

No.

IN THE
Supreme Court of the United States

TOFFIQ NASSER AWAD AL-BIHANI,

Petitioner,

v.

BARACK H. OBAMA, et al.,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the laws of armed conflict apply to determine the scope of who may be indefinitely detained under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

PARTIES TO THE PROCEEDING

The parties to the proceeding are Toffiq Nasser Awad Al-Bihani, Internment Serial Number 893, Guantanamo Bay, Cuba, President of the United States Barack H. Obama, and the civilian officials and military officers in the chain of command controlling the detention of Al-Bihani.

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OPINIONS BELOW

The court of appeals order summarily affirming the district court's decision (*see* Petitioner's Appendix ("App.") 1a-2a) is reported at No. 10-5352, 2010 U.S. App. LEXIS 2600 (D.C. Cir. Feb. 10, 2011). The district court's decision (3a-25a) is reported at No. 05-2386 (RBW), 2010 U.S. Dist. LEXIS 107590 (D.D.C. Sept. 22, 2010 and filed Oct. 7, 2010).

JURISDICTION

The court of appeals entered judgment on February 10, 2011. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224-25 (2001) provides:

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL - That the President is authorized 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION REQUIREMENTS-

(1) SPECIFIC STATUTORY AUTHORIZATION - Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is

intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS - Nothing in this resolution supercedes any requirement of the War Powers Resolution.

STATEMENT OF THE CASE

Petitioner, a Yemeni national, is being indefinitely detained by respondents in Guantanamo Bay, Cuba. App. 4a. Petitioner was originally detained in Iran and later came into respondent's custody. App. 9a-10a.

The district court upheld petitioner's indefinite detention based solely on the finding that he was part of al Qaeda. App. 16a, 23a. Petitioner admits he was part of al Qaeda while training in Afghanistan. App. 15a. He denies remaining part of al Qaeda after that training but the district court found to the contrary (App. 18a-19a, 23a n.8.) and petitioner does not challenge that factual finding.

In upholding petitioner's detention, the district court did not find or suggest that petitioner engaged in hostilities against the United States or any coalition partner. The district court did not even find that he intended to engage in such hostilities but, rather, that petitioner's "intent all along" was to accompany his brother to Chechnya for "military training." App. 21a-22a. Nevertheless, the district court relied on D.C. Circuit precedent and held that under the AUMF, respondents are not required to show that petitioner "engaged in hostile aggression, or to have desired to engage in such conduct, against the United States" in order to indefinitely detain him. App. 19a n.6.

The D.C. Circuit precedent on which the district court relied was *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) *cert. denied*, 79 U.S.L.W. 3568 (U.S. Apr. 4, 2011),¹ a case that involved petitioner's brother. In that case, the D.C. Circuit held that in determining the scope of the Executive's detention authority reliance on the laws of armed conflict (also known as the laws of war) was "both inapposite and inadvisable." 590 F.3d at 871. A petition for rehearing was denied. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010).

Based on the existence of this and other binding Circuit precedent and in recognition of the futility of proceeding in the court of appeals, petitioner and respondents moved to summarily affirm the district court's decision upholding petitioner's detention for the purpose of allowing petitioner to expedite this petition. The court of appeals summarily affirmed the district court's decision on February 10, 2011. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit has settled on a detention standard that ignores the historic law of armed conflict restrictions on indefinite detention and that is inconsistent with this Court's decisions in *Ex parte Quirin*, 317 U.S. 1 (1942), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

¹ The petitioner in *Al-Bihani* belonged to a military brigade and carried a brigade-issued weapon which he relinquished only when he surrendered, on the order of his superiors, to Northern Alliance forces. 590 F.3d at 869. His situation is thus quite different -- under the laws of armed conflict and otherwise -- than petitioner's.

(plurality opinion), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The Circuit’s standard allows indefinite detention of an individual based solely on his being “part of” a group, al Qaeda, without regard to whether the individual in question ever personally engaged in hostilities (direct or otherwise) against the United States or any coalition partner.

While the Executive claims to be acting under Congressional authorization in allowing such detention, the proffered basis for that authority, the AUMF, does not support the Executive’s position. Rather, the Executive can legitimately justify detention only by reference to the laws of armed conflict -- laws it at once embraces and shuns. Contrary to its own guidance in other areas and contrary to its own public proclamations, the Executive has promulgated guidance that purports to justify the indefinite detention of civilians at Guantanamo based solely on their associations and not based on their deeds. This is unsupportable under the laws of armed conflict.

Given the D.C. Circuit’s refusal to apply the laws of armed conflict, the inaction of Congress in providing for detention outside of those laws,² and the Executive

² As the Chief Judge of the United States District Court for the District of Columbia has explained: “We had no guidance from Congress. We had four different definitions from President Bush. We got two words in it changed by President Obama, and other than that we’ve been off and running doing the best we could with adjudicating these cases with very little political differences among the judges.” Hon. Royce C. Lamberth, Chief Judge, U.S. District Court for the District of Columbia, Remarks at the Brook-

cherry-picking which of those laws apply and which do not, the Court should grant this petition and decide whether the laws of armed conflict apply to define the scope of detention under the AUMF.

The Applicability of the Laws of Armed Conflict to the Executive's Detention Authority Is An Important Federal Question That This Court Should Resolve.

To date, the Court has refrained from addressing the question of who is detainable in the war on terror, believing that the lower courts should first address that question on a case-by-case basis. *See Hamdi*, 542 U.S. at 522 n.1 (“The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.”) Left alone by this Court, the D.C. Circuit has refused to apply the laws of armed conflict in construing the Executive’s detention authority. Nearly ten years into the war on terror, it is time for this Court to provide direction.

A. Contrary to the D.C. Circuit’s Ruling, the Laws of Armed Conflict Do More Than Identify the Powers Granted to the Executive Under the AUMF – They Define the Scope of Those Powers.

The Executive has proposed the following standard for who it may detain under the AUMF:

ings Institution's “Breaking the Judicial Nominations and Confirmations Logjam” (Feb. 28, 2011).

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

App. 27a-28a

Although the court of appeals acknowledged that the laws of armed conflict were “helpful to courts when identifying the general set of war powers to which the AUMF speaks” (*Al-Bihani*, 590 F.3d at 871), it held that those laws are “inapposite” in defining the scope of the Executive’s purported detention authority and that the notion they might limit that scope was “mistaken.” *Id.* The combined effect of the Executive’s position and the D.C. Circuit’s refusal to apply the laws of armed conflict to interpret that position is that the Executive purports to be able to detain an individual merely because “he [is a] ‘part of’ Al-Qaeda” regardless of whether he participated in or intended to participate in hostile acts against the United States. App. 4a.

