards for the export and subsequent use of armed or strike-enabled UAVs, which the United States and its partners will convene in Spring 2017. These discussions will be open to all countries, even if they choose not to join the Joint Declaration.

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2. Convention on Conventional Weapons

Principal Deputy Legal Adviser Richard Visek delivered the opening statement for the U.S. delegation at the Fifth Review Conference of the Convention on Conventional Weapons ("CCW") in Geneva on December 12, 2016. The opening statement is excerpted below and available at https://geneva.usmission.gov/2016/12/12/u-s-

opening-statement-at-the-fifth-review-conference-of-the-convention-on-conventional-weapons-ccw/.

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The United States places great value in the Conference of the Convention on Certain Conventional Weapons (CCW) as an international humanitarian law (IHL) treaty framework that brings together States with diverse security interests to discuss issues related to weapons that may be deemed to be excessively injurious or to have indiscriminate effects. We believe that the CCW provides a unique forum for discussing these important issues as it has an appropriate mix of technical, policy, political, and military experts.

We would like to commend the excellent efforts of the various coordinators of the work related to Amended Protocol II and Protocol V. We are pleased with the decisions of the High Contracting Parties to Amended Protocol II and Protocol V, and we look forward to adopting these decisions during this Review Conference.

The United States recognizes the need for universalization and full implementation of the CCW and its protocols. We welcome those States that have become party to the CCW and its protocols since the last Review Conference.

The importance of universalization and implementation has been reinforced by recent events. We have seen concerning reports that incendiary weapons continue to be used in places where civilians have been present, as well as increased reports of indiscriminate use of IEDs and landmines in places like Syria, Libya, Ukraine, and Yemen. These disturbing reports underscore that the universalization and implementation of the CCW and its protocols, are crucial if we want to help preclude such conduct from occurring in the future. We call on all High Contracting Parties that are parties to those conflicts to abide by their obligations under the CCW and we call on those States not yet party to the CCW and its protocols to become parties at the earliest opportunity.

The United States has supported the decision by the High Contracting Parties to discuss lethal autonomous weapons systems (LAWS). We continue to believe that the CCW is the right forum to consider this complex topic. This subject requires in-depth discussions and we continue to encourage States to participate actively in this process. In 2017, we should continue to seek a better understanding of the potential issues associated with LAWS, consistent with the recommendations of the Informal Meeting of Experts in April.

The United States supports concluding a legally binding protocol on mines other than anti-personnel mines (MOTAPM). That said, we see value in building on the constructive discussions that we have had, both formally and informally, in recent years. We strongly encourage High Contracting Parties to agree to the proposal put forth by Ireland to resume our work on this issue. MOTAPM, unlike LAWS, are existing weapons that continue to be used indiscriminately and that therefore pose a clear danger to civilians in conflict areas.

Madame President, with respect to our work in 2017, the United States supports an efficient work plan that that is still sufficient to ensure that we are able to implement the decisions we take related to future work. Noting the unfortunate constraints placed on this Review Conference due to insufficient funds, we must prioritize our work given our limited resources.

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C. DETAINEES

1. Law and Policy Report Regarding Detainees

The Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, discussed in section A.2, *supra*, includes a section on the legal and policy frameworks regarding detention during armed conflict. Excerpts follow (with most notes omitted) from section III of Part Two of the Report regarding detention of individuals in armed conflict.

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Under the 2001 AUMF, the United States may 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. …

Examination of whether an individual is "part of" an enemy force is informed by the fact that the armed groups against which the President is authorized to use force under the 2001 AUMF neither abide by the law of armed conflict nor typically issue membership cards or uniforms. Therefore, information relevant to a determination that an individual joined with or became part of an enemy force might range from formal membership, such as through an oath of loyalty, to more functional indications, such as training with al-Qa'ida (as reflected in some cases by staying at al-Qa'ida or Taliban safehouses that are regularly used to house militant recruits), taking positions with enemy forces, or in planning or carrying out attacks against the United States and its allies' persons or interests, particularly U.S. persons or interests. Often these factors operate in combination. In each case, given the nature of the irregular forces and the practice of their participants or members to try to conceal their affiliations, judgments about whether a particular individual falls within the scope of the authority conferred by the 2001 AUMF will necessarily turn on the totality of the circumstances.

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As noted above, the United States has also interpreted the 2001 AUMF to authorize the detention of individuals who "substantially support" enemy forces in the course of their hostilities against the United States or its coalition partners. This interpretation is informed by the law of armed conflict governing international armed conflicts, which allows for the detention of a narrow category of individuals who are not part of the enemy but bear sufficiently close ties to those forces as to be detainable. By providing "substantial support," an individual is "more or less part of" the enemy force. …

Under the 2001 AUMF, as informed by the law of armed conflict, detention is generally authorized until the end of hostilities. The relevant inquiry in determining whether detention remains authorized is whether active hostilities have ceased, not whether a particular combat mission is over. During ongoing hostilities, the U.S. Government's legal authority to detain "is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities." However, as a matter of policy, a detainee may be released or transferred while active hostilities are ongoing if a competent authority determines that the threat the individual poses to the security of the United States can be mitigated by other lawful means. This discretionary designation of a detainee for possible transfer from a detention facility, including the facility at Guantanamo Bay, does not affect the legality of his continued detention under the 2001 AUMF pending transfer.

B. Review of the Continued Detention of Detainees at Guantanamo Bay

In his first week in office, President Obama issued Executive Order 13492 regarding the review and disposition of individuals detained at Guantanamo Bay and the closure of the detention facility. As the Administration has made clear, the facility's continued operation weakens U.S. national security by furthering the recruiting propaganda of violent extremists, hindering relations with key allies and partners, and draining resources. …

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…As of the release of this report, there are 59 detainees at Guantanamo, compared to 242 detainees on January 20, 2009, when the President took office.

C. Treatment of Armed Conflict Detainees

1. Fundamental Treatment Guarantees for Armed Conflict Detainees

The standards in Common Article 3 of the 1949 Geneva Conventions apply to detainees in any military operation. Common Article 3 reflects a minimum standard of humane treatment protections in non-international armed conflict for all persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. Additional rules regarding treatment of detainees will apply depending on the particular context. In particular, Article 75 of Additional Protocol I to the Geneva Conventions sets forth fundamental guarantees for persons in the hands of an opposing force in an international armed conflict, including prohibitions on torture and humiliating and degrading treatment, as well as fair trial guarantees. The United States is not party to Additional Protocol I, but the United States has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and it expects all other nations to adhere to these principles as well.

Additional Protocol II to the Geneva Conventions contains detailed humane treatment standards and fair trial guarantees that would apply in the context of non-international armed conflicts, such as the hostilities authorized by the 2001 AUMF. The United States signed Additional Protocol II in 1987 and President Reagan submitted it to the Senate for advice and consent to ratification. In March 2011, this Administration urged the Senate to act on the Protocol as soon as practicable. Prior to urging the Senate to act, the U.S. Government conducted an extensive interagency review, which concluded that U.S. military practice is already consistent with the Protocol's provisions. The Executive Branch noted that joining the treaty would not only assist the United States in continuing to exercise leadership in the international

community in developing the law of armed conflict, but would also reaffirm the United States' commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

2. The Prohibition on Torture and Ill-Treatment

Torture and cruel, inhuman, or degrading treatment or punishment (CIDTP) are categorically prohibited under domestic and international law, including international human rights law and the law of armed conflict. These prohibitions exist everywhere and at all times.

a. The Prohibition on Torture and Ill-Treatment Under U.S. Domestic Law

Torture and ill-treatment are prohibited as a matter of U.S. domestic law. The Detainee Treatment Act of 2005 requires that "no individual in the custody or under the physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." This language means that under U.S. domestic law, every U.S. official, wherever he or she may be, is prohibited from engaging in torture or CIDTP.

Additionally, immediately upon taking office in January 2009, President Obama issued Executive Order 13491, which requires that any individual detained in any armed conflict who is in the custody or under the effective control of the United States or detained within a facility owned, operated, or controlled by the United States "shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment)."

Moreover, Executive Order 13491 requires that no individual in U.S. custody or under U.S. control in any armed conflict "shall . . . be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in [the] Army Field Manual." This requirement is applicable to all departments and agencies that conduct interrogations of terrorism suspects or detainees in armed conflict.

The President has stated repeatedly that waterboarding is torture, and the Army Field Manual explicitly prohibits it. Executive Order 13491 also revoked all executive directives, orders, and regulations inconsistent with that order.

The 2016 NDAA codified many of the key interrogation-related reforms required by that Executive Order. Specifically, it codified the requirement that an individual in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government, or detained within a facility owned, operated, or controlled by a U.S. department or agency, in any armed conflict, may not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. The 2016 NDAA also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.

b. The Prohibition on Torture and Ill-Treatment in International Law

The prohibition on torture is also binding as a matter of customary international law at all times on all States and all parties to an armed conflict, including the United States, regardless of a State's status as party or non-party to any particular treaty.

In the law of armed conflict, Common Article 3 of the 1949 Geneva Conventions explicitly prohibits torture and humiliating, degrading, or cruel treatment. Article 75 of Additional Protocol I explicitly prohibits torture of all kinds, whether physical or mental. Article

4(2)(a) of Additional Protocol II, which applies in non-international armed conflicts, prohibits violence to the life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment. Although the United States is not a party to Additional Protocol II, U.S. military practices, including its detention and interrogation practices, are consistent with its requirements, as noted above.

In international human rights law, the International Covenant on Civil and Political Rights prohibits torture and CIDTP. The United States has had international law obligations under this treaty as a State party since 1992. The UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) creates a variety of legal obligations related to torture and CIDTP that are binding on the United States as a matter of international law, including that each State Party must take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction, to ensure that all acts of torture are offences under its criminal law, and to promptly and impartially investigate credible allegations of torture in territory under its jurisdiction. The United States ratified the UNCAT in 1994, and enacted the Torture Convention Implementation Act to implement certain aspects of the Convention's requirements that were not already codified as part of U.S. domestic law.

The United States recognizes that a time of war does not suspend the operation of the UNCAT, which continues to apply even when a State is engaged in armed conflict. The law of armed conflict and the UNCAT contain many provisions that complement one another and are in many respects mutually reinforcing: for example, the obligations to prevent torture and CIDTP in the UNCAT remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict. In accordance with the doctrine of *lex specialis*, where these bodies of law conflict, the law of armed conflict would take precedence as the controlling body of law with regard to the conduct of hostilities and the protection of war victims.[198] However, a situation of armed conflict does not automatically suspend nor does the law of armed conflict automatically displace the application of all international human rights obligations. International human rights treaties, according to their terms, may also be applicable in armed conflict.

Additionally, the United States has stated that where the text of the UNCAT provides that obligations apply to a State Party in "any territory under its jurisdiction," such obligations extend to certain places beyond the sovereign territory of the State Party, and more specifically, "territory under its jurisdiction" extends to "all places that the State Party controls as a governmental authority." The United States currently exercises such control at the U.S. Naval Station at Guantanamo Bay, Cuba, and over all proceedings conducted there, and with respect to U.S.-registered ships and aircraft.[199]

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[198] For example, although Article 14 of the Convention contemplates an enforceable right to fair and adequate compensation for victims of torture, it would be anomalous under the law of armed conflict to provide individuals detained as enemy belligerents with a judicially enforceable individual right to a claim for monetary compensation against the Detaining Power for alleged unlawful conduct. The Geneva Conventions contemplate that claims related to the treatment of POWs and Protected Persons are to be resolved on a state-to-state level, and war reparations claims have traditionally been, and as a matter of customary international law are, the subject of government-to-government negotiations as opposed to private lawsuits.

[199] Besides these areas, whether the Convention applies with respect to particular territory is context-specific and would vary depending on the facts and circumstances. For example, occupied territory would likely be considered "territory under (a state's) jurisdiction" for the purposes of the Convention if the occupying power exercises the requisite control as a governmental authority in the occupied territory.

c. The Prohibition on Torture and Ill-Treatment in U.S. Policy

As discussed above, the 2016 NDAA and Executive Order 13491 require that individuals in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subject to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. The requirements of Army Field Manual 2-22.3 are binding on the U.S. military, as well as on all federal government departments and agencies, including the intelligence agencies, with respect to individuals in U.S. custody or under U.S. effective control in any armed conflict, without prejudice to authorized non-coercive techniques of Federal law enforcement agencies. The Army Field Manual explicitly prohibits threats, coercion, and physical abuse. Army Field Manual 2-22.3 must also remain available to the public, and any revisions must be made available to the public 30 days before taking effect.

Consistent with Executive Order 13491 and the 2016 NDAA, Army Field Manual 2-22.3 lists the 18 approved interrogation approaches. Those approaches include those that make use of incentives, emotions, and silence, as well as the limitations on their use. Additionally, Appendix M of Army Field Manual 2-22.3 lists the one approved restricted interrogation technique (separation) that may be authorized during the intelligence interrogation of detained "unlawful enemy combatants." Appendix M also includes the limitations on the use of this technique. Separation involves separating a detainee from other detainees and their environment. The use of this restricted technique requires Combatant Commander approval, and approval of each interrogation plan by the first General Officer or Flag Officer in the interrogator's chain of command.

