

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

UNITED STATES¹

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Official Legal Position — Targeting of Individual Hostile Belligerents

- Harold Hongju Koh, ‘The Lawfulness of the U.S. Operation Against Osama bin Laden’ on *Opinio Juris* (19 May 2011)
<<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden>>
- ‘Remarks by the President at the “Change of Office” Chairman of the Joint Chiefs of Staff Ceremony’ (Press Release, 30 September 2011)
<<http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>>
- John O. Brennan, ‘Strengthening our Security by Adhering to our Values and Laws’ (Speech Delivered at Program on Law and Security, Harvard Law School, Cambridge, Massachusetts, 16 September 2011)
<<http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>>

While the current government in Washington has abandoned the phrase ‘war on terror’ used by its predecessor, it has continued to insist that the United States is engaged in an armed conflict with the al Qaeda organization. The killing of two al Qaeda leaders in 2011 gave rise to considerable legal discussion. On 2 May 2011, a team of US special operations forces killed Osama bin Laden at a compound in Abbottabad, Pakistan and took custody of his body. In September 2011, Anwar al-Awlaki (also as ‘al-Aulaqi’) was killed by a drone attack on a vehicle convoy in Yemen.

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In the May incident, contradictory initial reports contributed to confusion over the legality of the operation under international humanitarian law.² In response, the Legal Adviser of the US Department of State posted a defense of the operation on *Opinio Juris*, a web log dedicated to international legal issues:

In conducting the bin Laden raid, the United States acted in full compliance with the legal principles previously set forth in a speech that I gave to the American Society of International Law on March 25, 2010, in which I confirmed that '[i]n ...all of our operations involving the use of force, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law.'

...

Given bin Laden's unquestioned leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda. In addition, bin Laden continued to pose an imminent threat to the United States that engaged our right to use force, a threat that materials seized during the raid have only further documented. Under these circumstances, there is no question that he presented a lawful target for the use of lethal force. ... Moreover, the manner in which the U.S. operation was conducted — taking great pains both to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter — followed the principles of distinction and proportionality ... and was designed specifically to preserve those principles, even if it meant putting U.S. forces in harm's way. Finally, consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.³

The last three sentences quoted above, stating the circumstances under which an armed force is required to accept an enemy's offer of surrender, appear to derive from a US Department of Defense report on the application of the laws of war during the 1991 Persian Gulf war. In that conflict US forces had been criticized in the media for bulldozing Iraqi fortifications without offering the defending troops a chance to surrender, and for continuing to attack Iraqi forces fleeing in disorder from Kuwait City. The US Congress requested a report on these allegations

² See, e.g., Frank Jordans, 'Bin Laden Death Prompts Questions about Legality', *Associated Press*, 4 May 2011 <http://www.breitbart.com/article.php?id=D9N0TCIG0&show_article=1>. White House officials initially reported that bin Laden had been killed while participating in a firefight and used a woman as a human shield. See Jay Carney, 'Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, 5/2/2011' (2 May 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-press-secretary-jay-carney-and-assistant-president-homela>>. These statements were retracted a day later. See 'Press Briefing by Press Secretary Jay Carney, 5/3/2011' (3 May 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/03/press-briefing-press-secretary-jay-carney-532011>>.

³ Harold Hongju Koh, 'The Lawfulness of the U.S. Operation Against Osama bin Laden' on *Opinio Juris* (19 May 2011) <<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden>>. See 13 *YIHL* (2010) pp. 639–643.

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from the Department of Defense. In reply, the report acknowledged the duty to grant quarter, but stated that '[a] combatant force involved in an armed conflict is not obligated to offer its opponent an opportunity to surrender before carrying out an attack.' It further specified the conditions under which an offer to surrender must be accepted:

Surrender involves an offer by the surrendering party (a unit or an individual soldier) and an ability to accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon — an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.⁴

Following the raid in which bin Laden was killed, US officials reported that after confirming his identity aboard a US warship, he was buried at sea in a manner consistent with his religious beliefs:

Aboard the USS Carl Vinson, the burial of bin Laden was done in conformance with Islamic precepts and practices. The deceased's body was washed and then placed in a white sheet. The body was placed in a weighted bag; a military officer read prepared religious remarks, which were translated into Arabic by a native speaker. After the words were complete, the body was placed on a prepared flat board, tipped up, and the deceased body eased into the sea.⁵