But the AUMF does not grant the Executive the power to detain individuals in the present armed conflict outside of the scope of the laws of armed conflict.

Rather, while the AUMF “activated the President’s war powers” it did not “expand or alter” the scope of those powers. *Hamdan*, 548 U.S. at 594. In *Hamdan*, this Court looked to other sources to determine whether and in what circumstances the President could exercise already-existing war powers that the AUMF “activated.” *Id.* at 594-95. Those existing sources of law define and place limits upon the otherwise undefined “force” that the AUMF “authorized” the Executive to use. Thus, although it is undisputed that Congress intended to authorize the President to exercise war powers against certain groups, the AUMF does not override the historical metes and bounds of those powers.

The text of the AUMF admits of no other reading. Section 2(b) clarifies that Congress considered the AUMF to be the specific statutory authorization contemplated by the War Powers Resolution, 50 U.S.C. §§ 1541 *et seq.* In turn, the War Powers Resolution explains that it is not intended to “alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties.”³ 50 U.S.C. § 1547(d)(1). Furthermore, the AUMF requires that force be “appropriate.” Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224. Had Congress sought to give the

³ *See also* (147 Cong. Rec. S9416 (Sept. 14, 2001) (statement of Sen. Levin) (“[The AUMF] is not a broad authorization for the use of military force It does not recognize any greater presidential authority than is recognized by the War Powers Resolution nor does it grant any new authority to the President.”); *Id.* at H5677 (statement of Rep. McGovern) (“[The AUMF] provides no new or additional grant of powers to the President.”))

Executive authority to exercise force (including detention authority) unfettered by the laws of armed conflict it would have enacted legislation doing so. It did not.

The court of appeals was distracted (perhaps offended) by the idea that the Executive could be bound by “international” law. 590 F.3d at 871 (“The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.”) Indeed, the laws of armed conflict are international in scope -- civilized nations consistently observe them. But they are the law domestically as well: this nation is a member of the international community and has recognized the importance of observing basic standards in armed conflict. That is why this Court has consistently ruled that when Congress speaks of military force, without further definition or limit, it means military force as prescribed by the laws of armed conflict. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (“From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”).

It is thus well settled that when Congress authorizes the use of military force without further definition, the laws of armed conflict define the scope of those powers. *See Quirin, supra; MacCleod v. United States*, 229 U.S. 416, 432 (1913) (Presidential authority “is subject to the laws and usages of wa[r] and, we may add, to such rules as are sanctioned by the established principles of international law” (internal citation omitted)); *Herrera v. United States*, 222 U.S. 558, 573 (1912) (explaining

that a wartime confiscation “done in violation of the laws of war . . . was done in the wrong”); *New Orleans v. S.S. Co.*, 87 U.S. 387, 394 (1874) (“There is no limit to the powers that may be exerted in [the cases of capture of territory], save those which are found in the laws and usages of war.”).

B. The D.C. Circuit’s Continuing Refusal to Apply the Laws of Armed Conflict to Analyze the Scope of the Executive’s Detention Authority Has Prevented Development of the Law in the Lower Courts.

The court of appeals, in approving the Executive’s claim to indefinite detention power over civilians who are a “part” of al Qaeda, reasoned that because “[t]here is no indication in the AUMF . . . that Congress intended the international laws of war to act as extra-textual limiting principles” those laws “lack . . . controlling legal force and firm definition” and are “inapposite and inadvisable” to use in determining “the limits of the President’s war powers.” *Al-Bihani v. Obama*, 590 F.3d 866, 871-72 (D.C. Cir. 2010), *cert. denied*, 79 U.S.L.W. 3568 (U.S. Apr. 4, 2011). It has refused to reconsider that position. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010).

This rationale is backwards. The laws of armed conflict limit Executive action in the absence of a clear statement to the contrary:

The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate

the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law.

MacLeod, 229 U.S. at 434 (analyzing a statute ratifying the Executive’s exercise of war powers); *see also Miller v. United States*, 78 U.S. (11 Wall.) 268, 309 (1871) (the Court will apply a “presumption that the legislature acts within the scope of its authority,” which scope is limited by the law of war); *Scholefield v. Eichelberger*, 32 U.S. 586, 593 (1833) (“relaxation of the laws of war is not to be inferred from ordinary circumstances, if indeed it may be inferred at all”). Under this precedent, the text of the AUMF, far from evincing intent to jettison the laws of armed conflict, should be understood as a specific endorsement of their applicability.

A plurality of this Court has already acknowledged that the laws of armed conflict define the power to indefinitely detain certain individuals under the AUMF. In *Hamdi*, the plurality held that the detention power activated by the AUMF could include detention of combatants for the duration of the relevant conflict specifically because of “longstanding law-of-war principles.”⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507,

⁴ Mr. Hamdi was detained because he allegedly “took up arms with the Taliban during this conflict.” 542 U.S. at 510. The plurality only decided that detention was proper under the laws of armed conflict for individuals “legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States.” *Id.* at 521 (internal quotation omitted). Petitioner did not engage in an armed conflict with anyone, much less the United States.

521 (2004) (plurality opinion). If the source of the AUMF's detention power is "law-of-war principles," it follows that the AUMF's detention power is constrained by the limitations embodied in those principles.

Hamdi was not the first time that this Court consulted the laws of armed conflict to discern the limits of Congressional authorizations of Executive power. Over a half century before deciding war-on-terror cases, this Court looked to "universal agreement and practice" and the "law of war," informed by "a long course of practical administrative construction by [our] military authorities" to discern the difference between lawful and unlawful combatants. *Ex parte Quirin*, 317 U.S. at 30, 31, 35. In light of this non-controversial and long-running precedent, the laws of armed conflict must be considered in determining the scope of the detention authority activated by the AUMF.

But the court of appeals has refused to even analyze the laws of armed conflict to determine whether they inform or limit the scope of the Executive's detention authority:

[W]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, *see Hamdi*, 542 U.S. at 520, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers. Therefore, putting aside that we find Al-Bihani's reading of international law to be unpersuasive, we have no occasion here to quibble over the intricate application of vague treaty

provisions and amorphous customary principles. The sources we look to for resolution of *Al-Bihani*'s case are the sources courts always look to: the text of relevant statutes⁵ and controlling domestic caselaw.