In addition to the Army Field Manual, the Department of Defense has Department-wide policy directives in place to ensure humane treatment during intelligence interrogations and detention operations. For example, Department of Defense Directive 3115.09 requires that Department of Defense personnel and contractors promptly report any credible information regarding suspected or alleged violations of Department policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning. Reports must be promptly and thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate.

Additionally, Department of Defense Directive 2311.01E requires that "[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense Component shall report reportable incidents through their chain of command," including "[a] possible, suspected, or alleged violation of the law of war, for which there is credible information." All reportable incidents must be investigated and, where appropriate, remedied by corrective action. Moreover, under U.S. law and policy, the Department of Defense does not use contract interrogators except in limited circumstances.

Department of Defense policy also includes specific requirements with regard to humane treatment in medical care during the period of detention. Consistent with Additional Protocol II to the Geneva Conventions, Department of Defense policy requires that health care personnel charged with the medical care of detainees in armed conflict protect detainees' physical and mental health and provide appropriate treatment for disease. Upon arrival in any Department of

Defense detention facility, all detainees receive medical screening and any necessary medical treatment. The medical care that detainees receive throughout their time in U.S. custody is generally comparable to that which is available to U.S. personnel serving in the same location.

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Excerpts below come from Part Two, Section V of the Report, regarding transfers of detainees in armed conflict from U.S. custody and specifically, U.S. policy on humane treatment assurances from the country to which detainees are transferred.

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The United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured in that country. This includes transfers conducted in the context of an armed conflict. The U.S. Government's policy is reflected in a statutory statement of U.S. policy and memorialized in court submissions.

For individuals who are detained at Guantanamo Bay, a decision to transfer a detainee from Guantanamo prior to the end of hostilities also reflects the best judgment of U.S. Government experts, including counterterrorism, intelligence, and law enforcement professionals, that, to the extent a detainee poses a continuing threat to the United States, the threat has been or will be sufficiently mitigated—and the national interest will be served—if the detainee is transferred to another country under appropriate security measures. When contemplating such a transfer of a detainee to another country, the United States considers the totality of relevant factors relating to the individual to be transferred and the government in question, including any security and humane treatment assurances received and the reliability of those assurances.

* * * *

Humane treatment assurances may be sought in advance of a detainee transfer as a prudential matter or, in certain cases, where, if credible and reliable, the assurances could mitigate treatment concerns, such that the transfer would ultimately be consistent with applicable law and policy. The essential question in evaluating foreign government assurances relating to humane treatment in any post-transfer detention is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, it is more likely than not that the individual will be tortured in the country to which he or she is being transferred. There have been cases where the United States has considered the use of assurances but nevertheless declined to transfer individuals because the United States was not satisfied that even with assurances the transfer would be consistent with its obligations, policies, or practices.

Although the content of any specific set of assurances must be determined on a case-by-case basis, assurances should fundamentally reflect a credible and reliable commitment by the receiving State to treat the transferred individual humanely and that such treatment would be

consistent with applicable international and domestic law. The U.S. Government considers a number of factors in evaluating the adequacy of assurances offered by the receiving State, including, but not limited to, information regarding the judicial and penal conditions and practices of the receiving State; U.S. relations with the receiving State; the receiving State's capacity and incentives to fulfill its assurances; political or legal developments in that State; the State's record in complying with similar assurances; the particular person or entity providing the assurances; and the relationship between that person or entity and the entity that will detain and/or monitor the individual transferee's activity.

Where appropriate, the U.S. Government also seeks assurances or a commitment that the receiving State will permit credible, independent organizations or, in some circumstances, U.S. Government officials to have consistent, private access to transferred detainees for post-transfer humanitarian monitoring. The U.S. Government has raised concerns, as appropriate, regarding both treatment and the process under which prosecutions have been pursued post-transfer when concerns come to its attention, whether from U.S. Government-obtained information, the results of monitoring by non-governmental organizations, or other sources. The United States has also taken other measures, such as training guard forces in anticipation of transfers, and has suspended transfers, where appropriate.

In a case in which the United States became aware of credible allegations that humane treatment assurances were not being honored, the United States would take diplomatic or other steps to ensure that the detainee in question would be appropriately treated, and to make clear the bilateral implications of continued non-observance of commitments made to the U.S. Government. A failure to honor humane treatment commitments would be a significant factor in determining whether to make any future detainee transfers from U.S. custody to the custody of a foreign government against which such a finding had been made. In specific cases where the United States had concerns about whether these commitments would be honored by the receiving country, the United States would not proceed with transfers to that country predicated on such assurances until those concerns had been appropriately addressed.

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2. Guantanamo Closure Plan

On February 23, 2016, the press secretary for the Department of Defense, Peter Cook, issued a statement on the submission to Congress of a plan for the closure of the detention facility at Guantanamo Bay. The statement is excerpted below and available at http://www.defense.gov/News/News-Releases/News-Release-View/Article/671225/statement-by-pentagon-press-secretary-peter-cook-on-submission-of-guantanamo-cl.

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The Department of Defense formally submitted the administration's plan for closing the Guantanamo Bay detention facility to Congress today. As the president has stated, responsibly closing the Guantanamo detention facility is a national security imperative. For this reason,

among others, Secretary Carter supports the president's commitment to bringing a responsible end to detention at Guantanamo.

Implementing this plan will enhance our national security by denying terrorists a powerful propaganda symbol, strengthening relationships with key allies and counterterrorism partners, and reducing costs. As the president has said, it "makes no sense" to keep open a facility that "the world condemns and terrorists use to recruit."

The plan provides a way ahead for closing the detention facility at Guantanamo Bay, which will markedly enhance our national security, while continuing to treat all detainees in U.S. custody in a manner that is consistent with international and domestic law. The plan has four primary tenets:

1. Securely and responsibly transferring to foreign countries detainees who have been designated for transfer by the president's national security team;
2. Continuing to review the threat posed by those detainees who are not currently eligible for transfer through the Periodic Review Board (PRB);
3. Identifying individualized dispositions for those who remain designated for continued law of war detention, including possible Article III, military commission, or foreign prosecutions;
4. Working with the Congress to establish a location in the United States to securely hold detainees whom we cannot at this time transfer to foreign countries or who are subject to military commission proceedings.

The plan does not endorse a specific facility to house Guantanamo detainees who cannot be safely transferred to other countries at this time. The administration seeks an active dialogue with Congress on this issue and looks forward to working with Congress to identify the most appropriate location as soon as possible.

The plan does include ranges of costs for closure, including low-end and high-end potential one-time costs and recurring costs. It also discusses savings that would be achieved by closure. The savings range reflects differing variables, like location selected and differing options in detention models.

Recurring costs at Guantanamo would be between $65 million and $85 million higher annually than at a U.S. facility. The one-time transition costs would be offset within three to five years due to the lower operating costs of a U.S. facility with fewer detainees. Closing Guantanamo could therefore generate at least $335 million in net savings over 10 years and up to $1.7 billion in net savings over 20 years.

Secretary Carter remains firmly committed to responsibly ending detention operations at Guantanamo Bay, and this plan gives the department an opportunity to do so in a way that is consistent with our interests, laws, and values. He looks forward to working with Congress on this effort.

The administration recognizes that there are currently statutory provisions restricting the transfer of Guantanamo detainees to the United States and the use of funds to build or modify facilities for such transfers. The administration looks forward to working with Congress to lift those restrictions.

The plan is available here: http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf.

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3. Transfers

The number of detainees remaining at Guantanamo Bay declined further in 2016 as part of U.S. government efforts to close the facility. As of January 6, 2016, 105 detainees remained at Guantanamo Bay. As of December 4, 2016, there were 59.[*]

On January 6, 2016, the Department of Defense announced the transfer of Mahmud Umar Muhammad Bin Atef and Khalid Muhammad Salih Al-Dhuby from the detention facility at Guantanamo Bay to the Government of Ghana. Bin Atef and Al-Dhuby were approved for transfer by the Guantanamo Review Task Force. DOD release no. NR-003-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/641768/detainee-transfers-announced. On January 8, DOD announced the repatriation of Faez Mohammed Ahmed Al-Kandari to Kuwait. Al-Kandari was recommended for transfer by the Periodic Review Board established by E.O. 13567. DOD release no. NR-008-17, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/641982/detainee-transfer-announced. On January 11, DOD announced the repatriation of Muhammed Abd Al Rahman Awn Al-Shamrani to Saudi Arabia. His transfer was recommended by the Periodic Review Board. DOD release no. NR-010-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/642178/detainee-transfer-announced. On January 14, DOD announced the transfers of Fahed Abdullah Ahmad Ghazi, Samir Naji al-Hasan Muqbil, Adham Mohamed Ali Awad, Mukhtar Yahya Naji al-Warafi, Abu Bakr Ibn Muhammad al-Ahdal, Muhammad Salih Husayn al-Shaykh, Muhammad Said Salim Bin Salman, Said Muhammad Salih Hatim, Umar Said Salim al-Dini, and Fahmi Abdallah Ahmad Ubadi al-Tulaqi—all of whom had been approved for transfer by the Guantanamo Review Task Force—to the Government of Oman. DOD release no. NR-016-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/643066/detainee-transfers-announced. On January 21, DOD announced the transfer of Tariq Mahmoud Ahmed Al Sawah to the Government of Bosnia and Herzegovina after his transfer received approval by the Periodic Review Board. DOD release no. NR-025-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/643910/detainee-transfer-announced. Also on January 21, DOD announced the transfer of Abd al-Aziz Abduh Abdallah Ali Al-Suwaydi to the Government of Montenegro after the transfer was approved by the Guantanamo Review Task Force. DOD release no. NR-026-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/643912/detainee-transfer-announced.

On April 4, 2016, Secretary Kerry issued a press statement expressing gratitude to the Republic of Senegal for offering humanitarian resettlement to two former Guantanamo detainees. See press statement, available at http://2009-2017.state.gov/secretary/remarks/2016/04/255449.htm. Also on April 4, 2016, the Defense Department announced the transfer of the two Libyan nationals, Salem Abdu Salam Ghereby and Omar Khalif Mohammed Abu Baker Mahjour Umar. Ghereby was

[*] Editor's note: As of January 19, 2017, 41 detainees remained at Guantanamo Bay.

approved for transfer by the Guantanamo Review Task Force and Umar's transfer was recommended by the Periodic Review Board. DOD release no. NR-118-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/712382/detainee-transfers-announced. On April 16, DOD announced the transfer of Ahmed Umar Abdullah Al-Hikimi, Abdul Rahman Mohammed Saleh Nasir, Ali Yahya Mahdi Al-Raimi, Tariq Ali Abdullah Ahmed Ba Odah, Muhammed Abdullah Muhammed Al-Hamiri, Ahmed Yaslam Said Kuman, Abd al Rahman Al-Qyati, Mansour Muhammed Ali Al-Qatta, and Mashur Abdullah Muqbil Ahmed Al-Sabri to Saudi Arabia, following their approval for transfer by the appropriate review process. DOD release No. NR-135-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/722845/detainee-transfers-announced.

On June 22, 2016, DOD announced the transfer of Abdel Malik Ahmed Abdel Wahab Al Rahabi to the Government of Montenegro. Transfer was recommended by the Periodic Review Board. DOD release no. NR-234-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/810253/detainee-transfer-announced.

On July 10, 2016, DOD announced the transfer of Fayiz Ahmad Yahia Suleiman from the detention facility at Guantanamo Bay to the Government of Italy. Transfer was recommended by the Guantanamo Review Task Force. DOD release no. NR-258-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/832604/detainee-transfer-announced. On July 11, 2016, Secretary Kerry announced that Serbia had offered humanitarian resettlement to two former Guantanamo detainees. July 11, 2016 press statement, available at http://2009-2017.state.gov/secretary/remarks/2016/07/259522.htm. The transfer of Tajik national Muhammadi Davlatov was approved by the Guantanamo Review Task Force, and the transfer of Yemeni national Mansur Ahmad Saad al-Dayf was recommended by the Periodic Review Board process. DOD release no. NR-260-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/832874/detainee-transfers-announced.

On August 15, 2016, DOD announced the transfer of 15 detainees to the United Arab Emirates: Abd al-Muhsin Abd al-Rab Salih al-Busi, Abd al-Rahman Sulayman, Mohammed Nasir Yahi Khussrof Kazaz, Abdul Muhammad Ahmad Nassar al-Muhajari, Muhammad Ahmad Said al-Adahi, Abdel Qadir al-Mudafari, Mahmud Abd Al Aziz al-Mujahid, Saeed Ahmed Mohammed Abdullah Sarem Jarabh, Mohammed Kamin, Zahar Omar Hamis bin Hamdoun, Hamid al-Razak (aka Haji Hamidullah), Majid Mahmud Abdu Ahmed, Ayub Murshid Ali Salih, Obaidullah, and Bashir Nasir Ali al-Marwalah. Six of the 15 were approved for transfer by the Guantanamo Review Task Force and the other nine by the Periodic Review Board process. DOD release no. NR-298-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/915216/detainee-transfers-announced.