In the US, the killing of Anwar al-Awlaki on 30 September was more controversial than the killing of Osama bin Laden because al-Awlaki was a US citizen by birth. Nevertheless, the President emphasized that he was targeted for the same general reasons that Koh had cited in the case of bin Laden, namely because of his leadership position in al Qaeda, including an operational role in planning attacks:

The death of Awlaki is a major blow to al Qaeda's most active operational affiliate. Awlaki was the leader of external operations for al Qaeda in the Arabian Peninsula. In that role, he took the lead in planning and directing efforts to murder innocent Americans. He directed the failed attempt to blow up an airplane on Christmas Day in 2009. He directed the failed attempt to blow up U.S. cargo planes in 2010. And he repeatedly called on individuals in the United States and around the globe to kill innocent men, women and children to advance a murderous agenda.⁶

Even if Osama bin Laden and Anwar al-Awlaki could be considered legitimate targets as leaders of enemy forces during an armed conflict, it has been questioned whether the US could lawfully attack them outside a theater of active hostilities such as Iraq or Afghanistan. The official US position on this issue was set forth by Presidential Assistant John Brennan in a speech at the Harvard University Law School:

⁴ Department of Defense Report to Congress on the Conduct of the Persian Gulf War, Appendix O, Role of the Law of War' (10 April 1992) in 31 *International Legal Materials* (1992) pp. 612, 614.

⁵ See Carney, *supra* n. 2. However, according to media reports some Islamic scholars denied that burial at sea was permitted under these circumstances. See Hamza Hendawi, 'Islamic Scholars Criticize bin Laden's Sea Burial', *Associated Press*, 2 May 2011 <http://news.yahoo.com/s/ap/20110502/ap_on_re_mi_ea/ml_bin_laden_sea_burial>.

⁶ 'Remarks by the President at the "Change of Office" Chairman of the Joint Chiefs of Staff Ceremony, 30 September 2011' <<http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>>.

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An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that — in accordance with international law — we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.

....

Others in the international community — including some of our closest allies and partners — take a different view of the geographic scope of the conflict, limiting it only to the 'hot' battlefields. As such, they argue that, outside of these two active theatres, the United States can only act in self-defense against al-Qa'ida when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an 'imminent' threat.

In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume. This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant — even if only temporary — disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define 'imminence.'⁷

Official Legal Position — Humanitarian Intervention to Protect Civilians in Libya

☛ Harold Hongju Koh, *Statement Regarding Use of Force in Libya to American Society of International Law* (26 March 2011)

<<http://www.state.gov/s/l/releases/remarks/159201.htm>>

In reaction to the Gadhafi government's violent crackdown on dissidents and demonstrators, in March 2011 US armed forces began operation Odyssey Dawn, an air and cruise missile campaign to weaken Libyan security forces with the avowed aim of protecting the civilian population from its own government. On 26 March, at a speech before the American Society of International Law, State Department Legal Adviser Koh presented the administration's legal justification for the operation, which he firmly based on UN Security Council Resolution 1973. Resolution 1973 authorized member states 'to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya.'⁸

These United States military actions rest on ample international legal authority. Chapter VII of the United Nations Charter grants authority to the Security Council to decide what measures shall be taken to maintain or restore international peace and security where it determines the existence of any threat to the peace, breach of the peace or act of aggression (Article 39). Articles 41 and 42 further specify that the Security Council may take such action by air, sea and land forces as may be necessary to maintain or restore international

⁷ John Brennan, 'Remarks of John Brennan, Assistant to the President for Homeland Security and Counterterrorism, at Harvard Law School, 16 September 2011' <<http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>>.

⁸ UNSC Res 1973/2011, UN Doc. S/RES/1973, 17 March 2011.

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peace and security. Acting under Chapter VII, in Resolution 1973, the Security Council determined that the situation in the Libyan Arab Jamahiriya constitutes a threat to international peace and security (PP21), and: (1) in operative paragraphs 6 to 8 of the resolution imposed a No-Fly Zone in the air space of the Libyan Arab Jamahiriya in order to help protect civilians, and authorized states to take 'all necessary measures' to enforce that No-Fly Zone in accordance with the Resolution, (2) in operative paragraph 4 authorized Member States to take all necessary measures to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory; and (3) in operative paragraph 13 authorized Member States to use all measures commensurate to the specific circumstances to carry out inspections aimed at the enforcement of the arms embargo.