590 F.3d at 871-72.

The Circuit's refusal to work through the application of the laws of armed conflict is more than wrong; it has blocked an opportunity for the laws of armed conflict to be subjected to lower court interpretation and analysis in Guantanamo cases. Instead of being allowed to develop in the normal course of litigation, the key principles that govern military detention are excluded from consideration in the only court with jurisdiction over challenges to the propriety of that detention.⁶

⁵ After rejecting application of the laws of armed conflict in its search for authority, the court of appeals cited the Military Commissions Acts of 2006 and 2009 (Pub. L. No. 109-366, 120 Stat. 2600 and Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2575-76) as support for its view that being "part of" al Qaeda is sufficient to subject a man to indefinite detention. *Al-Bihani*, 590 F.3d at 871-72. But neither of these Acts enacts a detention regime or defines a standard for detention. The Acts merely distinguish the tribunals that will apply to the prosecution of various types of individuals who are charged with war crimes. Petitioner has never been charged with any crime, under the laws of armed conflict or otherwise. The Acts do not even purport to authorize or define the scope of the indefinite detention petitioner presently endures for being part of al Qaeda.

⁶This is why there is not a circuit split for the Court to resolve. There never will be. *Habeas corpus* cases involving Guantanamo Bay detainees are heard only in the United

While this Court need not determine on a case-by-case basis whether individuals like petitioner can be subject to indefinite detention under the laws of armed conflict, the Court must intervene to decide whether those laws apply to define the scope of the Executive's detention authority in order to give the lower court the opportunity to make those case-by-case determinations. Otherwise, the district court will be unable to apply the appropriate legal standard to determine the propriety of the detention of petitioner and the other men who remain in Guantanamo.

C. Petitioner Is Not Detainable Under the Laws of Armed Conflict.

Unlike the court of appeals' ruling, the Executive's guidance on the scope of its detention authority under the AUMF does not assert that the laws of armed conflict play no role. Rather, it invokes those laws to assert that the AUMF "authorizes the use of necessary and appropriate military force against members of an opposing armed force, whether that armed force is the force of a state or the irregular forces of an armed group like al-Qaida." App. 32a. This is wrong.

Under the principles of the laws of armed conflict embodied in both United States and "international" sources, petitioner is a civilian because he has not given up the protections of that status by direct and active participation in hostilities. *See* Dep't of the Navy, *Commander's Handbook on the Law of Naval Operations* 5.4.1, and 5.4.3 (July 2007) ("Combatants are persons engaged in hostilities during an armed

States District Court for the District of Columbia and appealed only through the D.C. Circuit.

conflict ... [u]nlawful enemy combatants ... engage in acts against the United States or its coalition partners in violation of the laws and customs of war during armed conflict;” “[a] civilian is a person who is not a combatant”); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (“Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured.”) (citations omitted). While the laws of armed conflict allow a belligerent force to capture and detain “secret participants in hostilities, such as banditti, guerillas, spies, &c” (Military Commissions, 11 Op. Att’y Gen. 297, 1865 U.S. AG LEXIS 36, at *20 (July 1865) such enemies must be “active participants” (*id.* at *19-20).

Petitioner is not detainable under the laws of armed conflict because he was not participating in hostilities. “Absent direct participation in hostilities a civilian is not a combatant, and not a lawful object of either military armed force or detention as a combatant.” Gary D. Solis (“Solis Decl.”) ¶ 6.f (App. 50a.) United States military publications, treaties, and authoritative commentary confirm this established rule. *See, e.g.*, U.S. Air Force Pamphlet 110-31, § 5-3(a)(1)(c), at 5-8 (Nov. 19, 1976) (“Civilians enjoy the protection afforded by law unless and for such time as they take a direct part in the hostilities.”); *see also* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3(1) Aug. 12, 1949 (prohibiting attacks on civilians “taking no active part in hostilities”); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 13(2)-(3), June 8, 1977, 1125 U.N.T.S. 609, 615 (“Additional Protocol II”) (App. 69a) (civilian population “shall not be the object of attack” “unless and for

such time as they take a direct part in hostilities”); 1 Haekaerts & Doswald-Beck, Customary International Humanitarian Law 19-20 (2005) (noting that State practice “establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts”); Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2113-14 (2005) (“The laws of war permit combatants to target other combatants, but prohibit them from targeting non-combatants unless the non-combatants take part in hostilities.”).

Notwithstanding the Executive’s claim of detention authority over petitioner, it has recently acknowledged that Additional Protocol II represents United States military practice and requested the Senate to ratify it. *Fact Sheet: New Actions on Guantanamo and Detainee Policy* (Mar. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guantanamo-and-detainee-policy>. But under Additional Protocol II, “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack” a protection which civilians “shall enjoy ...unless and for such time as they take a direct part in hostilities.” Art. 13 (App. 69a). In other words, even though he was a “part of” of al-Qaeda, because petitioner did not take part in hostilities under Additional Protocol II -- a provision the Executive concedes is the law of the land -- he cannot be targeted or detained under the laws of armed conflict.

This is not an untoward result; the “direct participation in hostilities” standard is a critical distinction in the laws of armed conflict, as it determines when civil-

ians may be treated as “combatants” and when they may not.⁷ The consequences of that determination are important: “combatants” may be deliberately targeted with deadly military force; civilians not participating in hostilities may not. Combatants may also be detained in order to prevent their return to the battlefield. The same is not true of civilians. They may not be targets of military force (including detention until the end of conflict) unless they have given up the protections of civilian status by actively engaging in combat. *See* Solis Decl. ¶ 6.f. (App. 49a-50a). “As the law of armed conflict now stands, there is no basis for asserting that merely being a member of or associating with an enemy organization is a legal basis for the application of military force.” *Id.* ¶ 6.i (App. 56a); *see also* Jennifer K. Elsea, *Congressional Research Service Report: Detention of American Citizens as Enemy Combatants* 11 (Mar. 31, 2005) (“We are unaware of any U.S. precedent confirming the constitutional power of the President to detain indefinitely a person accused of being an unlawful combatant due to mere membership in or association with a group that does not qualify as a legitimate belligerent, with or without the authorization of Congress”).

⁷ Nor is it a suicide pact. “[S]enior terrorist leaders . . . should be considered to continually be taking a direct part in hostilities.” Solis Decl. ¶ 6.g. (App. 52a). Such individuals, by virtue of their “senior leadership positions and involvement in or planning of combat operations, are always combatants.” *Id.* (App. 53a). Accordingly, the recent commando raid in which Usama bin Laden was targeted and killed was appropriate under the laws of armed conflict.