On October 17, 2016, DOD announced the transfer of Mohamedou Ould Slahi to the Government of Mauritania. Transfer was recommended by the Periodic Review Board. DOD release no. NR-371-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/975922/detainee-transfer-announced.

On December 4, 2016, DOD announced the transfer of Shawqi Awad Balzuhair to the Government of Cabo Verde. Transfer was recommended by the Periodic Review Board. DOD release no. NR-426-16, available at https://www.defense.gov/News/News-Releases/News-Release-View/Article/1019445/detainee-transfer-announced.

4. U.S. court decisions and proceedings

a. Detainees at Guantanamo: Habeas Litigation

(1) Al Razak v. Obama

As discussed in *Digest 2015* at 775-76, several detainees filed habeas petitions asserting that they were being unlawfully detained because hostilities in Afghanistan had ended. In one such case, *Al Razak v. Obama*, No. 05-1601 (D.D.C.), the district court issued its decision denying the detainee's petition for habeas on March 29, 2016. The court's opinion is excerpted below (with footnotes omitted). While the case name is *Al Razak*, the detainee explained that name was erroneous and the court's opinion refers to him by the name, Haji Hamdullah. The opinion is available in full at at https://www.state.gov/s/l/c8183.htm.

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Petitioner's Petition raises two issues: whether "active hostilities" are considered to have ended, · and who makes that determination. Both parties appear to agree that the Court should rely on the President's decision, but differ as to how to interpret President Obama's position. Petitioner relies on speeches made by the President declaring an end to combat operations in Afghanistan, … while Respondents rely on the assertions by individuals in the political branches that active hostilities continue. …

While entitled to some deference, the President's position is not dispositive. Our Court of Appeals has stated that, under separation of powers principles, "[t] he determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on that matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." *Al Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010) (citing *Ludecke v. Watkins*, 335 U.S. 160, 168-70 & n.13 (1948)). But, the *Hamdi* plurality recognized that deference to the Executive must have limits. *Hamdi*, 542 U.S. at 530 ("history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present [an immediate threat to national security]"). As Judge Lamberth noted in *Al Warafi v. Obama*, the *Hamdi* Court held that the AUMF's detention authorization turns partly on whether "the record establishes that United States troops are still involved in active combat in Afghanistan." *Al Warafi v. Obama*, No. 09-CV-2368, 2015 WL 4600420 at *3 (D.D.C. July 30, 2015) (emphasis added in *Al Warafi*) (quoting *Hamdi*, 542 U.S. at 521). As Judge Lamberth indicated, a "record" implies review by a court, and suggests that *Hamdi* stands for the proposition that a court can and must examine the issue of whether

active combat continues. *Id*. The Court does not address Respondents' separation of powers argument at this time because the Court finds that the President has not declared the end of active hostilities and because the Court agrees with Respondents' position that active hostilities continue in Afghanistan.

* * * *

ANALYSIS

A. Cessation of Active Hostilities

The crux of the Parties' disagreement is whether detention is authorized for the duration of "active combat" or "active hostilities." Compare *Hamdi*, 542 U.S. at 521 ("If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force'.") with *Hamdi*, 542 U.S. at 520 ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities."); see also Third Geneva Convention, Art. 118 (prisoners of war must be released "after the cessation of active hostilities").

The "cessation of active hostilities" standard was first adopted in the 1949 Geneva Conventions following the delayed repatriation of prisoners of war in earlier armed conflicts. See 3 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War, 541-43 (J. Pictet gen. ed. 1960) ("Third Convention Commentary").

The two predecessor multilateral law-of-war treaties to the 1949 Geneva Conventions required repatriation of prisoners of war only "after the conclusion of peace." See *id*. at 541. Repatriation delays arose after World Wars I and II due to a substantial gap in time between the cessation of active hostilities and the signing of formal peace treaties. *Id*. The "cessation of active hostilities" requirement sought to correct this problem, thereby making repatriation no longer contingent on a formal peace accord or political agreement between the combatants. *Id*. at 540, 543, 546- 47.

In light of this history, Petitioner correctly interprets the Third Geneva Convention's "cessation of active hostilities" so that final peace treaties are no longer a prerequisite to mandatory release of prisoners of war. Based on that change, Petitioner argues that the Third Geneva Convention contemplates the possibility that some degree of conflict might continue even after the core of the fighting has subsided. …

Petitioner argues that cessation of active hostilities requires only an end to active combat. … Petitioner reaches this conclusion by comparing the language of the Third Geneva Convention with language in Articles 6 and 133 of the Fourth Geneva Convention. …Article 133 of the Fourth Geneva Convention addresses the internment of civilians in wartime and provides that such internment "shall cease as soon as possible after the close of hostilities." Fourth Geneva Convention art. 133. Relying on the Fourth Convention's Commentary, Petitioner attempts to show that "close of hostilities" could be a point in time that might occur after "cessation of active hostilities." The Court is not convinced. Indeed, the Commentary Petitioner cites acknowledges that the provisions are similar and "should be understood in the same sense." 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 514-15 (J. Pictet gen. ed. 1960) ("Fourth Convention Commentary"). Petitioner also looks to Article 6 of the Fourth Geneva Convention, which states that application of the Fourth Geneva Convention "shall cease on the close of military operations." Fourth Geneva Convention, art. 6. The phrase "close of military operations" was understood to mean "the final end of all fighting between all those concerned." Fourth Convention Commentary at 62. The

Court agrees with Petitioner that "cessation of active hostilities" is distinct from "close of military operations," and that active hostilities can cease prior to the close of military operations. This distinction is consistent with the differing purposes of Article 6 (defining the period of time in which the Fourth Geneva Convention, in its entirety, applies) and Article 118 (focusing on detention specifically). But, it does not necessarily follow that "cessation of active hostilities" therefore requires only an end to combat operations, as Petitioner argues. …

For the foregoing reasons, the Court concludes that the appropriate standard is cessation of active hostilities and that active hostilities can continue after combat operations have ceased. But, cessation of active hostilities is not so demanding a standard that it requires total peace, signed peace agreements, or an end to all fighting.

B. Mr. Hamdullah's Detention Under the AUMF

Next, the Court looks to whether active hostilities have, in fact, ceased. Petitioner relies heavily on the Bilateral Security Agreement and the President's speeches regarding the end of the combat mission and war in Afghanistan in support of his argument that active hostilities have ceased.

Petitioner relies on the Bilateral Security Agreement's requirement that the United States receive consent from the Afghan government prior to conducting combat operations in Afghanistan as evidence that combat operations have ceased. … Even assuming this to be true, the Court has already determined that "active hostilities" are not the same as "combat operations." See *supra*, Section III.A. The Bilateral Security Agreement is not evidence that active hostilities have ceased. Respondents add that although the United States has ended its combat mission in Afghanistan, this shift does not mark the end of active hostilities in Afghanistan, and indeed, fighting still continues. …

Petitioner cites to speeches by the President, including his 2015 State of the Union Address and his May 2014 Statement on Afghanistan, but notably, none of these statements discuss the end of "active hostilities." … The end of the combat mission is not synonymous with the end of active hostilities. See *supra*, Section III.A. Indeed, the President has expressly stated that active hostilities continue. …

Petitioners point to greatly reduced troop numbers in Afghanistan as evidence of cessation of active hostilities. Respondents counter that the continued presence of nearly 10,000 U.S. troops in Afghanistan is actually evidence of ongoing active hostilities. …While troop numbers alone are not sufficient to determine whether active hostilities persist, … a United States presence of nearly 10,000 troops certainly supports the conclusion that ongoing active hostilities exist.

Respondents provide numerous examples of ongoing conflict in Afghanistan and instances of hostile forces engaging U.S. personnel. … In 2015, there were over 360 "close air support missions carried out by the United States in Afghanistan involving the release of at least one weapon." *Id.* at 16. Coalition forces conducted air strikes in southern Afghanistan that destroyed a large al-Qaeda training camp and U.S. armed forces continue to participate in certain ground operations. *Id*. at 17.

"The Geneva Conventions require release and repatriation only at the 'cessation of active hostilities.'" *Al-Bihani*, 590 F .3d at 874 (citing Third Geneva Convention art. 118). As this Court has noted, "The Supreme Court and the D.C. Circuit have repeatedly held that detention under the AUMF is lawful for the duration of active hostilities." *Al Odah v. United States*, 62 F. Supp. 3d 101, 114 (D.D.C. 2014). While what constitutes "active hostilities" has never been clearly defined, Respondents have provided convincing examples of ongoing hostilities in

Afghanistan. Given this evidence, combined with the deference accorded the Executive's determination of when hostilities have ceased, the Court concludes that active hostilities continue in Afghanistan. Mr. Hamdullah's continued detention, therefore, is both authorized under the AUMF and does not violate the Third Geneva Convention.

* * * *

(2) Suleiman v. Obama

In *Suleiman v. Obama,* the detainee filed a habeas petition in December 2015, arguing he must be released because hostilities in Afghanistan have ended. The United States filed a classified motion to dismiss on February 5, 2016. Excerpts follow (with footnotes omitted) from the unclassified U.S. reply brief filed on April 28, 2016. The U.S. reply brief is available in full at https://www.state.gov/s/l/c8183.htm. The case was subsequently dismissed as moot after the detainee was transferred.

* * * *

Throughout the opposition brief, Petitioner argues that the Court should order his release because the President has said in speeches that the "war against the Taliban is over," Pet'r's Opp'n at 10 (emphasis added), or that the "combat mission in Afghanistan is over," *id*. at 11 (emphasis added). The appropriate legal standard, however, is whether active hostilities are ongoing.

Article 118 of the Third Geneva Convention, which is entitled "Release and Repatriation of Prisoners of War at the Close of Hostilities[,]" states that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." See Geneva Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 3406, Article 118 (emphasis added). Relying on this provision in construing the detention authority provided by the AUMF, the Supreme Court in *Hamdi v. Rumsfeld* explained that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." 542 U.S. 507, 520 (plurality opinion) (citing Third Geneva Convention, art. 118).

Indeed, the Court of Appeals has applied the "active hostilities" standard in response to arguments by a Guantanamo Bay detainee that his law of war detention was no longer justified because the conflict in which he was captured had purportedly ended. In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), the petitioner argued that he "must now be released according to longstanding law of war principles because the conflict with the Taliban has allegedly ended." *Id*. at 874 (emphasis added). The Court of Appeals rejected that argument and held that "[t]he Geneva Conventions require release and repatriation only at the 'cessation of active hostilities.'" *Id*. (quoting Third Geneva Convention, art. 118) (emphasis added). The Court of Appeals explained that "the Conventions use the term 'active hostilities' instead of the terms 'conflict' or 'state of war' found elsewhere in the document" and found that usage "significant," concluding that "[t]he Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops." *Id.*

Following this precedent, every Judge on this Court who has considered the issue has concluded that active hostilities is the proper standard for evaluating the lawfulness of detention under the AUMF. Most recently, on March 29, 2016, Judge Kessler applied the active hostilities standard in denying a motion filed by a Guantanamo Bay detainee who sought release based on the purported end of hostilities. See *Razak v. Obama*, No. 05-CV-1601 (GK), 2016 WL 1270979, at *5 (D.D.C. Mar. 29, 2016) ("the Court concludes that the appropriate standard is cessation of active hostilities"). This decision follows earlier decisions by Judges Lamberth and Kollar-Kotelly reaching the same conclusion. See *Al Warafi v. Obama*, No. 09-CV-2368 (RCL), 2015 WL 4600420, at *2, 7 (D.D.C. July 30, 2015), vacated as moot, No. 15-5266 (D.C. Cir. Mar. 4, 2016); *Al-Kandari v. United States*, No. 15-CV-329 (CKK), Memorandum Opinion at 19-21 (D.D.C. Aug. 31, 2015) (Resp'ts' Ex. 1), vacated as moot, No. 15-5268 (D.C. Cir. Mar. 4, 2016). Petitioner has provided no basis for this Court to deviate from the standard applied in these decisions.