....

The President directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to his constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. The President has well-recognized authority to authorize a mission of this kind, which as he explained, will be time-limited, well-defined, discrete, and aimed at preventing an imminent humanitarian catastrophe that directly implicates the national security and foreign policy interests of the United States.⁹

Treaty Actions and Government Policy — Additional Protocol II to the 1949 Geneva Conventions

- Hillary Rodham Clinton, US Secretary of State *Reaffirming America's Commitment to Humane Treatment of Detainees* (7 March 2011)
<<http://www.state.gov/secretary/rm/2011/03/157827.htm>>

On 7 March 2011, Secretary of State Hillary Clinton announced that the government would ask the US Senate to give its advice and consent to ratification of 1977 *Additional Protocol II*, on non-international armed conflict.¹⁰ *Additional Protocol II* had been submitted to the Senate by President Reagan in 1987, but that body has taken no action on it.¹¹ In calling for Senate action on the Protocol, the Secretary stated that the treaty 'is fully consistent with current military practice and would improve America's ability to maintain strong coalition cooperation in ongoing and future operations.'¹²

⁹ Harold Hongju Koh, 'Statement Regarding Use of Force in Libya' (Speech Delivered at American Society of International Law, Washington, 26 March 2011) <<http://www.america.gov/st/texttrans-english/2011/March/20110327160858su0.4296992.html?distid=ucs>>.

¹⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

¹¹ 'Message from the President transmitting Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts' (100th Congress, 1st Session, US Senate Treaty Document 100-2, 1987).

¹² Hillary Rodham Clinton, *US Secretary of State Reaffirming America's Commitment to Humane Treatment of Detainees* (7 March 2011).

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Treaty Actions — Weapons — Nuclear Weapons Free Zones

- Message to the US Senate on Protocols to the African Nuclear-Weapon-Free Zone Treaty (2 May 2011)
<http://www.whitehouse.gov/sites/default/files/2011african_msg_rel.pdf>
- Message to the US Senate on Protocols to the to the South Pacific Nuclear Free Zone Treaty (2 May 2011)
<http://www.whitehouse.gov/sites/default/files/2011sptreaty_msg_rel.pdf>

In May 2011, President Obama submitted the Protocols to the *African Nuclear Weapon Free Zone Treaty (Treaty of Pelindaba)*¹³ and the *South Pacific Nuclear Weapon Free Zone Treaty (Treaty of Raratonga)*¹⁴ to the US Senate for its advice and consent to ratification of both agreements.¹⁵ If ratified, Protocol I to the *Treaty of Pelindaba* and Protocol II to the *Treaty of Raratonga* would obligate the US 'not to use or threaten to use a nuclear explosive device' against any party to either Treaty.

Government Policy — Detention of Hostile Belligerents — Administrative Review and Standards of Treatment

- *Executive Order 13567 of 7 March 2011: Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, 76 Fed Reg 13277 (10 March 2011)
<<http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>>

In March, President Obama signed an Executive Order establishing procedures for periodic review of whether detainees at Guantánamo Bay should continue to be held in US custody.¹⁶ Reviews would be conducted by a 'Periodic Review Board' composed of 'senior officials' from the Departments of State, Defense, Justice, and Homeland Security, as well as the Offices of the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff.¹⁷ The Board would determine whether continued detention 'is necessary to protect against a significant threat to the security of the United States.'¹⁸

Detainees would be provided with a written, unclassified summary of the factors and information the Board would consider, and be allowed to present a written or oral statement to the Board, introduce relevant information, including written declarations, answer any questions posed by the Board, and call witnesses who were reasonably available and willing to provide relevant information. Detainees would be assisted by 'a Government-provided personal

¹³ Opened for signature 11 April 1996, 35 ILM 698 (entered into force 15 July 2009).

¹⁴ Opened for signature 6 August 1985, 24 ILM 1440 (entered into force 11 December 1986).

¹⁵ 'Statement on Nuclear Free Zones in Asia and Africa' (2 May 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/02/statement-nuclear-free-zones-asia-and-africa>>.