Because of the D.C. Circuit's erroneous refusal to apply the laws of armed conflict to the Executive's broad claims of indefinite-detention authority, Petitioner faces the very real prospect of spending the remainder of his life in military detention -- a civilian detained as a combatant in a never-ending war in which he did not fight. He faces this bleak future not because he took up arms against the United States but because he associated with a group that includes men who did. Such detention is anathema to the laws of armed conflict and is not authorized by the AUMF.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10-5352

September Term 2010

1:05-cv-02386-RBW

Filed On: February 10, 2011

Tofiq Nasser Awad Al Bihani,

Appellant

v.

Barack Obama, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and
Ginsburg and Griffith, Circuit Judges

ORDER

Upon consideration of the joint motion for summary affirmance, it is

ORDERED that the motion be granted and the district court's order filed September 24, 2010, denying appellant's petition for a writ of habeas corpus, be summarily affirmed. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

Although appellant objects to the district court's decision upholding his detention and contends the district court applied an erroneous legal standard, the parties jointly agree that this court's decisions foreclose appellant's arguments challenging the lawfulness of his detention under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), or the laws of armed conflict. See, e.g., Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010), cert. denied, No. 10-487 (U.S. Jan. 18, 2011); Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010), petition for cert. filed, No. 10-7814 (U.S. Nov. 29, 2010). Accordingly, appellant joins the motion for summary affirmance in recognition of the futility of pursuing the current appeal and as an expeditious means to obtain a judgment of this court that will allow him to seek review by the Supreme Court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue forthwith to the district court a certified copy of this order in lieu of formal mandate.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)	
TOFFIQ NASSER)	FILED WITH THE COURT SECURITY OFFICER CSO: [ILLEGIBLE] DATE: 9/27/10
AWAD AL-BIHANI,)	
)	
)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 05-
)	2386 (RBW)
)	
BARACK H. OBAMA,)	
President of the United)	
States, <u>et al.</u> ,)	
)	
Respondents.)	
)	

MEMORANDUM OPINION

Currently before the Court is the petition of Toffiq Nasser Awad Al-Bihani (ISN 893)¹ for a writ of habeas corpus, in which he argues that he should be released from the United States detention facility in Guantanamo Bay, Cuba, because his detention is

¹ “ISN” is the acronym for “Internment Serial Number.” Al-Harbi v. Obama, Civil Action No. 05-2479 (HHK), 2010 WL 2398883, at *3 n.2 (D.D.C. May 13, 2010). Each of the detainees currently housed in Guantanamo Bay has been assigned an ISN. Id.

not authorized under the Authorization for the Use of Military Force (the “AUMF”), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). Petition for a Writ of Habeas Corpus ¶ 344. Not surprisingly, the government opposes the petitioner’s habeas petition on the grounds that he was “part of” al-Qaeda, thereby rendering him detainable under the AUMF. June 16, 2010 Hearing Transcript (“Hr’g Tr.”) at 46:18-20, June 16, 2010. After carefully considering the evidence presented by both parties and the arguments of counsel during the merits hearing that commenced on June 16, 2010, and concluded on June 17, 2010, as well as the various documents that have been filed by the parties in this matter and the exhibits attached to these filings,² the Court concludes for the following reasons that the petitioner’s petition for a writ of habeas corpus must be denied.

I. Background

The following facts are derived from the petitioner’s testimony at the merits hearing, his declaration, and the stipulated facts contained in the Joint Pre-Trial Statement. The petitioner is a Yemeni national, *id.* at 100:3-4, who was born in 1972, Gov’t’s Exhibits, Ex. 50 (Declaration of Toffiq Al-Bihani (“Al-Bihani Decl.”)) ¶ 1, and raised in Saudi Arabia, Hr’g Tr. 99:12-17. The petitioner was one of twelve children in his immediate family, *see id.* at 100:20-101:2, one sibling being his older

² In addition to the evidence and arguments presented by the parties at the merits hearing, the Court considered the following documents in reaching its decision: (1) the government’s Factual Return; (2) the petitioner’s Traverse; and (3) the parties’ Joint Pre-Trial Statement (the “Joint Stmt.”).

brother, Mansour, “also known as Assam al-Tabuki,” Joint Stmt. at 6. During the time he resided in Saudi Arabia, the petitioner was abusing various drugs, including alcohol, Hr’g Tr. at 107:17, marijuana, hashish, crystal methamphetamine, and depression pills, id. at 108:21-23; see also Gov’t’s Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 6 (statement by the petitioner that he had “been a regular user of hash[ish] and other narcotic drugs throughout [his] life”). The petitioner began to “increase [his] intake of alcohol and drugs,” Hr’g Tr. at 107:14-17, when his fiancée ended their engagement due to her concerns that “she would fall out of grace with her father if she married a Yemeni against his wishes,” Gov’t’s Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 7.

At this point, which was around the spring of 2000, Mansour suggested that the petitioner travel to Chechnya to fight the Russians . Id. ¶ 12. Mansour “was an experienced fighter who fought against the Russians in Chechnya,” and who “had close relationships with senior Chechen fighters and other individuals who were engaged in training men to fight in Chechnya and in other countries.” Joint Stmt. at 6. Motivated by his desire to prepare for jihad in Chechnya, Joint Stmt. at 6, the petitioner agreed to travel to Afghanistan with Mansour, see Hr’g Tr. at 107:21-23, who “provid[ed] funding for the trip” and coordinated the petitioner’s lodging and jihad training logistics, Joint Stmt. at 6; see also Gov’t’s Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 13 (statement by the petitioner that “Mansour got [him] a passport and made travel arrangements for [him] to travel to Afghanistan during the summer of 2000”). The petitioner then left for Karachi, Pakistan. Id. ¶ 14.

Upon his arrival in Karachi, the petitioner stayed at a hotel for approximately one week, id., after which he boarded a train and traveled to Quetta, Pakistan, where he “stayed at a guesthouse run by Dawood the Afghani,” Joint Stmt. at 7. The petitioner then traveled to Kandahar, Afghanistan, where he first stayed at the al Nebras guesthouse before moving to the 1 ██████████ guesthouse. Id. The 1 ██████████ guesthouse was operated “by a man named Katab[,] who was a jihad fighter that ...Mans[o]ur had fought with in Chechnya.” Id. The petitioner knew at the time he stayed at these guesthouses that they “were run by, or had ties to, al-Qaida.” Id. at 6.