Petitioner ignores this well-established precedent and asks the Court to adopt a new legal standard that is contrary to both law and common sense. But the end of a "combat mission" or "war" is not necessarily the same as an end of "active hostilities." See The Handbook of Humanitarian Law in Armed Conflicts § 732 (Dieter Fleck ed., 1995) (explaining that "cessation of active hostilities" involves a situation where "the fighting has stopped"); Int'l Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War, art. 118 at 547 (J. Pictet ed., 1960) (release is only required when "the fighting is over") ("Third Geneva Convention Commentary")…. Further, Petitioner's proposed standard, in which release of enemy belligerents would be legally required before the end of the fighting, would undermine the "fundamental" purpose of law of war detention, which is "to prevent a combatant's return to the battlefield." *Hamdi*, 542 U.S. at 519; see Third Geneva Convention Commentary at 546-47 ("In time of war, the internment of captives is justified by a legitimate concern—to prevent military personnel from taking up arms once more against the captor State."). Nothing in the commentary, history, or development of Article 118's "active hostilities" standard suggests that it should be understood to require release of enemy belligerents prior to the end of fighting.

Petitioner claims that because he did not fight against U.S. forces, "there is no battle to which he could return" and his detention is inconsistent with the principles underlying law-of-war detention. … But this argument overlooks the well-established principle that detention of enemy belligerents may last until the cessation of active hostilities, and that the purpose of that detention is to prevent return to the battlefield and not to a specific battle or previous engagement with particular forces. As this Court previously found, Petitioner traveled from Yemen to Afghanistan with assistance of the Taliban, stayed at Taliban guesthouses, and remained in the front lines with Taliban forces while in possession of a weapon. See *Sulayman*, 729 F. Supp. 2d at 44, 53. Petitioner's continued detention is consistent with the purpose of law-of-war detention as it prevents him, at a minimum, from the rejoining the ranks of the Taliban forces that continue to engage in active hostilities against U.S. forces in Afghanistan. …

Petitioner also incorrectly argues that the Court of Appeals decision in *Al-Maqaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2013), supports his view that release of enemy belligerents is required when the President declares that the "war," as opposed to "active hostilities," is over. … *Al-Maqaleh* addressed whether the Court had jurisdiction over habeas corpus petitions filed by detainees held by the United States at Bagram Military Base in Afghanistan. See 738 F.3d at 328. In answering that question in the negative, the Court of Appeals evaluated the practical obstacles to resolving the petitions and concluded that "war-borne practical obstacles"

overwhelmingly weighed against extending habeas jurisdiction to detainees held in Afghanistan. *Id*. at 341. In reaching this conclusion, the Court of Appeals emphasized the fact that the "United States remains at war in Afghanistan" and cited well-established authority dating back to the 19th century that "[w]hether an armed conflict has ended is a question left exclusively to the political branches." *Id*. The Court of Appeals had no occasion in that case to consider, and certainly did not address, the active hostilities standard or the point in time when release of enemy belligerents would be required under the law of war. Consequently, the fact that the Court of Appeals used the terms "war" and "armed conflict" in the context of describing the general legal principle that the political branches have the authority to say when armed conflicts end does not undermine *Al-Bihani*, *Hamdi*, or the other extensive authority Respondents have cited to support application of the active hostilities standard in the current context. The Court should reject Petitioner's argument that *Al-Maqaleh*, a case addressing an entirely separate question, somehow controls this case or overrules the more specific authority from the detention context applying the active hostilities standard.

Additionally, Petitioner contends that he should be released because a "conflict of a different kind is now underway in Afghanistan" and the United States' current mission in Afghanistan—Operation Freedom's Sentinel—marked the end of the "relevant conflict" or "particular conflict" in which he was captured. See Pet'r's Opp'n at 4-9 (quoting *Hamdi*, 542 U.S. at 518, 521). But by arguing that the terms "relevant conflict" or "particular conflict" as used in *Hamdi* apply to a particular military mission rather than active hostilities against al-Qa'ida, Taliban, and associated forces, Petitioner misconstrues the meaning of those terms and attributes greater meaning to these phrases than they can bear in context. As discussed previously, the *Hamdi* Plurality, in addressing the question of when release is required, cited the language from Article 118 to answer, "no longer than active hostilities." 542 U.S. at 520. The Plurality's later use of the phrases "particular conflict" and "relevant conflict" when discussing detention authority in the context of ongoing hostilities does not undermine that answer; rather, in context, those phrases primarily refer to the parties involved in the hostilities and, in all events, not to a particular military mission. *Id*. at 518 (explaining that "individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network," are detainable "for the duration of the particular conflict in which they were captured"); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-631 (2006) (discussing the "relevant conflict" by reference to the parties to the conflict, such as the United States, the Taliban, and al-Qa'ida). The "relevant conflict" here is the conflict against al-Qa'ida, Taliban, and associated forces, and active hostilities against those groups continue.

Indeed, as a common sense matter, there can be no merit to the contention that Petitioner should be released simply because the United States announced a transition of its mission in Afghanistan at the beginning of 2015, and correspondingly renamed the current military mission "Freedom's Sentinel." To be sure, the transition of the United States' military mission in Afghanistan at the beginning of 2015 is a significant milestone, but it reflects just that, a transition, and not a cessation of active hostilities. Armed conflict is unpredictable, and the nature of hostilities can change dramatically in the course of any conflict, as evidenced by the increase in hostilities in Afghanistan during 2015. See Respt's' Mot. at 10-23; see also United Nations Report: The Situation in Afghanistan and its Implications for International Peace and Security at 4-6 (Mar. 7, 2016) (Exhibit 57) (stating that "the security situation [in Afghanistan] deteriorated further in 2015" and "Taliban activities continued at a rapid pace" between December 2015 and March 2016). Accordingly, it should be unsurprising that military missions

undergo transitions as they are adjusted to respond to current facts and circumstances, which is precisely what occurred at the beginning of 2015 when the United States transitioned to a support and counterterrorism mission in Afghanistan, in which active hostilities remain ongoing. To require the release of enemy belligerents at each transition point within an ongoing armed conflict would defy common sense and conflict with the purpose of law of war detention, which is "to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518.

In fact, Petitioner's argument is the same one the Court of Appeals rejected in *Al-Bihani*. See 590 F.3d at 874 (rejecting detainee's argument that "each successful campaign of a long war" required release because, if accepted, such a rule would be "a Pyrrhic prelude to defeat" and "would trigger an obligation to release Taliban fighters captured in earlier clashes" and result in "constantly refresh[ing] the ranks" of enemy forces"). Like Petitioner here, the petitioner in *Al-Bihani* argued that the conflict had reached a point that necessitated his release because the conflict "has allegedly ended." *Id*. ("Al-Bihani contends the current hostilities are a different conflict, one against the Taliban reconstituted in a non-governmental form" and argues that release was required when the Taliban was removed as the governing power in Afghanistan). Petitioner here identifies a different alleged end point—the transition of the U.S. mission in 2015 to Operation Freedom's Sentinel—but his argument suffers the same flaw the Court of Appeals identified in *Al-Bihani*: active hostilities have not ceased. The Court of Appeals rejected the attempt in that case to "draw such fine distinctions" regarding the point at which release is required under the laws of war and, instead, reaffirmed the longstanding rule that "release is only required when the fighting stops." *Id.* As in *Al-Bihani*, Petitioner has merely identified a transition point in the armed conflict, not the end of active hostilities.

Further, in *Al-Kandari*, Judge Kollar-Kotelly considered and rejected the same argument regarding the "relevant conflict" language in *Hamdi* that Petitioner raises here. See *Al-Kandari*, Memorandum Opinion at 16 ("The Court rejects Petitioner's argument that the relevant conflict is Operation Enduring Freedom."). Agreeing with Respondents, Judge Kollar-Kotelly concluded that the "relevant conflict at issue in the instant action is the conflict in Afghanistan involving al-Qaeda, the Taliban, and its associated enemy forces." *Id*. "As such, the fact that there has been a transition from Operation Enduring Freedom to Operation Freedom's Sentinel does not necessarily signal an end of the 'particular conflict.'" *Id*. at 16-17. This Court should follow the same approach in this case.

* * * *

(3) Davliatov v. Obama

In *Davliatov*, the detainee asserted that the government's authority to detain him under the law of war had unraveled because the practical circumstances of the current conflict are unlike those of previous armed conflicts, and argued in addition that his detention is arbitrary and violates the AUMF and the Due Process Clause. Excerpts follow (with footnotes omitted) from the U.S. reply brief, which was filed on February 10, 2016. The public versions of the opening brief filed in 2015 and the reply brief are both available at https://www.state.gov/s/l/c8183.htm. The case was dismissed as moot on August 1, 2016, following the detainee's transfer.

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I. Petitioner's Continued Detention Remains Consistent With The Laws Of War

Binding precedent establishes that Petitioner's continued detention remains authorized by the AUMF as informed by the laws of war. Petitioner's attempts to distinguish or limit this precedent fail. Most notably, Petitioner cannot be considered a civilian under the laws of war, *Gherebi*, 609 F.Supp.2d at 65-66, but rather as part of enemy armed forces, he is properly detainable until the cessation of active hostilities, *Hamdi*, 542 U.S. at 521. Those hostilities remain ongoing. Similarly, Petitioner's contentions that the support of the traditional laws of war for his continued detention has "unraveled," and that the government has cherry-picked the laws of war upon which it relies, are not accurate. Accordingly, Petitioner's continued detention despite his long-standing designation for transfer remains fully authorized under the AUMF.

1. As the government has argued, binding precedent establishes that Petitioner's continued detention is fully consistent with the laws of war. Resps' Opp'n at 17-18. To reiterate briefly, the Court of Appeals has consistently held that an individual may be detained under the AUMF if he was part of al Qaeda, the Taliban, or associated forces at the time of his capture. *Uthman*,637 F.3d at 401-402; *al-Bibani*, 590 F.3d at 872. The Supreme Court has held that the government may continue to lawfully detain such individuals under the AUMF, as informed by the laws of war, while active hostilities are ongoing. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality op.) (detention "for the duration of the particular conflict in which they were captured is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use"); see *id*. at 521 (AUMF includes the authority to detain for the duration of the relevant conflict, and …is based on longstanding law-of-war principles."). Directly pertinent here, the Court of Appeals has held that a discretionary designation of a detainee for possible transfer by the Executive does not affect the legality [of] his continued detention under the AUMF as informed by the laws of war pending that transfer. *Almerfedi*, 654 F.3d at 4 n. 3. Further, the level of threat a detainee may pose to the United States or its coalition partners if released—and the extent to which that threat may be mitigated by appropriate security assurances—does not affect the legality of his continued detention under the AUMF. *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cjr. 2011) (question of whether a detainee would pose a risk to national security if released is irrelevant to whether he may continue to be detained under the AUMF).

Petitioner fits squarely within this precedent. First, the government has determined that he was a part of al Qaeda, the Taliban, or associated forces. Resps' Opp'n at 4-5. Accordingly, he is detainable under the AUMF. See, *e.g. Uthman*, 637 F.3d at 401-402. Second, hostilities in the conflict for which Petitioner is detained continue in Afghanistan against al Qaeda, the Taliban, and associated forces. Resps' Opp'n at 26-32. Consequently, he may continue to be detained until those hostilities end. *Hamdi*. 542 U.S. at 5181 521; *al-Bihani*. 590 F.3d at 874. And third, although Petitioner has been designated for transfer, pursuant to *Almerfedi* that designation does not alter the legality of his continued detention. 654 F.3d at 4 n.3. For these reasons alone, the Court should deny Petitioner's request for an order of release and dismiss his second habeas petition. *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (district judges are obligated to apply controlling Circuit precedent until that precedent is overturned by the Court of Appeals sitting en banc or by the Supreme Court).

2. That the government's detention authority under the AUMF is informed by the laws of war provides no basis to disregard this precedent. Rather, Petitioner's continued detention despite his designation for transfer is fully consistent with the laws of war.

As the government explained, because Petitioner is an unprivileged enemy belligerent detained in a non-international armed conflict, he is entitled to the protections of Common Article Three of the Geneva Conventions, that is, to humane treatment. Resps' Opp'n at 24-25; see *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-31 (2006) (noting that Common Article Three applies to Guantanamo Bay detainees through the AUMF). As the Supreme Court has explained, such detention is, "by universal agreement and practice, [an] important incident[] of war," the purpose of which is not to punish but merely "to prevent captured individuals from returning to the field of battle." *Hamdi*, 542 U. S. at 518. Nothing in Common Article Three prohibits detention until the cessation of hostilities, notwithstanding a detaining power's discretionary determination that it may be able to release a detainee before that time under appropriate conditions. See Resps' Opp'n at 22-26; see also *al-Bihani*, 590 F.3d at 874. Further, as with the Supreme Court's holding in *Hamdi*, the government's understanding and exercise of its detention authority—including its duration—is informed directly by the laws of war, specifically Article 118 of the Third Geneva Convention. Resps' Opp'n at 23-24; see *Hamdi*, 542 U.S. at 520 (citing GC III, art. 118). Although that provision, which requires the release of prisoners of war upon the cessation of active hostilities, is inapplicable as a matter of law to individuals, like Petitioner, who are detained in the context of a non-international armed conflict, it reflects the same rationale for detention that operates in both international and non-international armed conflict, namely to prevent the return of captured fighters to the battlefield.