¹⁶ *Executive Order 13567 of 7 March 2011: Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, 76 Fed Reg 13277 (10 March 2011).

¹⁷ *Ibid.*, s. 9(b).

¹⁸ *Ibid.*, s. 2.

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representative' who possessed the security clearances necessary for access to the classified information the Board would consider, which would not be made available to the detainee.¹⁹

Initial hearings are to be held within a year of the Executive Order, and every three years thereafter. Between hearings, the Board would review detainee files every six months.²⁰ It may be noted that this is consistent with the *Fourth Geneva Convention's* call for review 'twice yearly', or 'if possible every six months' of the continued detention of civilian internees in international armed conflict,²¹ although the US government regards the detainees at Guantánamo Bay as participants in a non-international armed conflict.

Legislation — Detention of Hostile Belligerents — Military Custody and Treatment

• *National Defense Authorization Act for Fiscal Year 2012*, Pub L No 112-81, 125 Stat 1297 (2011)

<<http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>>

On the last day of December 2011, President Obama signed into law the *National Defense Authorization Act for Fiscal Year 2012*, part of which deals with the treatment while in US custody of any 'person who 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-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces', such as detainees at the Guantánamo Bay Naval Station.²² The Act authorized the detention of such persons 'under the law of war without trial until the end of the hostilities.'²³

It further provided that any person 'captured in the course of hostilities' was to be held by US military, rather than civilian, authorities if determined 'to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and ... to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.' Exceptions were allowed for law enforcement and intelligence interviews, and the President was authorized to waive this requirement if he certifies that 'such a waiver is in the national security interests of the United States.'²⁴

The Secretary of Defense was also required to develop 'a national security protocol governing communications to and from individuals detained at United States Naval Station, Guantanamo Bay' and report this to Congress. The security protocol would cover, *inter alia*, 'access to military or civilian legal representation ... including any limitations on such access and the manner in which any applicable legal privileges will be balanced with national security considerations' as well as 'communications with persons other than' US government personnel,

¹⁹ *Ibid.*, s. 3.

²⁰ *Ibid.*

²¹ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) arts. 43, 78.

²² *National Defense Authorization Act for Fiscal Year 2012*, Pub L No 112-81, § 1021(b), 125 Stat 1297, 1562 (2011).

²³ *Ibid.*, § 1021(c)(1).

²⁴ *Ibid.*, § 1022.

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'including meetings, mail, phone calls, and video teleconferences,' to include 'any limitations on categories of information that may be discussed or materials that may be shared.'²⁵

It will be interesting to see whether the security protocol will continue to allow for private interviews with International Committee of the Red Cross delegates, who have been visiting Guantánamo detainees since 2002. At the end of 2011, the ICRC had made 83 visits to Guantánamo.²⁶

Although the President signed these provisions into law, he issued a public 'signing statement' expressing 'serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists.' He stated his intention to 'interpret and implement' these provisions 'in a manner that best preserves the flexibility on which our safety depends and upholds the values on which this country was founded.'²⁷

Government Policy — Collateral Injury to Civilians — Afghanistan

- Letter from David Petraeus, General, US Army to Members of NATO International Security and Assistance Force (ISAF) (COMISAF Guidance Concerning Civilian Casualties, 15 May 2011)

<<http://www.isaf.nato.int/images/stories/File/COMISAF-Guidance/COMISAF%20Guidance%20Concern%20CIVCAS.pdf>>

- Letter from John Allen, General, US Marine Corps to Members of NATO's ISAF (COMISAF's Letter to the Troops upon Taking Command, 18 July 2011)

<<http://www.isaf.nato.int/images/stories/File/COMISAF/2011-07-18%20COMISAF%20Ltr%20to%20Troops%20Upon%20Taking%20Command.pdf>>

In 2011, collateral civilian casualties continued to be an irritant between the Afghan and US governments, and a major challenge for the US and International Security Assistance Forces (ISAF) fighting the Taliban in Afghanistan. Anticipating increased fighting in the upcoming summer, in May, US General David Petraeus, commander of ISAF and US Forces-Afghanistan, issued a letter to all subordinates stressing the importance of this matter:

The issue of civilian casualties demands the continued attention of every leader and trooper in Afghanistan. Indeed, no issue highlights more the need to balance tactical aggressiveness with tactical patience — both of which are critical to achieving our objectives.