The petitioner then began training at the al-Farouq training camp, where he “received, at a minimum, weapons training.” Id. at 7; see also Hr’g Tr. at 116:22-25 (testimony by the petitioner that he “trained on the pistol and [Kalashnikov rifle] and the Becca” while at al-Farouq). Although he was enrolled at al-Farouq for approximately five months, he only “received approximately two months of training,” Joint Stmt. at 7, because he would train for approximately “a week or two weeks” before feigning illness in order to leave and “do hashish or tobacco,” Hr’g Tr. at 112:6-10. While he was away from the camp, the petitioner would travel to Kandahar to stay at the 1 ██████████ guesthouse, after which he would return to al-Farouq. Id. at 112:6-11. He repeated this cycle several times. Id. at 112:12. Towards the end of his time at al-Farouq, the trainers at the camp informed him that he was “not ready physically because [he] keep[s] leaving and going back.” Id. at 112:15-17. The trainers purportedly concluded that he was of “no use,” and

“they kick[ed him] out of the camp.” Id. at 112:17-19. Nonetheless, the petitioner admits that he “became[,] and was part of[,] al Qaida at least during the five[-]month period he was training at al-Farouq.” Joint Stmt. at 7.

While the petitioner claimed that he was no longer welcomed at al-Farouq, he testified at the merits hearing that his separation from the camp was mutual. Specifically, he claims that Mansour “came to al[-Farouq],” at which point he told Mansour that he was “done” and that he “want[ed] to go back home.” Id. at 112:20-22. Mansour then told the petitioner that they would go to Chechnya for additional military training. Id. at 112:24-25; 119:25-120:2. Mansour also asked the petitioner to “be patient” until he procured a passport, after which he promised the petitioner that he would find a way for the both of them to leave Afghanistan. Id. at 120:14-16.

Soon thereafter, “[i]n approximately July 2001,” the petitioner left al-Farouq with Mansour, Joint Stmt. at 7, and “went to the Hassan Guesthouse in Kandahar” before returning to the [REDACTED] guesthouse, where he stayed for approximately a month, id. at 8; but see Hr’g Tr. 123:8-9 (testimony by the petitioner that he stayed at the [REDACTED] guesthouse after leaving al-Farouq “for about two weeks, about three weeks”). In August 2001, the petitioner left Kandahar and traveled to Kabul, where he stayed with Hamza Al Qa’ity for approximately one to two weeks. Joint Stmt. at 8. The petitioner described the Al Qa’ity guesthouse “as one that jihad fighters used as a transition point.” Id. The petitioner then traveled to Jalalabad

to visit several of Mansour's friends in the area. Hr'g Tr. at 123:19-22. The petitioner subsequently traveled to and from these locations. See id. at 123:22-25 (testimony by the petitioner that he stayed in Jalalabad, then he "went back to Kabul ...then back to Kandahar"). At one point, the brothers left Kandahar "to go to a photography shop" located in Kabul "to get passport pictures taken to go to Chechnya." Gov't's Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 20. As they were driving into Kabul, they approached "a roadblock or checkpoint," at which the petitioner "learned about the September 11, 2001 attacks," Hr'g Tr. at 124:3-5, from several Taliban guards at that post, id. at 152:16-19.

The petitioner then "returned to Kandahar in mid to late October[] 2001[,] and stayed at [the] ¹ guesthouse for another month." Joint Stmt. at 8. Towards the end of his stay at the ¹ guesthouse, "the fighting ...got too intense," id., and the situation became "dire," Hr'g Tr. at 156:15. The petitioner then left Kabul with Mansour and headed to Jalalabad. Id. at 124:21-22. Upon their arrival in Jalalabad, "the Pakistani military [was] surrounding the border," id. at 124:23-25, and thus the petitioner was advised by Mansour's friends to return to Kandahar, id. at 124:25-125:1. At that point, Al Qa'eity "managed to get a tractor-trailer truck ...to carry a group of people across the border into Quetta." Gov't's Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 24. The only people that were allowed to board the truck were those "who appeared sick or injured," id.; see also Hr'g Tr. at 156:15-16 (testimony by the petitioner that there were efforts to "get the wounded and the sick out"), and therefore Mansour was able to board the truck "because he was ill," Hr'

g Tr. at 156:16-17, while the petitioner could not, Gov't's Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 24. Thus, the petitioner embarked on a journey "with a group of other men who were ...fleeing Afghanistan into Iran." Joint Stmt. at 8.

That journey began when the petitioner left Kandahar and traveled to Zormat, Afghanistan, because he had heard a "rumor ...that [people] could walk across the Pakistani border" there. Gov't's Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 25. The petitioner then headed to Waziristan, Pakistan, and after passing several small towns, he stayed with a Pakistani man who gave him food and water. *Id.* ¶ 26. That same man then took the petitioner to Lahore, Pakistan, *id.* ¶ 26, where he stayed "for two weeks" with "an Arab family," *id.* ¶ 27. While in Lahore, the petitioner testified that he "spoke with [a] Pakistani person there who owns the home," Hr'g Tr. at 158:9-10, and was told that "he would [rejoin] Mans[o]ur and Hamza [Al'Qaiety]," Joint Stmt. at 9. After his stay in Lahore, the petitioner took the train to Quetta, Pakistan, *id.* at 8, before taking a bus to Baluchistan, Pakistan, which is located at the Pakistan-Iran border, *id.* at 7; see also Gov't's Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 28. The petitioner then crossed the Pakistan-Iran border by bus and traveled to an area near Zahedan, Iran, Gov't's Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 29, and "went to the [bus] driver's house," *id.* ¶ 30.

The petitioner stayed at the bus driver's house for about an hour and a half. *Id.* ¶ 30. The driver then drove the petitioner to the home of an Iranian family, and during his stay there, Al Qa'eity arrived to pick up the petitioner to reunite him with

Mansour. Id. ¶ 31. At that exact time, however, [REDACTED] descended on the house and apprehended the petitioner. He was flown to Afghanistan, id. ¶ 34, and ultimately, the petitioner was transferred to United States custody and taken to Guantanamo Bay, id. ¶ 35.

Along with numerous other detainees, the petitioner filed the petition now before the Court on December 21, 2005, seeking release from Guantanamo Bay on the grounds that, inter alia, his detention by the United States government violates his due process rights under the United States Constitution and the Geneva Conventions. See Petition for Writ of Habeas Corpus ¶¶ 378, 382, 386. Having “serious questions concerning whether this Court retain[ed] jurisdiction” as a result of Congress’s attempt to strip this Court of jurisdiction in passing the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in part at 28 U.S.C. § 2241) (the “2006 MCA”), the Court stayed the proceedings in these cases until the question of jurisdiction was resolved on appellate review. Order, Jabbarov v. Bush, Civil Action No. 05-2386 (RBW) at 1 (D.D.C. Jan. 31, 2007). The Court later lifted the stay after the Supreme Court issued its opinion in Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229 (2008), in which the Supreme Court held that non-United States citizens detained at Guantanamo Bay are constitutionally entitled to seek habeas relief and that the 2006 MCA’s jurisdiction-stripping provision was “an unconstitutional suspension of the writ.” Id. at 2274.