Petitioner cannot escape this result by now suggesting that he should be considered a civilian and, so, that the Fourth Geneva Convention, rather than the Third, should inform the basis for his detention. Petr's Opp'n at 18-20. First, in *Gherebi v. Obama*, 609 F.Supp.2d 43 (D.D.C. 2009), this Court squarely rejected the very premise that Petitioner asserts here, namely that there are no "combatants" in non-international armed conflicts such as the one involved here, but only government forces and civilians. *Id*. at 62-66. The proper distinction for non-international armed conflicts is between enemy armed forces and civilians. *Id*. at 65-66. The Court noted that enemy armed forces are those parties and individuals in actual armed conflict with each other, which may include government forces on one side and intra-national rebels (in a civil war) or transnational fighters (in a conflict such as this) on the other. See *id*. at 66-67. Civilians, in contrast, are those who are not members of enemy armed forces (either formally or functionally by their actions). See *id*. The government detained Petitioner as part of enemy armed forces—al Qaeda, the Taliban, or associated forces—and he does not challenge the basis of his detention here. See Petr's Mot. at 15 (noting he does not concede but does not challenge the merits of his detention here). Accordingly, Petitioner cannot claim here to be a civilian.

To be sure, the Court of Appeals subsequently established the detention-authority standard applicable in the Guantanamo cases, rejecting any requirement, such as imposed in *Gherebi*, that an individual must be shown to be part of the "command structure" of enemy forces. See *Awad*, 608 F.3d at 11. But the Court of Appeals did not disturb this Court's understanding of the parties to this conflict, namely enemy armed forces and civilians. Rather, that understanding is fully consistent with the detention standard applicable in this Circuit, which permits the detention of individuals who are part of or substantially supporting al Qaeda, the Taliban, or associated forces. *Id*. Consequently, Petitioner's argument that he should be

considered a civilian under the laws of war should be rejected for the reasons explained in *Gherebi*.

And lastly, there is also no merit in Petitioner's contention that his detention should be assessed under the Fourth Geneva Convention because he does not qualify as a prisoner of war under the Third Geneva Convention. In holding that the AUMF authorizes detention until the end of hostilities, the Supreme Court in *Hamdi* specifically cited to Article 118 of the Third Geneva Convention, without regard to whether *Hamdi* was entitled to prisoner-of-war status. 542 U.S. at 520. Far from "cherry picking" international-armed-conflict principles, as Petitioner contends, Petr's Opp'n at 16, the government is adhering to Supreme Court precedent by looking to the Third Geneva Convention to inform its authority to detain Petitioner. Nor has the support of the traditional laws of war for Petitioner's continued detention "unraveled." See Petr's Opp'n at 14-15. First, the length of the current conflict is irrelevant to the legal analysis. The laws of war permit detention until the cessation of hostilities for both prisoners of war and unprivileged enemy combatants. Resps' Opp'n at 22-26 (noting that Petitioner's detention is consistent with the laws of war, including Common Article Three). The purpose of this continued detention is to prevent detained combatants from returning to the battlefield after their release. *Hamdi*, 542 U.S. at 518. Here, the conflict and hostilities for which Petitioner is detained continue, see Resps' Opp'n at 28-32 & n.18, so this rationale remains fully applicable. See *Ali*, 736 F.3d at 552 ("the Constitution allows detention of enemy combatants for the duration of hostilities" and "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention"). Further, that the end date of the current conflict is not known is also irrelevant: the lengths of all armed conflicts are indeterminate until the fighting stops.

Second, as for Petitioner's claim that the character of this conflict has changed—that the fighting now includes new enemies in new locations—the fact remains that hostilities continue against al Qaeda, the Taliban, and associated forces in Afghanistan. Resps' Opp'n at 26-32 & Exs. 5-8. (confirming that hostilities against al Qaeda and the Taliban continue in Afghanistan). So long as that remains true, this Court need not decide if the new opponents and locations undermine the government's detention authority vis-a-vis Petitioner.

Third, while the United States forces in Afghanistan have transitioned from a combat mission to one of support and counterterrorism, that transition does not change the one fact pertinent here: United States military forces continue to actively engage al Qaeda, Taliban, and associated forces in Afghanistan. *Id*. And though Petitioner does not "concede" that the conflict in which he is detained continues, he offers no evidence to rebut the substantial evidence offered by the government for the rather self-evident proposition that hostilities against al Qaeda, the Taliban, and associated forces have yet to abate in Afghanistan. Resps' Opp'n at 26-32 & Ex. 8. Indeed, no court to date has ruled otherwise. Resps' Opp'n at 18, 28. Thus, because hostilities against the relevant enemies continue, there is simply no question that the laws of war continue to support Petitioner's detention under the AUMF.

And lastly, Petitioner's accusation that the law of war principles informing detention authority under the AUMF in this Circuit have been "cherry pick[ed]," Pet'r Opp'n at 16, reflects no more than Petitioner's dissatisfaction with the decisions of this Court and the Court of Appeals concerning detention authority under the AUMF as informed by the laws of war.

Indeed, Petitioner acknowledges that the decisions of the Court of Appeals on these issues are contrary to his argument. *Id*. at 16, 19-20. Thus, rather than "cherry picking," the government has established that the laws of war simply do not support Petitioner's assertion that

his continued detention is unlawful.

II. Petitioner's Continued Detention Does Not Violate The Due Process Clause

Petitioner's attempt to invoke the Due Process clause as a possible basis for this Court to order his release also remains unavailing. Petr's Opp'n at 6-10. First, binding circuit precedent establishes that Petitioner may claim no due-process rights under the Fifth Amendment in challenging his detention, let alone any that might authorize his release from detention. Second, even if he had such rights, his continued detention would not violate the Due Process Clause because Petitioner's detention during ongoing hostilities in the conflict in which he was captured is neither indefinite nor arbitrary. Accordingly, for either of the foregoing reasons, there is simply no need for the Court to reinterpret the government's detention authority under the AUMF, as Petitioner urges, to avoid a potential constitutional impediment. To the contrary, Petitioner's continuing detention pursuant to the AUMF remains constitutional.

1. As the government had argued, Resps.' Opp'n at 32-33, the binding law of this Circuit is that unprivileged enemy belligerents detained at Guantanamo Bay are not within the reach of the Fifth Amendment's Due Process Clause. See *Kiyemba I*. 555 F.3d at 1026. As with the binding precedent noted above regarding the validity of Petitioner's continued detention under the AUMF, see supra section 1.1, unless and until that decision is reversed by either the Court of Appeals sitting en banc or the Supreme Court, this Court is bound to follow that controlling precedent. *Torres*, 115 F.3d at 1036.

* * * *

2. In any event, Petitioner's detention is neither arbitrary nor indefinite under due-process principles. As Respondents made clear in their Opposition, Petitioner has been detained pursuant to the AUMF because he was part of or substantially supported al Qaeda, the Taliban, or associated forces. Resps' Opp'n at 4-5. Petitioner has chosen not to challenge that determination here, thereby conceding for purposes of this motion that his capture and detention were not arbitrary. Petr's Mot. at 15. More pertinently, that he remains detained despite the government's discretionary designation of him for transfer does not alter that conclusion. In claiming that his designation for transfer means that there is "no military rationale for detention," that his "detention [is] no longer an issue," or that no one thinks he should continue to be held, possibly for the duration of his life," Petr's Opp'n at 2, 14, & 15, Petitioner simply refuses to acknowledge that both his designations for transfer in 2008 and in 2009 were conditioned on negotiating appropriate security measures with the receiving country, measures designed to prevent a detainee's return to the battlefield. Resps' Opp'n at 20-21 (as to the 2008 designation, citing Ex. 4, Decl. of C. Williamson) & at 6-7 (as to 2009 designation, citing Final Report-Guantanamo Review Task Force (Jan. 22, 2010) at 17); see *Hamdi*, 542 U.S. at 518 (purpose for detaining combatants is to prevent their return to the battlefield). Of course, to date,

[REDACTED TEXT]

have even agreed to receive him, and thus the government must continue its efforts to find an appropriate transfer country. … Accordingly, Petitioner's continued detention cannot be considered arbitrary.

Nor is Petitioner's continued detention unconstitutionally indefinite. Pursuant to *Hamdi* and the law of this Circuit, Petitioner's detention is bounded by the ultimate cessation of hostilities. 542 U.S. at 518. That limit, even though currently not determinable, renders his detention sufficiently definite to satisfy the Due Process Clause. See *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (holding that civil commitment statute did not violate Due Process because, although the end of an individual's commitment could not be calculated, statute required the release of the committed individuals once they no longer posed a threat).

Recently, on facts that mirror those here—continued detention of a detainee despite his approval for transfer by the Department of Defense in 2008 and again by the President's Guantanamo Review Task Force in 2009—Judge Lamberth squarely rejected arbitrariness and indefiniteness claims identical to those Petitioner puts forward here. See *al-Wirghi v. Obama*, 54 F.Supp.3d 44, 47 (D.D.C. 2014). Although the Court rested its decision on standing grounds, it nevertheless directly addressed both prongs of the due process claim asserted by Petitioner here, concluding (1) that the continued detention of the petitioner in the case was not indefinite because *Hamdi* authorizes detention under the AUMF until the end of hostilities and those hostilities continue, and (2) that the detention was not arbitrary because the government's discretionary decision to approve the petitioner for transfer had always remained conditioned on the receipt of appropriate security assurances from the receiving country. *Id*. The same result should obtain here.

Any doubts that Petitioner's continued detention is not unconstitutionally arbitrary or indefinite were definitively dispelled in *Hamdi*. In *Hamdi*, there was no question that the Due Process Clause applied, as the petitioner was a United States citizen detained within the country. 542 U.S. at 510. Nevertheless, the Supreme Court upheld the law-of-war detention of enemy armed forces under the AUMF pending the future end of hostilities. *Id*. at 521. In doing so, the Court specifically balanced Hamdi's substantial liberty interest to be free from detention, but found it outweighed by the government's interest in ensuring he did not return to the battlefield against the United States. *Id*. at 53.

* * * *

b. Former Detainees

Jawad v. Gates, No. 15-5250, is a case brought by a former Guantanamo detainee after he was released for damages due to alleged mistreatment while he was in U.S. custody. The district court dismissed and Jawad appealed. The United States filed its appeal in the U.S. Court of Appeals for the D.C. Circuit on February 25, 2016. The U.S. brief is excerpted below and available in full at https://www.state.gov/s/l/c8183.htm.

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* * * *

I. This Court should affirm the district court's judgment dismissing Jawad's claims because [Military Commissions Act or] MCA Section 7(a) eliminates the courts' jurisdiction "to hear or consider any * * * [non-habeas] action against the United States or its agents relating" to the "treatment" or "conditions of confinement" of any "alien" detained by the United States and

"determined by the United States to have been properly detained as an enemy combatant." 28 U.S.C. § 2241(e)(2). Each of the claims in Jawad's complaint "rather plainly" comes within that jurisdictional bar. *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012). Accordingly, MCA Section 7(a) "requires that [this Court] affirm the dismissal of the action." *Id*.

Jawad's contrary arguments are waived or lack merit. Jawad argues that the MCA, including its jurisdictional bar, does not apply to juveniles. Br. 12. But that is an argument Jawad failed to make in the district court, so it is waived. The argument also lacks merit. Jawad notes that an international convention to which the United States is a party requires member states to reintegrate juvenile soldiers. Br.16. And he appears to argue that the detention of a juvenile as an enemy combatant always violates that convention. Br. 15-16. For that reason, he argues, the MCA should not be interpreted to preclude his suit. *Id*. But even if Jawad's interpretation of the convention were correct, that says nothing about whether Congress, in the MCA, foreclosed damages actions. And, in any event, Jawad's belief that the treaty always precludes the detention of juveniles is inconsistent with the Executive Branch's interpretation of the convention and that of the United Nations body that monitors the treaty's implementation.

Jawad next argues that the MCA does not authorize military commissions to criminally try juveniles and, for that reason, the MCA's jurisdictional bar does not apply to juveniles. Br. 16-20. That, however, is simply another version of an argument this Court already has rejected: that the MCA's jurisdictional bar applies only to persons who are *properly* detained as enemy combatants. *See Al Janko v. Gates*, 741 F.3d 136, 144 (D.C. Cir. 2014). Instead, the jurisdictional bar is triggered when the Executive Branch determines that the alien's detention is authorized, "without regard to the determination's correctness." *Id*.

Jawad further argues that the jurisdictional bar applies only to persons whom the United States has determined to be *unlawful* enemy combatants. Br. 21-25. Because the United States only determined him to be an "enemy combatant," Jawad contends, he is free to bring suit. *Id*. That argument lacks any merit. It is flatly inconsistent with the unambiguous language of MCA Section 7(a), which nowhere contains the qualifier "unlawful." And the argument is inconsistent with this Court's determination that what triggers the jurisdictional bar is a determination by the United States of an alien's "enemy-combatant status." *Al Janko*, 741 F.3d at 144. Moreover, Congress considered and rejected the very interpretation Jawad now presses.