...

[Enemy] attacks may increase the risk of civilian casualties and put Afghan and ISAF forces into difficult situations. In the face of such enemy actions, we must continue our efforts to

²⁵ Ibid., § 1025.

²⁶ International Committee of the Red Cross, 'Persons Detained by the US in Relation to Armed Conflict and the Fight against Terrorism — The Role of the ICRC' (9 January 2012)
<<http://www.icrc.org/eng/resources/documents/misc/united-states-detention.htm>>.

²⁷ 'Statement by the President on H.R. 1540' (31 December 2011) <<http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>>.

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reduce civilian casualties to an absolute minimum. Indeed, every loss of innocent civilian life is a tragedy for the family involved and diminishes our cause.²⁸

In July, US General John Allen took over command from General Petraeus. He issued his own letter reaffirming the importance of eliminating civilian casualties.²⁹

Government Policy — Maritime Blockade — Gaza II Flotilla

- US Department of State, 'Gaza "Anniversary" Flotilla' (Media Release, 24 June 2011)
<<http://www.state.gov/r/pa/prs/ps/2011/06/166967.htm>>
- US Department of State, 'Quartet Statement on the Situation in Gaza' (Media Release, 2 July 2011)
<<http://www.state.gov/r/pa/prs/ps/2011/07/167525.htm>>

In May 2010, a flotilla of ships carrying purported humanitarian aid, and manned by activists opposed to the Israeli blockade of the Gaza coast, attempted to break the blockade, leading to a confrontation with the Israeli armed forces in which several activists were killed. In the summer of 2011, efforts were made to organize a second flotilla to try again to break the blockade. In response, the US State Department criticized the effort, noting that the blockade served legitimate security concerns and that there were established procedures for sending humanitarian supplies to Gaza:

Groups that seek to break Israel's maritime blockade of Gaza are taking irresponsible and provocative actions that risk the safety of their passengers. Established and efficient mechanisms exist to transfer humanitarian assistance to Gaza. For example, humanitarian assistance can be delivered at the Israeli port of Ashdod, where cargo can be offloaded, inspected, and transported to Gaza. We urge all those seeking to provide such assistance to the people of Gaza to use these mechanisms, and not to participate in actions like the planned flotilla.

...

Recent seizures by Israel and Egypt of advanced military systems, weapons, and ammunition bound for terrorist groups in Gaza, as well as periodic rocket and mortar attacks from Gaza against Israeli civilians, highlight the continuing problem of illicit arms smuggling to Gaza. These seizures underscore the vital importance to Israel's security of ensuring that all cargo bound for Gaza is appropriately screened for illegal arms and dual-use materials.³⁰

In July the 'Quartet' of States and organizations (US, United Nations, European Union and Russia) seeking to mediate the peace process in the Israeli–Palestinian conflict issued a statement calling for improved living conditions in Gaza, but also expressing concern over a second blockade confrontation and calling on 'all those wishing to deliver goods to the people of Gaza

²⁸ Letter from David Petraeus, General, US Army to Members of NATO International Security and Assistance Force (ISAF) (COMISAF Guidance Concerning Civilian Casualties, 15 May 2011).

²⁹ Letter from John Allen, General, US Marine Corps to Members of NATO's ISAF (COMISAF's Letter to the Troops upon Taking Command, 18 July 2011).

³⁰ Department of State, 'Gaza "Anniversary" Flotilla' (Media Release, 24 June 2011).

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to do so through established channels so that their cargo can be inspected and transferred via established land crossings.’³¹

Cases — Civilian Courts — Offenses by Civilians Accompanying Armed Forces

- US Department of Justice, ‘Contractor Sentenced to 37 Months in Prison for Death of Afghan National in Kabul, Afghanistan’ (Press Release, 14 June 2011)
<<http://www.justice.gov/opa/pr/2011/June/11-crm-771.html>>
- US Department of Justice, ‘Contractor Sentenced to 30 Months in Prison for Death of Afghan National in Kabul, Afghanistan’ (Press Release, 27 June 2011)
<<http://www.justice.gov/opa/pr/2011/June/11-crm-843.html>>

Established in March 2010, the Human Rights and Special Prosecutions Section of the Department of Justice focuses on cases involving violations of international human rights and humanitarian law.³² Under the *Military Extraterritorial Jurisdiction Act*, US federal courts have criminal jurisdiction over serious crimes committed by persons ‘employed by or accompanying the Armed Forces outside the United States.’³³ Based on this statute, in 2011 the Special Prosecutions Section successfully prosecuted two US citizens for crimes against local civilians while employed by a US military contractor in Afghanistan.