In light of the Boumediene decision, the members of this Court on July 1, 2008, “resolved by

Executive Session to designate” the Honorable Thomas F. Hogan of this Court “to coordinate and manage proceedings in all cases involving petitioners presently detained in Guantanamo Bay, Cuba.” Order, In re Guantanamo Bay Detainee Litigation, Miscellaneous No. 08-442 (TFH) at 1 (D.D.C. July 2, 2008). After carefully considering the positions of the various parties in these cases, Judge Hogan issued a case management order on November 6, 2008, which outlined the procedural and substantive contours for resolving these habeas petitions.³ Pursuant to this order, the government then filed its Factual Return in this case on November 25, 2008, in which it proffered the evidence that it intends to rely upon in this proceeding to justify the petitioner’s detention. In turn, the petitioner responded to the evidence proffered by the government in his Traverse, which he filed on May 4, 2009. With all discovery having been completed and the matter having been fully briefed, the Court commenced a hearing on June 16, 2010, to consider the merits of the petitioner’s petition for a writ of habeas corpus.

II. Standard of Review

The ultimate question to be resolved in regards to the petitioner’s habeas petition is whether the government’s detention of the petitioner is lawful under the AUMF. While the Supreme Court in Boumediene held that individuals detained by the government at Guantanamo Bay were “entitled to the privilege of habeas corpus to challenge the

³ Judge Hogan subsequently amended his case management order on December 16, 2008, and this member of the Court issued several amendments to the order on December 19, 2008, February 19, 2009, and June 12, 2009.

legality of their detention,” Boumediene, 128 S. Ct. at 2262, it also concluded that “[t]he extent of the showing required of the Government in these cases [was] a matter [left] to be determined” in future proceedings,” id. at 2271. The development of the detention standard in these Guantanamo Bay habeas cases was thoroughly explored by this Court in its recent decision in Sulayman v. Obama, __ F. Supp. 2d __ 2010 WL 3069568 (D.D.C. 2010) (Walton, J.), and it need not repeat that analysis here. Suffice it to say that

under the law of this circuit, the government may establish the lawfulness of the petitioner’s detention by showing that he “engaged in hostilities ...against the United States,” that he “purposefully and materially supported hostilities against the United States or its coalition partners,” or that he “is part of the Taliban, al Qaeda, or associated forces.” And, the determination of whether an individual is “part of” the Taliban, al Qaeda, or associated forces is one that “must be made on a case-by-case basis by using a functional rather than a formal approach.” Moreover, the government may seek to justify detention by making a showing that the detainee was part of the “command structure” of either the Taliban, al Qaeda, or their associated forces, yet it is not necessary for the government to make such a showing. But, the government must do more

than just prove that the detainee was an “independent ...freelancer.”

Id. at ___, 2010 WL 3069568, at *5 (internal citations omitted).

As for the burden of proof required to justify detention, the Court noted in Sulayman that the standard set forth in Judge Hogan’s case management order--“to wit, that the government has the burden of persuading the Court that the petitioner is detainable under the AUMF by a preponderance of the evidence”--has been accepted by the District of Columbia Circuit.⁴ Id.; see also Awad v. Obama, 608 F.3d 1, 10 (D.C. Cir. 2010) (citing Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010)) (“We have already explicitly held that a preponderance of the evidence standard is constitutional in evaluating a habeas petition from a detainee held at Guantanamo Bay.”). This means that the government must convince the Court “to believe that the existence of a fact is more probable than its nonexistence.” Concrete Pipe & Prods. of

⁴ As the Court observed in Sulayman, the District of Columbia Circuit has “left open the question of whether a lower standard of proof could constitutionally suffice as well.” __ F. Supp. 2d at ___, 2010 WL 3069568, at *5 n.5 (citing Al-Bihani, 590 F.3d at 878 n.4.); see also Al-Adahi v. Obama, __ F.3d ___, ___, 2010 WL 2756551, at *2 (D.C. Cir. July 13, 2010) (noting that it was not “aware of [any] precedents in the eighteenth[-]century English courts [that] adopted a preponderance standard,” and that the standard of proof applied in various habeas proceedings ranged from “some evidence to support the order” to “probable cause”). However, given that the government in this case has established the lawfulness of the petitioner’s detention by a preponderance of the evidence, the Court need not resolve the standard of proof question left open by the circuit.

Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (J 993) (internal quotation marks omitted). Accordingly, the government has the initial burden of producing evidence in support of its claim for detention, and should the government produce evidence sufficient to establish a prima facie case for detention, then the burden of producing evidence to rebut the government's case shifts to the petitioner. See Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (observing that "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria," and that such a "burden-shifting scheme" would not offend the Constitution). After both parties have presented all of their evidence, the Court must weigh the evidence to determine whether the government has met its burden of showing that its evidence "is ...more convincing than the evidence ...offered in opposition to it." Greenwich Collieries v. Dir., Office of Workers' Comp. Programs, 990 F.2d 730,736 (3d Cir. 1993). If the government *is* successful in making this showing, then the Court must deny the habeas petition. But, where the petitioner's evidence demonstrates that his version of the facts is more likely to be true, or where "the evidence is evenly balanced," the Court must rule in favor of the petitioner. Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 281 (1994).

III. Legal Analysis

As noted above, the Court is tasked with determining whether the government has met its

burden of proving by a preponderance of the evidence that the petitioner was “part of” al-Qaeda or the Taliban at the time of his apprehension. The government has established—indeed, the petitioner has conceded—that he was “part of” al-Qaeda for at least the time period between February 2001 until July 2001 because of his participation in military training while at the al - Farouq training camp. Joint Stmt. at 7. Furthermore, the petitioner’s admissions that he continued to stay at al-Qaeda-affiliated guesthouses and associate with al-Qaeda or Taliban operatives after leaving al-Farouq, *id.* at 7-8, and that he was apprehended at a house in Iran along with Hamza Al Qa’eity, *id.* at 9, an individual who the petitioner admits operated a guesthouse “that *jihad* fighters used as a transition point,” *id.* at 8, constitutes evidence that, at least on its face and taken as a whole, supports the government’s theory that the petitioner had no intention of cutting his ties to al-Qaeda, and that he in fact was “part of” al-Qaeda at the time of his capture. *See Al-Bihani*, 590 F.3d at 873 n.2 (noting in dicta that evidence to support a finding that a non-citizen’s visit to an al-Qaeda-affiliated guesthouse “would seem to overwhelmingly, if not definitively, justify the government’s detention”); *Al-Adahi*, ___ F.3d at ___, 2010 WL 2756551, at *6 (concluding that the detainee’s “voluntary decision to move to an al-Qaida guest house ... makes it more likely ... that [he] was ... a recruit”); *cf. Barhoumi v. Obama*, 609 F.3d 416, 418, 425 (D.C. Cir. 2010) (finding detainee’s capture alongside a “reputed terrorist leader” to be probative evidence that he was “part of” that leader’s organization).