Jawad's constitutional challenge to the MCA is plainly without merit. As this Court has recognized, Congress may preclude Guantanamo detainees from maintaining claims for money damages without running afoul of Article III. *See Al-Zahrani*, 669 F.3d at 319. That holding dooms both Jawad's as-applied and facial constitutional challenges. Jawad's bill-of-attainder challenge also fails because Jawad makes no attempt to show that MCA Section 7(a) has the characteristics of a bill of attainder. *See* Br. 31.

II. Alternatively, this Court may affirm the district court's dismissal because Jawad's first three claims are not cognizable under the [Federal Tort Claims Act or] FTCA and because his remaining causes of action fail to state a claim.

Under this Court's precedent, there is no question that the United States properly substituted itself for the individual-capacity defendants as to Jawad's first three claims, because those defendants were acting within the scope of their employment. *See, e.g., Allaithi v. Rumsfeld*, 753 F.3d 1327, 1332 (D.C. Cir. 2014). Jawad's contention that the individual-capacity defendants were acting as rogue officials is inconsistent with Jawad's complaint, which alleged that the officials used the "frequent flyer" program for punishment and control in addition to

intelligence gathering.

Because the United States was properly substituted for the individual-capacity defendants, the district court properly dismissed Jawad's first three claims as not cognizable under the FTCA. That statute excludes from the United States' waiver of sovereign immunity "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Even though the United States exercises "*de facto* sovereignty" over Guantanamo Bay, Cuba retains "legal and technical" sovereignty over that territory. *Boumediene v. Bush*, 553 U.S. 723, 754, 755 (2008). That is determinative for purposes of the FTCA's foreign-country exception, which applies to any "territory subject to the sovereignty of another nation." *United States v. Spelar*, 338 U.S. 217, 219 (1949). Jawad's first three claims are also barred because he did not file suit within the FTCA's six-month statute of limitations. 28 U.S.C. § 2401(b).

III. Jawad's fourth cause of action, asserted under the [Torture Victim Protection Act or] TVPA, fails to state a claim because that statute creates a right of action only against individuals acting under color of law "of any foreign nation." § 2(a)(1), 106 Stat. at 73. Jawad makes no attempt to demonstrate that the individual-capacity defendants acted under color of foreign law. Instead, he invites the Court to extend the application of the statute to officials acting pursuant to U.S. law. Br. 54. But Jawad's contention that the Constitution required the district court to rewrite the statute to extend it to U.S. officials is plainly without merit.

IV. Finally, Jawad's constitutional claims are foreclosed by Circuit precedent. This Court has held that aliens detained in Afghanistan and Guantanamo could not bring damages actions challenging their treatment because such suits could interfere with the United States' significant national-security and foreign-policy interests. *See Ali v. Rumsfeld*, 649 F.3d 762, 765-66, 773-74 (D.C. Cir. 2011) (Afghanistan); *Allaithi*, 753 F.3d at 1332, 1334 (Guantanamo).

Jawad largely ignores that precedent. Instead, he reiterates the very arguments that this Court previously considered and rejected. Br. 44-50. And with respect to the only new arguments that he makes, Jawad provides no explanation as to why his juvenile status is relevant to the special-factors inquiry. Moreover, Jawad does not explain how the international instruments he cites (which do not create judicially enforceable obligations, in any event), bear on the separate question of whether courts should recognize a claim for violation of a domestic constitutional right.

Even if special factors did not bar Jawad's fifth and sixth claims, Circuit precedent establishes that it was not clearly established that Jawad had any rights under the Fifth or Eighth Amendments when he was detained. *See Ali*, 649 F.3d at 771; *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (per curiam). Accordingly, the individual-capacity defendants enjoy qualified immunity from Jawad's fifth and sixth claims. *Rasul*, 563 F.3d at 529.

* * * *

The appeals court issued its opinion affirming the district court's dismissal on August 12, 2016. The decision is excerpted below.

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* * * *

The relevant portion of section 7(a) of the 2006 MCA states:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any [non-habeas] action against the United States or its agents relating to any aspect of the detention,

> transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(2). By its clear terms, this provision strips federal courts of jurisdiction to hear most claims against the United States arising out of the detention of aliens like Jawad captured during the United States' invasion of Afghanistan in response to the attacks of September 11, 2001. Jawad acknowledges that he is an "alien" and that his lawsuit is an "action against the United States or its agents relating to... [his] detention,... treatment,... or conditions of confinement." *Id.* But he asserts that his lawsuit escapes the statute's jurisdictional bar because he has not "been determined by the United States to have been properly detained as an enemy combatant." *Id.*

Jawad concedes that a [Combatant Status Review Tribunal or] CSRT found that he was an "enemy combatant." J.A. 33. We have held that such a finding by a CSRT fully satisfies the section 7(a) requirement that an alien be determined by the United States to have been properly detained as an enemy combatant. *Al Janko*, 741 F.3d at 144-45 (citing *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 317, 319 (D.C. Cir. 2012) and 28 U.S.C. § 2241(e)(2)). But Jawad offers several reasons why the CSRT finding does not do so here. Each of them fails.

Jawad first points to the government notice, filed in the habeas action, that it would "no longer treat" Jawad as "detainable." This statement, Jawad contends, was a "determination [that] he was *not* properly detained." Appellant's Br. 9 (emphasis added). According to Jawad, with this language, the government announced that it had rescinded the previous CSRT and [Administrative Review Board or] ARB determinations. As a result, he argues, section 7(a)'s bar does not extend to him.

We assume that Jawad is right, as a matter of law, that the government could override a prior determination that an alien had been "properly detained" by issuing a new determination to the contrary in habeas litigation. But, as a matter of fact, the government did not do so here. It never said that Jawad was *not* properly detained, only that the United States would no longer *treat* him as such. Notice of the United States, *Al Halmandy v. Obama*, No. 05-cv-2385 (D.D.C. July 24, 2009), J.A. 81-82 (describing its position as "a decision not to contest the writ"). The government's statement says nothing about the jurisdictional question raised by section 7(a): whether the United States had determined that Jawad was properly detained as an enemy combatant. *See Al Janko*, 741 F.3d at 144. That determination had already been made in Jawad's CSRT and ARB proceedings, and nothing in the government's habeas filing contradicted those earlier conclusions. This case would be much different and a closer call had the government conceded before the district court that Jawad had never been properly detained. But that is not the case here.

Jawad also argues that the initial CSRT determination that he was properly detained was "illegal and void" because "his capture, torture, and detention[] violated domestic and international law concerning treatment of juveniles accused of a crime." Appellant's Br. 20-21; *see id.* at 15-20 (citing the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, S. TREATY DOC. NO. 106-37A (ratified June 18, 2002); Uniform Code of Military Justice, 10 U.S.C. § 948b(c) (2006); and Federal Juvenile Delinquency Act, 18 U.S.C. § 5031 *et seq.*). The United States asserts that Jawad forfeited or waived this argument by failing to raise it before the district court. But the United States takes too narrow a view of Jawad's position before the district court. There, he argued that section 7(a) did not divest the court of jurisdiction because his juvenile status "taint[ed]" the CSRT

determination and the United States "should never have taken custody of [Jawad]" due to his juvenile status. Mem. Opposing Mot. to Dismiss at 25-26, *Jawad v. Gates*, No. 14-cv-00811 (D.D.C. Apr. 20, 2015). This was adequate to preserve the argument on appeal.

On the merits, we conclude that even if we were to decide that an allegation that a CSRT was "illegal and void" bears on whether section 7(a)'s jurisdictional bar applies—a conclusion we need not, and do not, reach—Jawad's argument fails for other reasons. Jawad has not shown that his CSRT determination ran afoul of any domestic or international law. He does not cite any provision in the Uniform Code of Military Justice or other domestic law that prohibits the detention of juvenile enemy combatants pursuant to the AUMF, much less explain how violations of any such provisions would "void" the CSRT's determination. Nor does Jawad show how any alleged failure of the United States to comply with its treaty obligations would do so. In particular, Jawad relies on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which the United States ratified in 2002. That treaty requires signatories to "take all feasible measures to ensure" that child soldiers "recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service" and to provide, "when necessary, . . . all appropriate assistance for their physical and psychological recovery and their social reintegration." Optional Protocol, art. 6(3). Jawad argues that the United States violated the Protocol's requirement to provide rehabilitation and reintegration to detained juveniles. But Jawad never explains how these provisions would render his initial detention improper under the treaty, let alone why a violation of the treaty would "void" the CSRT's determination.

Jawad argues as well that his juvenile status makes the jurisdictional bar of section 7(a) wholly inapplicable to his case because the "MCA lacks jurisdiction over minors." Appellant's Br. 16. Although it is not altogether clear what Jawad means by this, we understand him to be arguing that no provision of the MCA can apply to juveniles, leaving him free to bring his damages action. According to Jawad, it is "well-established that military tribunals lack jurisdiction over minors below the age of consent." *Id.* at 17 (citing *United States v. Blanton*, 23 C.M.R. 128 (C.M.A. 1957) (holding that the "enlistment of a person under the statutory age is void so as to preclude trial by court-martial for an offense committed by him while still under such age")). Similarly, Jawad points to the Federal Juvenile Delinquency Act, which provides certain procedures for the prosecution and detention of juveniles in federal cases, and contends that the MCA lacks those protections. *See* 18 U.S.C. § 5031 *et seq.* But Jawad again sidesteps the relevant question. Nothing in those sources of law bears on whether Congress, through section 7(a), barred courts from hearing damages actions brought by juveniles determined to be properly detained as enemy combatants. The court-martial cases deal with whether military courts have jurisdiction to try juveniles. That has no relevance here because Jawad is not being tried by any military court. The Federal Juvenile Delinquency Act is equally immaterial. Even if its procedures for detaining and prosecuting juveniles were somehow applicable to detainees like Jawad, any argument based on such procedures relates only to Jawad's merits claim about his treatment in detention. The Act is silent as to the question at issue here: whether juveniles detained under the AUMF are barred from filing damages actions in federal court.

Jawad next argues that section 7(a) is inapplicable here because the United States never determined that he was an *unlawful* enemy combatant. Although Jawad agrees that his CSRT and ARB determinations found him to be an enemy combatant, he maintains that section 7(a) should apply only to detainees who are determined to be *unlawful* enemy combatants because the 2006 MCA provides that military commissions have jurisdiction only over such combatants. 10 U.S.C.

§ 948d(a) (2006). According to Jawad, section 7(a) "may only bar claims by individuals over which the MCA has jurisdiction," which is limited to *unlawful* enemy combatants. Appellant's Br. 25.

But the plain language of section 7(a) does not require a finding of *unlawfulness*. Rather, the jurisdictional bar applies where a detainee has been determined to be an "enemy combatant." 28 U.S.C. § 2241(e)(2). We will not "read[] a phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Where, as here, the statutory text is clear, "[t]he plain meaning of legislation should be conclusive" unless it "compels an odd result." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (internal quotation marks omitted).

Nothing odd results from applying section 7(a)'s jurisdictional bar to suits by detainees who have been determined to be enemy combatants, but not only *unlawful* enemy combatants. To be sure, Congress conditioned the jurisdiction of military commissions on unlawful-enemy-combatant status in the 2006 MCA, 10 U.S.C. § 948d(a). Section 7(a), however, is not linked to the MCA's grant of jurisdiction to military commissions. The bar is instead tied to the AUMF's detention authority, which allows "the President to detain enemy combatants"—not solely unlawful ones. *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013). We affirmed this understanding in *Al Janko*, explaining that section 7(a) applies where the United States has made a determination "that the detainee meets the *AUMF*'s criteria for enemy-combatant status." 741 F.3d at 144 (emphasis added). Because section 7(a) deals with the jurisdiction of federal courts over lawsuits by individuals determined to have been properly detained, section 7(a) understandably applies to enemy combatants—the category of combatants who may be properly detained under the AUMF—and is not limited to unlawful enemy combatants. In fact, Congress's use of "unlawful" in the sections of the 2006 MCA that deal with military-commission jurisdiction, but not in section 7(a), further works against reading that term into the jurisdictional bar. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Finally, Jawad raises several meritless constitutional claims. First, he contends that he is entitled to a damages remedy for "unconstitutional trespasses by the United States." Appellant's Br. 33. Our precedent, however, forecloses this position. We have held that monetary remedies are not constitutionally required "even in cases such as the present one, where damages are the sole remedy by which the rights of plaintiffs . . . might be vindicated." *Al-Zahrani*, 669 F.3d at 320. Second, Jawad maintains that section 7(a) is unconstitutional on its face because its "broad elimination of jurisdiction" is "inconsistent with the plain language of Article III of the Constitution." Appellant's Br. 29-30. To succeed on a facial challenge, Jawad must show "that no set of circumstances exists under which [section 7(a)] would be valid, or that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal citations and quotation marks omitted). But our precedent again forecloses Jawad's argument. As we have held, section 7(a) can constitutionally be applied to "*any* [non-habeas] detention-related claims, whether statutory or constitutional, brought by an alien detained by the United States and determined to have been properly detained as an enemy combatant." *Al Janko*, 741 F.3d at 146. Jawad also urges that section 7(a) is a legislative act inflicting punishment without trial in violation of the Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3. *See United States v. Lovett*, 328 U.S. 303, 315 (1946). A law is an unconstitutional bill of attainder if it "applies with

specificity" to a person or class and "imposes punishment." *BellSouth Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir. 1998); Anthony Dick, Note, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177 (2011). Even assuming that section 7(a) meets the specificity requirement because it applies only to enemy combatants, Jawad advances no argument that the jurisdictional bar is a form of punishment. We will "not consider 'asserted but unanalyzed' arguments." *Anna Jaques Hosp. v. Sebelius*, 583 F.3d 1, 7 (D.C. Cir. 2009) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)) ("[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." (quoting *Carducci*, 714 F.2d at 177)). And even if we did consider Jawad's argument, "only the clearest proof could suffice to establish the unconstitutionality of a statute" on Bill of Attainder Clause grounds, *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 83 (1961), and his failure to provide such proof dooms his claim. *See also Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013) (concluding that section 7(a) does not qualify as a bill of attainder); *Ameur v. Gates*, 759 F.3d 317, 329 (4th Cir. 2014) (same).