Justin Cannon and Christopher Drotleff were employed by a subsidiary of Xe Services LLC (formerly known as Blackwater Worldwide) to train Afghan security forces. In May 2009, they were driving in a convoy in Kabul. After the lead vehicle in the convoy crashed and overturned, a civilian car attempted to pass the accident scene. Cannon fired an AK 47 rifle and Drotleff, a nine millimeter pistol at the passing car, killing the passenger, Romal Mohammad Naiem and wounding the driver. A civilian walking his dog nearby was also shot and killed in the incident. After trial in the US District Court for the Eastern District of Virginia, a jury convicted them of involuntary manslaughter of the passenger, Naiem, and acquitted them of murder and assault charges. Cannon was sentenced to 30 months imprisonment³⁴ and Drotleff to 37 months.³⁵ Both were allowed to remain free while their case was on appeal to the US Court of Appeals for the 4th Circuit. The appeal is expected to be heard in 2012.³⁶ After Drotleff’s sentencing, Assistant Attorney General Breuer, head of the Special Prosecutions Section, stated:

We hope that today’s sentence will bring some measure of comfort to the victims’ families. Reckless violence by those who are employed by our armed forces abroad endangers the lives of innocent civilians and undermines the trust that our international partners have

³¹ Department of State, ‘Quartet Statement on the Situation in Gaza’ (Media Release, 2 July 2011).

³² Department of Justice, ‘New Human Rights and Special Prosecutions Section in Criminal Division’ (Press Release, 30 March 2010) <<http://www.justice.gov/opa/pr/2010/March/10-crm-347.html>>.

³³ 18 USC § 3261.

³⁴ Department of Justice, ‘Contractor Sentenced to 30 Months in Prison for Death of Afghan National in Kabul, Afghanistan’ (Press Release, 27 June 2011).

³⁵ Department of Justice, ‘Contractor Sentenced to 37 Months in Prison for Death of Afghan National in Kabul, Afghanistan’ (Press Release, 14 June 2011).

³⁶ Bruce Alpert, ‘Louisiana Man Appeals Conviction in Death of Afghan Civilian’, *Greater New Orleans*, 19 August 2011 <http://www.nola.com/military/index.ssf/2011/08/louisiana_man_appeals_convicti.html>.

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placed in our military efforts. Mr. Drotleff's conduct stands in stark contrast to the actions of the many brave men and women who serve this country honorably.³⁷

Government Policy — Trial of Hostile Belligerents — Military Commissions

- 'Statement by Defense Secretary Gates on Resumption of Military Commission Charges' (Press Release, 7 March 2011)
<<http://www.defense.gov/Releases/Release.aspx?ReleaseID=14316>>

In January 2009, the Obama administration ordered a halt to all Military Commission proceedings at the Guantánamo Bay Naval Station while it studied options for closing the facility and prosecuting detainees before civilian courts in the US. In the face of legal obstacles and political opposition to bringing the detainees to the US, on 7 March 2011, the Secretary of Defense ordered the resumption of Military Commission trials.³⁸ At the beginning of April, the Department of Justice announced that, after consultation with the Department of Defense, five detainees suspected of involvement in the 11 September 2001 attacks — Khalid Sheikh Mohammed, Walid Bin Attash, Ramzi Bin Al-Shibh, Ali Abdul Aziz Ali and Mustafa Al-Hawsawi — were eligible for Military Commission charges and referred their cases to the Department of Defense for trial.³⁹

Government Policy — Exclusion from Entry into the United States of Human Rights and Humanitarian Law Violators

- 'Presidential Proclamation — Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses' (4 August 2011)
<[http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-proclamation-suspension-entry-immigrants-and-nonimmigrants->](http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-proclamation-suspension-entry-immigrants-and-nonimmigrants-)

In August 2011, as part of a series of actions on humanitarian law policy, President Obama issued a Proclamation barring from entry into the US:

(a) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population based in whole or in part on race; color; descent; sex; disability; membership in an indigenous group; language; religion; political opinion; national origin; ethnicity; membership in a particular social group; birth; or sexual orientation or gender identity, or who attempted or conspired to do so.