Thus, given that the government has met its burden of establishing a prima facie case that supports the lawfulness of the petitioner's detention,⁵ the burden now shifts to the petitioner to produce evidence to rebut the government's case. Because the petitioner has already admitted to once having been "part of" al-Qaeda, to rebut the government's evidence he must demonstrate that "he was no longer part of [al-Qaeda] at the time of his capture by showing that he took affirmative actions

⁵ The government also relies on numerous summary interrogation reports and intelligence information reports in its case-in-chief. These interrogation reports contain unsworn hearsay statements "that [are] not otherwise admissible under the Federal Rules of Evidence or 28 U.S.C. § 2246 [(2006)]," and thus the government has the burden of "establish[ing] the reliability of those statements" under the two-prong standard set forth by Judge Hogan in his case management order, as supplemented by the decisions issued by the undersigned member of this Court and thoroughly discussed in Sulayman, ___ F. Supp. 2d at ___, 2010 WL 3069568, at *11. But the Court need not assess whether the government has presented its hearsay "in a form ... that permits the ... [C]ourt to assess its reliability," Parhat v. Gates, 532 F.3d 834, 849 (D.C. Cir. 2008), because as the Court discusses below, the government's case for detention can be made based on the stipulated facts, the petitioner's sworn declaration, and his testimony.

As for any hearsay evidence that the petitioner relies upon in support of his case-in-chief, this member of the Court observed in Sulayman that there remains an open question as to whether the prohibitions against the admission of hearsay evidence should be relaxed for the petitioner's proffered hearsay evidence, given that "the Supreme Court mentioned only the possibility of considering hearsay proffered by the government in Hamdi and Boumediene." Sulayman, ___ F. Supp. 2d at ___, 2010 WL 3069568, at *11 n. 10 (citations omitted and emphasis added). But here, the petitioner does not rely on any hearsay evidence to rebut the stipulated facts, the petitioner's declaration, or his testimony, and thus there is no need for the Court to address this open question.

to abandon his membership.” Khalifh v. Obama, Civil Action No. 05-1189 (JR), 2010 WL 2382925, at *2 (D.D.C. May 28, 2010) (citing Al Ginco v. Obama, 626 F. Supp. 2d 123, 128 (D.D.C. 2009) (Leon, J.) (concluding that “a prior relationship between a detainee and al Qaeda ... can be sufficiently vitiated by the passage of time, intervening events, or both, such that the detainee could no longer be considered ... ‘part of’ [al-Qaeda] at the time he was taken into custody)). In his attempt to meet this burden, the petitioner testified that he had no real desire to engage in jihad while in Afghanistan, see Hr’g Tr. at 125:23-24 (testimony that jihad “was not really in the back of [his] mind” while in Afghanistan), and that upon leaving al-Farouq, he wanted to leave Afghanistan for Pakistan in order to “depart from the Pakistani airport to Saudi Arabia,” id. at 127:5-6, but that he remained in Afghanistan with Mansour because he was “scared” about being captured at the Afghanistan-Pakistan border, see id. at 120:8-11 (testimony that he was told by Mansour about “gangsters ..., drug dealers[, and] the police [who] might capture” him at the border, “and that [he] might spend the rest of[his] life in prison”); id. at 126:7-9 (“And truly I was a scared individual. You know I use[d] to be scared [of] ... drug dealers, [of] ... the police, [and of] people that are out there watching the roads.”), and because Mansour assured him that they would attempt to enter Iran in order “to make it to Saudi Arabia or Yemen,” id. at 124:19-20. As the Court discusses below, however, the petitioner’s testimony, the stipulated facts, and his sworn declaration, when viewed collectively, reveal material inconsistencies that undermine his assertions and overall credibility as a witness.

Of significance to the Court's assessment of the petitioner's credibility are his inconsistent statements regarding his motivation for traveling to Afghanistan, and his desire to engage in jihad while in Afghanistan. At the merits hearing, he testified that his travel to Afghanistan, and his attendance at al-Farouq, were motivated by nothing more than his desire to "change [his] lifestyle," and that he "wanted to forget about the problems [he] had," Hr'g Tr. at 111:22-112:1, presumably regarding the end of his relationship with his fiancée or his illicit drug use. He also testified that when he traveled to Afghanistan, he "didn't even know he was going to fight," id. at 110: 10-12, and that he "didn't have any idea or any clue of fighting anyone," id. at 110:17-19. In fact, he testified that Mansour convinced him to go to Chechnya to "go there [and] help the children [and the] women[,] instead of staying [in Saudi Arabia and] doing drugs," id. at 107:18-20, and that the purpose of going to Afghanistan to get trained was so that if "something happens [he will] be able to defend [himself]," id. at 107:22-25. Yet, the petitioner stipulated in the Joint Pre-Trial Statement that "[t]he purpose of [his] travel to Afghanistan was to train to fight jihad in Chechnya." Joint Stmt. at 6 (emphasis added). This acknowledgement is buttressed by the petitioner's own declaration, in which he states that Mansour asked him to go to Chechnya because "it was better for [him] to die on the battlefields ... fighting the Russians than to die of a drug overdose or a broken heart in Saudi Arabia," Gov't's Exhibits, Ex. 50 (Al-Bihani Decl.) ¶12 (emphasis added), and that Mansour decided that the petitioner needed training because he "had never been trained to fight jihad," id. ¶ 13 (emphasis added). Thus, on the one hand

the petitioner asserts that he “didn’t have any idea or any clue” that the purpose of his travel was to engage in warfare, while on the other hand he admits that he traveled to Afghanistan to prepare for jihad. The petitioner’s statements cannot be reconciled, and in “[w]eighing the self-serving nature of the petitioner’s testimony against” his prior inculpatory statements, “the Court concludes that his testimony cannot be credited.” Sulayman, ___ F. Supp. 2d at ___, 2010 WL 3069568, at *16 n.15 (citing Williamson v. United States, 512 U.S. 594, 599 (1994)). The Court, therefore, rejects the petitioner’s attempt to “put an innocuous gloss over” his motivations for traveling to Afghanistan.⁶ Al Odah v. United States, 611 F.3d 8, 15 (D.C. Cir. 2010).