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5. Criminal Prosecutions and Other Proceedings

United States v. Hamidullin

As discussed in *Digest 2015* at 785-95, the United States opposed Hamidullin's motion to dismiss the indictment against him for his role in the November 29, 2009 attack on the Afghan Border Police ("ABP") compound known as Camp Leyza. Hamidullin was tried and convicted after the court denied his motion to dismiss, agreeing with the U.S. argument that he was not entitled to protected status under the Geneva Convention Relative to the Treatment of Prisoners of War as a member of the Taliban or Haqqani Network. He appealed and the United States filed its brief in the U.S. Court of Appeals for the Fourth Circuit on June 21, 2016. *United States v. Hamidullin*, No. 15-4788. Excerpts follow from the U.S. brief, which is available in full at https://www.state.gov/s/l/c8183.htm. The Court of Appeals heard argument in the case in December 2016.

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The United States argued below that Hamidullin's combatant immunity claim failed for two essential reasons. First, at the time of the offenses the continued conflict against the Taliban in Afghanistan was not an international armed conflict under Article 2 of the [*Geneva Convention Relative to the Treatment of Prisoners of War* or] GPW, and therefore, the provisions of the GPW that reflect the doctrine of combatant immunity do not apply to the Taliban. Second, even if that were not the case, Hamidullin's bid for "lawful combatant" status would fail as members of the Taliban and Taliban-affiliated groups do not qualify for prisoner-of-war status under Article 4 of the GPW.

The district court did not decide the first issue, and it ruled in favor of the United States on the second issue. Hamidullin's arguments fail, however, on both grounds. Moreover, Hamidullin's claim that he ought to have received a more individualized assessment of his combatant circumstances is unavailing both as a matter of law and fact.

1. The law of combatant immunity.

Lawful combatant immunity is a doctrine reflected in international law, including the customary international law of war. It "forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets." *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002); *see also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942). Belligerent acts committed by lawful combatants in an armed conflict generally "may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict." *Lindh*, 212 F. Supp. 2d at 553.

The concept of lawful combatant immunity has a long history preceding the GPW and is grounded in common law principles, early international conventions, statutes, and treatises. *See Instructions for the Government of the Armies of the United States in the Field*, Headquarters, United States Army, Gen. Order No. 100 (Apr. 24, 1863), *reprinted in The Laws of Armed Conflicts* 3 (3d ed. 1988) ("So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."); Col. William Winthrop, *Military Law and Precedents*, at 791 (2d ed. 1920) ("[T]he status of war justifies no violence against a prisoner of war as such, and subject him to no penal consequence of the mere fact that he is an enemy."); *Hague Convention Respecting the Laws and Customs of War on Land* ("Hague Convention"), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; 4 Brussels Declaration of 1874, Article IX, July 27, 1874, *reprinted in The Laws of Armed Conflicts* 25 (3d ed. 1988); *Manual of Military Law* 240 (British War Office 1914).

As noted by *Lindh*—and as agreed by both parties in this case—the combatant immunity doctrine is reflected in the provisions of the GPW. *See Lindh*, 212 F. Supp. 2d at 553. The United States is a party to the GPW and it therefore has the force of law in this case under the Supremacy Clause. *See* U.S. Const. art. VI, § 2.

The GPW sets forth certain principles with respect to the prosecution of persons entitled to prisoner-of-war status under the GPW:

> Article 87: "Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." and
>
> Article 99: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."

GPW, arts. 87 and 99. Taken together, these Articles "make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war." *Lindh*, 212 F. Supp. 2d at 553.

Although immunity based on lawful combatant status may be available as an affirmative defense to criminal prosecution in appropriate circumstances, this defense is not available to a defendant just because he believes that he has justly taken up arms in a conflict. *Lindh*, 212 F. Supp. 2d at 554. Rather, this defense is available only to a defendant who can establish that he is a "lawful combatant" against the United States under the requisite criteria established in

international law that is binding upon the United States—that is, "members of a regular or irregular armed force who fight on behalf of a state and comply with the requirements for lawful combatants." *Id.* at 554. *See also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1222 (USCMCR 2007).

Importantly, the burden of establishing the application of the combatant immunity defense is upon the defendant raising an affirmative defense. *See Lindh*, 212 F. Supp. 2d at 557 (holding "it is Lindh who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity" by showing that "the Taliban satisfied the four criteria required for lawful combatant status outlined by the GPW"); *id.* at 557 n.36 (noting that defendants bear the burden of proving affirmative defenses and citing in support Convention of 1929—conferred rights on alien enemies that could be vindicated "only through protests and intervention of protecting powers," not through the courts). *Mullaney v. Wilbur*, 421 U.S. 684, 697-99 (1975), and *Smart v. Leeke*, 873 F.2d 1558, 1565 (4th Cir. 1989)).

On appeal, Hamidullin argues that under the GPW he is presumed to be entitled to prisoner of war (POW) status until he receives an Article 5 hearing from the military, which he asserts he never received. He argues that the United States therefore bore the burden below to prove that he was not entitled to POW status. … This argument fails for at least three reasons. First, the primary authority for this argument is Article 5 of the GPW, which provides, in relevant part, that

> [s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

GPW art.5, ¶ 2. The condition precedent for Article 5 is "doubt" as to whether a person is entitled to the Article 4 protections. For the reasons described in detail below, when Hamidullin was captured, there really was no appreciable doubt as to whether the Taliban or their associates qualified as lawful combatants.

Second, Article 5 simply says the individual enjoys GPW protections until the person's status is determined by a "competent tribunal." Article 5 does not say which side bears the burden of production or persuasion when that tribunal convenes. Thus, even assuming Article 5 applies to this federal criminal prosecution—a point that is not at all evident and which the United States does not concede—it does not address which side bears the burden of proof, and the normal rules of the United States criminal process, which place the burden of production and persuasion for affirmative defenses on the defendant, would continue to govern.

Third, Hamidullin's position conflicts with deeply entrenched law. "[I]t bears repeating that, at common law, the burden of proving 'affirmative defenses—indeed, 'all . . . circumstances of justification, excuse or alleviation'—rested on the defendant.'" *Dixon v. United States*, 548 U.S. 1, 8 (2006) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977); 4 W. Blackstone, Commentaries *201)). And this common-law rule "accords with the general evidentiary rule that 'the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.'" *Id.* (quoting 2 J. Strong, MCCORMICK ON EVIDENCE § 337, p.415 (5th ed. 1999)). The Supreme Court has applied this rule to the defense of duress in federal criminal cases. *Id.* at 13-14. The same should apply here.

2. By 2009, hostilities in Afghanistan were non-international in nature.

The provisions of the GPW that have been interpreted as reflecting the principles of combatant immunity do not apply to the Taliban or the Haqqani Network in this case. Under GPW Article 2, the provisions of the Convention apply to "all cases of declared war or of any other *armed conflict which may arise between two or more of the High Contracting Parties,* even if the state of war is not recognized by one of them." GPW, art.2, ¶ 1 (emphasis added). In other words, for the GPW Article 4 provisions defining the categories of persons who are entitled to be treated as prisoners of war to be triggered, there must first be an international armed conflict within the meaning of Article 2. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 73 (D.D.C. 2009) (noting that Article 4 does not apply to the non-international armed conflict with al Qaeda). If there is no international armed conflict within the meaning of Article 2, then the provisions of Article 3, which govern conflicts not of an international character, address the treatment of captives.

Hamidullin does not claim that Article 3 provides for combatant immunity, nor could he. Regardless of the nature of the conflict in Afghanistan in 2001, by November 2009 the Taliban had been removed from power in Afghanistan for *eight years* and was not the government for Afghanistan (the GPW "High Contracting Party"). At the time of Hamidullin's attack, there was no international conflict between the United States and Afghanistan. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (noting that the conflict with al Qaeda is a "conflict not of an international character"). Rather, the two powers, along with other States, were working together in a coalition directed at assisting the legitimate Afghan government to stop the Taliban's unlawful attacks within the country's borders. *See supra* at pp.6-7.

The International Committee of the Red Cross ("ICRC"), a non-governmental organization with expertise in interpreting the GPW, came to the same conclusion in 2007:

> This conflict [against the Taliban] is non-international, albeit with an international component in the form of a foreign military presence on one of the sides, because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States. *The ongoing hostilities in Afghanistan are thus governed by the rules applicable to non-international armed conflicts found in both treaty-based and customary IHL* [International Humanitarian Law].

Int'l Comm. Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 725 (2007) (emphasis added). *See also* Int'l Comm. Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 10 (2011)11 ("As the armed conflict does not oppose two or more states, *i.e.* as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature). The applicable legal framework is Common Article 3 and customary IHL.").

Under the GPW, if a conflict is not international in nature, detainees captured in the course of the conflict are entitled only to the limited humanitarian protections enumerated in Article 3. They are not entitled to the panoply of protections contained in the remaining articles of that Convention. This distinction is important here because the various provisions of the GPW that require a State to afford combatant immunity protections only apply during international armed conflict. *See* Int'l Comm. Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 726 (2007) ("*only in international armed conflicts* does IHL [International Humanitarian Law] provide combatant (and prisoner-of-war)

status to members of the armed forces. The main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives.") (emphasis in original). In contrast, individuals who fight for non-State armed groups non-international armed conflicts and are held under Article 3 are not entitled to combatant immunity. *See id.* at 728 ("Upon capture, civilians detained in non-international armed conflicts do not, as a matter of law, enjoy prisoner-of-war status and may be prosecuted by the detaining State under domestic law for any acts of violence committed during the conflict . . . ."). Hamidullin below argued that the second paragraph of GPW Article 2 supports his claim to entitlement to its protections. It provides that the "Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." GPW, art. 2, ¶ 2. That provision, however, is not relevant as Afghanistan is not occupied under the laws of war; nor was it occupied at the time of Hamidullin's offenses.

3. Even assuming the conflict in Afghanistan fell within Article 2 of the GPW in 2009, the defendant and his cohorts did not qualify as lawful combatants under Article 4.

Even assuming for the sake of argument that the conflict in Afghanistan was international in nature as of 2009, Hamidullin cannot meet the stringent requirements for claiming POW or lawful combatant status under GPW Article 4. Article 4 lists a number of categories of persons who may qualify for POW status, but only the first three are potentially relevant here. Article 4(A)(1) of the GPW provides POW status to "Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces." Article 4(A)(2) provides POW status to:

> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates; that of having
> a fixed distinctive sign recognizable at a distance; that of carrying arms openly; that of
> conducting their operations in accordance with the laws and customs of war.

Finally, Article 4(A)(3) provides POW status to "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

After hearing the evidence adduced at the pretrial hearing, the district court concluded that the nature of Hamidullin's fighting group was most appropriately analyzed under Article 4(A)(2). As the Court reasoned:

> the Haqqani Network and Taliban fit most compatibly within Article 4(A)(2). These groups are not members of militias or volunteer corps forming part of the armed forces of a party to the conflict [i.e., Article 4(A)(1)]. Furthermore, they are not members of a regular armed force as contemplated by Article 4(A)(3).

JA 760-61. Based on the record established at the hearing, the district court found "that neither the Taliban nor the Haqqani Network fulfills the conditions of Article 4(A)(2)." JA 761 (finding that these groups lack a clearly defined command structure, lack a fixed distinctive sign recognizable at a distance, employ concealed weapons in the form of suicide bombers, and

"neither entity conducts their operations in accordance with the laws and customs of war"). The district court also concluded that these groups did not satisfy the criteria for POW status articulated in "any other provision of the GPW." *Id.* For the reasons detailed below, the district court's conclusion was correct.