³⁷ Department of Justice, *supra* n. 35.

³⁸ 'Statement by Defense Secretary Gates on Resumption of Military Commission Charges' (7 March 2011)
<<http://www.defense.gov/Releases/Release.aspx?ReleaseID=14316>>.

³⁹ 'Statement of the Attorney General on the Prosecution of the 9/11 Conspirators' (4 April 2011)
<<http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html>>; 'Justice Department Refers Five Accused 9/11 Plotters to Military Commissions' (Press Release, 4 April 2011)
<<http://www.justice.gov/opa/pr/2011/April/11-ag-421.html>>.

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(b) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, war crimes, crimes against humanity or other serious violations of human rights, or who attempted or conspired to do so.⁴⁰

A person otherwise denied entry under the Proclamation could be admitted if the Secretary of State 'determines that the particular entry of such person would be in the interests of the United States.'⁴¹

A press release accompanying the Proclamation explained that it was intended to fill gaps in existing US immigration law. By statute, aliens who engaged some human rights and humanitarian law violations were already excluded from entry, including persons engaged in terrorist activity, participants in Nazi-era crimes against humanity, or those recruiting or using child soldiers.⁴² The press release explained:

However, before today [4 August 2011], the United States did not have an explicit bar to admission on the basis of participation in serious violations of human rights or humanitarian law or other atrocities that do not otherwise fit into those categories specifically enumerated in the Immigration and Nationality Act. This proclamation fills this gap by expanding the grounds for denial of entry into the United States to cover a broader array of recognized violations of international humanitarian law and international criminal law, such as war crimes and crimes against humanity. The proclamation will also cover participants in serious human rights violations, such as prolonged arbitrary detention, forced disappearances, slavery, and forced labor, as well as participants in widespread or systematic violence against civilians based on ethnicity or other grounds.⁴³

Government Policies — Establishment of Atrocities Prevention Board

☛ 'Presidential Study Directive on Mass Atrocities' (PSD-10, 4 August 2011)

<<http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>>

In August 2011, the President also ordered an official study intended to lead to the creation of a US government Interagency Atrocities Prevention Board:

The primary purpose of the Atrocities Prevention Board shall be to coordinate a whole of government approach to preventing mass atrocities and genocide. By institutionalizing the coordination of atrocity prevention, we can ensure: (1) that our national security apparatus recognizes and is responsive to early indicators of potential atrocities; (2) that departments and agencies develop and implement comprehensive atrocity prevention and response

⁴⁰ 'Proclamation — Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses' (4 August 2011) s. 1 <<http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-proclamation-suspension-entry-immigrants-and-nonimmigrants->>.

⁴¹ *Ibid.*, s. 5.

⁴² 8 USC §§ 1182(a)(3)(B), 1182(a)(3)(E), 1182(a)(3)(G).

⁴³ 'Fact Sheet: President Obama Directs New Steps to Prevent Mass Atrocities and Impose Consequences on Serious Human Rights Violators' (4 August 2011) <<http://www.whitehouse.gov/the-press-office/2011/08/04/fact-sheet-president-obama-directs-new-steps-prevent-mass-atrocities-and>>.

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strategies in a manner that allows 'red flags' and dissent to be raised to decision makers; (3) that we increase the capacity and develop doctrine for our foreign service, armed services, development professionals, and other actors to engage in the full spectrum of smart prevention activities; and (4) that we are optimally positioned to work with our allies in order to ensure that the burdens of atrocity prevention and response are appropriately shared.⁴⁴

The President's National Security Adviser was tasked with leading an interagency study to 'develop and recommend the membership, mandate, structure, operational protocols, authorities, and support necessary for the Atrocities Prevention Board to coordinate and develop atrocity prevention and response policy.' At the time of writing, April 2012, the study was still ongoing and the Atrocities Prevention Board had yet to be formed.

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⁴⁴ 'Presidential Study Directive on Mass Atrocities' (PSD-10, 4 August 2011).