It merits note at the outset that perhaps the principal source on which Hamidullin bases his lawful combatant arguments is a draft memorandum from the State Department Legal Advisor. Hamidullin Br. at 22-23, 24, 25, 26-27.14 This draft memorandum's analysis was based on the circumstances at the time it was composed (in and around 2001), and did not reflect the ultimate view of the Executive Branch. "On February 7, 2002, the White House announced the President's decision, as Commander-in-Chief, that the Taliban militia were unlawful combatants pursuant to the GPW and general principles of international law, and, therefore, they were not entitled to POW status under the Geneva Conventions." *Lindh*, 212 F. Supp. 2d at 554-55. *See* Memorandum of President George W. Bush at 2 (Feb. 7, 2002)15 ("Based on facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.").

The United States does not argue that the President's determination is dispositive of the issue. Indeed, the United States submitted its evidence to the district court for determination and to this Court for appellate review. But the President's decision is important in at least two respects. First, it reflects the position of the Executive Branch and, as such, supersedes any contrary reasoning in the draft State Department memorandum on which Hamidullin relies so heavily. Second, the President's determination that the Taliban did not qualify for lawful combatant status under the GPW is entitled to a degree of deference as a reasonable interpretation and application of the GPW to the Taliban by the Commander in Chief. *Lindh*, 212 F. Supp. 2d at 556 (noting that "courts have long held that treaty interpretations made by the Executive Branch are entitled to some degree of deference" and that the application of the GPW to the Taliban involves interpretation of the GPW); *id.* at 558 (concluding that the President's interpretation of the GPW as it applies to Lindh as a member of the Taliban was entitled to deference as a reasonable interpretation of the treaty).16 *See also* A.A.G. Jay S. Bybee, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, Opinions of the Office of Legal Counsel, at 3-9 (2002)17 (hereinafter "Bybee, *Status of Taliban Forces*") (concluding that Taliban forces were most naturally analyzed as a "militia" under Article 4(A)(2), that the President had reasonable grounds to conclude they did not meet the four criteria of Article 4(A)(2), and that the four Article 4(A)(2) factors were also understood to apply, and did apply, to the armed forces described in Articles 4(A)(1) and (A)(3)).

Though the President's determination was made in 2002, none of the facts adduced at the motions hearing in this case suggest that events in the ensuing years have undermined the reasonableness of the President's determination. If anything, the experience of these years …only confirms the Taliban's ineligibility for POW status.

i. The defendant and fellow fighters are most naturally analyzed under Article 4(A)(2), and they fail to meet those criteria.

As the district court concluded, the band of fighters with which Hamidullin was affiliated was, if anything, best understood to be one of the types of "other militias," volunteer corps, or organized resistance movements referenced in Article 4(A)(2) of the GPW, as opposed to the types of groups referenced in Articles 4(A)(1) or (A)(3). Article 4(A)(2) appears to cast the broadest and the only net that could include Hamidullin's group. But to qualify for lawful

combatant status under Article 4(A)(2), the group must meet all four of the specified criteria in that subparagraph. The United States presented evidence at the pretrial hearing that the Taliban and Haqqani Network essentially failed to meet any of those criteria. As summarized above, *see supra* at p.32, the district court found that these groups lacked a command structure, made tactical decisions not to wear uniforms and to wear civilian clothing to blend into the population, employed suicide bombings and other forms of attack involving concealed weapons, and engaged in systematic violations of the laws of war, including the targeting of civilian populations for attack and retribution and the summary execution of captives.

Hamidullin, for his part, presented no evidence to the contrary. Indeed, Hamidullin's own expert and sole witness at the motions hearing testified that he made no claim that the Taliban satisfied the requirements of Article 4(A)(2). *See* JA 481 (Professor Paust: "I do not argue that they meet these criteria [referring to the Article 4(A)(2) criteria].").

Unsurprisingly, given the overwhelming and uncontroverted evidence that these groups did not comply with any of the criteria, the district court specifically found that the Taliban and Haqqani Network failed to meet the requirements of Article 4(A)(2). *See also Lindh*, 212 F. Supp. 2d at 558 (concluding that the Taliban falls far short when measured against the four GPW criteria for lawful combatant status). Hamidullin identifies no clear error with the district court's factual findings.

ii. The defendant does not qualify as a POW under either Article 4(A)(1) or (A)(3).

As the district court concluded, Hamidullin's fighting band does not fit into either of the categories of armed forces or regular armed forces that Articles 4(A)(1) and (A)(3), respectively, contemplate. Hamidullin nevertheless claims that he meets the criteria of at least the Article 4(A)(3) category because he was affiliated with the Taliban and the Taliban constituted the armed forces of Afghanistan, even in 2009. Hamidullin Br. at 24. For the reasons explained below, even assuming Hamidullin's fighting band is considered to be part of the Taliban itself, the Taliban fail to qualify for lawful combatant status under Articles 4(A)(1) or (A)(3).

Neither Articles 4(A)(1) or (A)(3) specify the four requisite factors of a fighting force that are delineated in Article 4(A)(2). But these Article 4(A)(2) criteria have long been understood to be the *minimum* defining characteristics of any lawful armed force and were well established in customary international law before being codified in the GPW in 1949. As such, they were understood to be basic criteria also applicable to the armed forces referenced in GPW Articles 4(A)(1) and (A)(3). *See Lindh*, 212 F. Supp. 2d at 557, n. 34; *Hague Convention Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 ("The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war."); *Manual of Military Law* 240 (British War Office 1914) ("It is taken for granted that all members of the army as a matter of course will comply with the four conditions [required for lawful combatant status]; should they, however, fail in this respect . . . they are liable to lose their special privileges of armed forces.").

Hamidullin claims that these requirements, which are specifically enumerated in GPW Article 4(A)(2), do not apply in determining whether a combatant qualifies as a prisoner of war under GPW Article 4(A)(3) as they are not expressly mentioned under that subsection. Hamidullin Br. at 24. *Lindh* considered and rejected that very argument and held that these elements must be met for all the categories of armed forces covered by the GPW. As it

explained, the argument:

> ignores long-established practice under the GPW and, if accepted, leads to an absurd result. First, the four criteria have long been understood under customary international law to be the defining characteristics of any lawful armed force. Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a "regular armed force." It would indeed be absurd for members of a so-called "regular armed force" to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war.

Lindh, 212 F. Supp. 2d at 557, n.35 (internal cross-reference omitted). *See also United States v. Arnaout*, 236 F. Supp. 2d 916, 917-18 (N.D. Ill. 2003) (quoting favorably *Lindh*'s conclusion that all armed forces and militias must meet the four criteria if their members are to receive combatant immunity); Bybee, *Status of Taliban Forces*, at 4-9 (concluding that the four Article 4(A)(2) factors apply to the forces in Articles 4(A)(1) and (A)(3) based on the history of the GPW and its interpretation by various commentators); JA 332, 340-41 (testimony of Colonel Parks).

This analysis is fully consistent with the interpretation of the ICRC. *See* Int'l Comm. Red Cross, *Commentary - Art. 4. Part I : General provisions*, at 62-63 (1960)18 (concluding that "These 'regular armed forces' [in Article 4(A)(3)] have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1) [of Article 4(A)]: they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d).").

Because the four criteria listed in Article 4(A)(2) are fully applicable to Articles 4(A)(1) and (A)(3), Hamidullin failed to meet his burden to establish his eligibility for either of these other categories for the same reasons he failed to meet his burden of proving lawful combatant status under Article 4(A)(2). It bears repeating that Article 4(A)(3), on which Hamidullin primarily relies on appeal, refers to "regular armed forces" and there is no sense in which one could accurately describe Hamidullin's makeshift band of militants as regular armed forces. Hamidullin argues that the rationale for Article 4(A)(3) was to avoid a situation where a party does not apply the GPW solely on political grounds, *i.e.*, does not accord POW status simply by virtue of not recognizing the legitimacy of the government backing the opposing forces. Hamidullin Br. at 25. But the Taliban are distinguishable from the various historical examples Hamidullin gathers. *See id.* at 25-27. First, while it is true that the United States has never recognized the Taliban as the legitimate government of Afghanistan, that position hardly reflects the unilateral political position of the United States. Of the roughly 200 sovereign nations of the world, only three recognized the Taliban as legitimate before September 11, 2001. For roughly eight years preceding the acts in this case, *no government in the world* recognized the Taliban as the government of Afghanistan, and they were not the *de facto* government of Afghanistan during that time. Second, even putting aside the Taliban's universal lack of recognition at the time of the offense, a government-in-exile continuing the battle (as Hamidullin would characterize the Taliban) must nevertheless field forces that comply with the laws of war, and as

discussed above the Taliban fail that test in essentially every respect. It would indeed be an anomalous result if a government-in-exile were free to field forces that violated the four essential criteria of an armed force articulated in Article 4(A)(2), and nevertheless claim the benefits of Article 4 for its forces when they were captured.

4. The defendant's arguments on appeal that he could have established combatant immunity based on an individualized determination are wrong as a matter of law and fact.

Hamidullin argues that the district court failed to make an *individualized* assessment of his POW status. Hamidullin Br. at 19. Hamidullin argues that the district court's analysis looked too broadly at the Taliban as a whole without focusing sufficiently on his own conduct. A properly individualized assessment was important, he claims, "because the inquiry under article 4(A)(2) focuses on the specific 'militia or volunteer corps' to which Mr. Hamidullin belonged," and, as such "the fact that other members of the Taliban may fail to satisfy the conditions of article 4(a)(2)—and in particular engage in violations of the laws of war—is irrelevant." Hamidullin Br. at 23.

If the district court's analysis did not sufficiently consider Hamidullin's individual circumstances, the blame lies with Hamidullin himself. As noted above, it was Hamidullin's burden to prove his eligibility for combatant immunity: it was his motion to dismiss the indictment, and here combatant immunity is an affirmative defense on which the defendant bears the burden of proving all the elements. Hamidullin's single witness at the motions hearing introduced essentially no evidence regarding his own conduct, and the defense witness conceded that the Taliban did not meet the criteria of Article 4(A)(2). Hamidullin's argument was that he was entitled to combatant immunity *by virtue of his association with the Taliban*, and so naturally the district court analyzed the Taliban's eligibility as an organization. Hamidullin would fault the district court for failing to analyze evidence he never presented. Finally, as discussed further below, *see infra* at pp.44-47, what evidence was adduced at trial regarding Hamidullin and his band only strengthens the conclusion that Hamidullin was not associated with a lawful combatant group.

Regardless of Hamidullin's failings in this regard, the district court's analysis was appropriately focused on the organizations with which Hamidullin associated. Each of the potentially pertinent Article 4 categories refers to *organizations*. *See* GPW art.4(A)(1) (referring to the "armed forces of a Party to the conflict"); *id.* art. 4(A)(2) (referring to "militias" and "other volunteer corps"); *id.* art.4(A)(3) (referring to "regular armed forces"). The four criteria in Article 4(A)(2), which, as noted above, also apply to Articles 4(A)(1) and (A)(3), simply cannot be meaningfully assessed on a solely individual basis. *See id.* art.4(A)(2)(d) (requiring assessment of whether "*their* operations" (emphasis added) are conducted in accordance with laws and customs of war).

If a military force generally follows the criteria in Article 4, the fact that some individual members of that armed force may commit war crimes does not mean that the entire force is stripped of combatant immunity. Conversely, if an armed force consciously and systematically violates the laws of war as a matter of policy and practice, the fact that individual members of that force may not have personally committed a war crime does not mean those individuals are entitled to lawful combatant immunity. Here, the uncontroverted evidence before the district court was that the Taliban and Haqqani Network do not meet the Article 4 criteria, and therefore Hamidullin cannot claim combatant immunity by virtue of his association with them.

* * * *

Cross References

Citizenship transmission on military bases, **Chapter 1.A.3.**
Terrorism, **Chapter 3.B.1.**
Abu Khatallah *case*, **Chapter 4.C.1.**
Meshal *case regarding detention in counterterrorism context,* **Chapter 5.A.1.**
Center for Biological Diversity v. Hagel, **Chapter 5.C.2.**
U.S. report on optional protocol on children in armed conflict, **Chapter 6.C.1.a.**
Children and armed conflict, **Chapter 6.C.2.**
ILC's work on protection of the environment in relation to armed conflict, **Chapter 7.C.**
IACHR competence to review claims under law of war, **Chapter 7.D.1.e.**
Terrorism sanctions, **Chapter 16.A.6.**
Sanctions relating to malicious activities in cyberspace, **Chapter 16.A.11.**
Arms Export Control Act and International Trafficking In Arms regulations, **Chapter 16.B.**
Syria, **Chapter 17.B.2.**
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Daesh and atrocities, **Chapter 17.C.3.**
Arms Trade Treaty, **Chapter 19.E.**