Even without the inconsistency noted above, the Court does not accept the petitioner’s claim that he desired to travel to Pakistan after leaving al-Farouq, but that he remained in Afghanistan

⁶ Even assuming that the catalyst behind the petitioner’s travel to Afghanistan was to prepare for battle in Chechnya, and not against the United States, this fact has no material effect on whether the government can detain the petitioner. Nothing in the AUMF, as construed by this Court and the District of Columbia Circuit, requires an individual to be “part of” al-Qaeda and to have also engaged in hostile aggression, or to have desired to engage in such conduct, against the United States in order to be rendered detainable. To the contrary, the circuit in Al-Adahi dismissed the significance of a detainee’s motive for affiliating himself with al-Qaeda because “the significant points are that al-Qaida was intent on attacking the United States and its allies, that [Osama] bin Laden had issued a fatwa announcing that every Muslim had a duty to kill Americans, and that [the detainee] voluntarily affiliated himself with al-Qaida.” ___ F.3d at ___, 2010 WL 2756551, at *6.

because Mansour had “scared” him away from crossing the Afghanistan-Pakistan border prior to the September 11, 2001 attacks. See Hr’g Tr. at 120:8-11, 126:7-9. After all, the petitioner stated in his declaration that in making his way to Afghanistan from Saudi Arabia, he left Quetta, Pakistan in a taxi and crossed the border into Kandahar, Afghanistan, Gov’t’s Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 14. Thus, if he experienced no complications using public transportation to travel into Afghanistan from Pakistan earlier, then there is no reason to believe that the petitioner could not have utilized that same mode of transportation to return back to Pakistan after he left al-Farouq. Furthermore, the petitioner’s excuse for remaining in Afghanistan prior to the September 11, 2001 attacks becomes even more difficult to accept considering that he was able to cross the Afghanistan-Pakistan border without the assistance of his brother after September 11, 2001, see Joint Stmt. at 8 (“In going from Afghanistan to Iran,[the p]etitioner traveled from ... Zormat, Afghanistan ... to Waziristan, Pakistan); Gov’t’s Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 25 (statement by the petitioner that he was able to travel to Waziristan by car and then by walking), which he readily admitted was at a time when “the Pakistani military [was] surrounding the border,” Hr’g Tr. at 124:21-25; see also Gov’t’s Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 22 (stating that he and Mansour tried to cross into Pakistan following the September 11, 2001 attacks, “[b]ut all of the gates were under strict security”). In other words, the petitioner, despite his purported fear of being captured by “street gangsters, drug dealers[,] and the police,” and that he “might spend the rest of [his] life in

prison,” Hr’g Tr. at 120:8-13, demonstrated the ability to cross the border at a time when, by his own description, the risk of being apprehended and detained was much greater than it had been prior to the attacks of September 11, 2001, when he had been able to cross the border in a taxi. Thus, if the petitioner truly wanted to cross the Afghanistan-Pakistan border in order to return to Saudi Arabia or Yemen, he had ample opportunities to do so. But because he did not seize those opportunities, the Court is left with the impression that the petitioner had no real desire to travel to Pakistan. See Al Odah, 611 F.3d at 16 (finding no error in the Court’s reliance on an incuplatory finding that when the detainee “had a choice to head out of the country or to stay, he consistently chose to remain in Afghanistan following directions of a member of the Taliban”).

Indeed, not only do the petitioner’s statements demonstrate a lack of any genuine effort to return to Saudi Arabia or Yemen, his statements reveal that his intent all along after leaving al-Farouq was to accompany Mansour to Chechnya. Specifically, the petitioner testified that upon Mansour’s arrival at al-Farouq in July 2001, Mansour informed him that they would go to Chechnya for further training, Hr’g Tr. at 119:25-120:1; Gov’t’s Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 18, to which he simply told Mansour that “the most important thing is you get me out of [al-Farouq],” Hr’g Tr. at 120:1-2. Mansour then asked the petitioner to “be patient” while he procured his passport, and that he would lead the petitioner out of Afghanistan. Id. at 120: 14-16. The petitioner ultimately departed with his brother, and they proceeded to visit and stay at various al-Qaeda

affiliated guesthouses. See Joint Stmt. at 7-8 (stipulating that “[i]n approximately July 2001,” the petitioner “went to the Hassan Guesthouse in Kandahar” before returning to the [REDACTED] guesthouse, where he stayed for approximately a month). Immediately prior to the September 11, 2001 attacks, the brothers traveled to Kabul for the purpose of going “to a photography shop” so that Mansour could “get passport pictures taken to go to Chechnya.” Gov’t’s Exhibits, Ex. 50 (Al-Bihani Decl.) ¶ 20 (emphasis added). Thus, based on these statements by the petitioner, it is clear that he was fully aware of Mansour’s intent to take him to Chechnya for further training, that the petitioner nonetheless remained with his brother knowing that Mansour desired to take him to Chechnya, and that the petitioner had knowledge of the affirmative steps that Mansour was taking to travel to Chechnya. The Court, therefore, has no doubt that despite the petitioner’s claim that he desired to cross the border into Pakistan so that he could return to Saudi Arabia, his real intention for remaining in Afghanistan was to accompany Mansour to Chechnya for further military training.⁷

In sum, the Court finds that the petitioner’s version of the events leading up to his detention, as construed by the Court from a collective evaluation

⁷ Because the Court finds that the petitioner had no intent to travel to Pakistan upon leaving al-Farouq, the Court does not credit the petitioner’s claims that he attempted to procure an “exit document” from a Pakistani cook that would allow him to depart from “the Pakistani airport to Saudi Arabia.” Hr’g Tr. 127:5-6; see also *id.* at 127:14-23 (describing purported conversation with a Pakistani cook regarding an “exit document” that would allow the petitioner to depart Pakistan).

of his testimony, his declaration, and the stipulated facts in this case, reveals numerous material inconsistencies that completely undermine his credibility. In fact, the inherent incongruity in the petitioner's account strongly suggests that he is providing "false exculpatory statements" to conceal his association with al-Qaeda, and such statements "are evidence—often strong evidence—of guilt." Al Adahi, ___ F.3d at ___, 2010 WL 2756551, at *5. Without any credible evidence in the record that rebuts the petitioner's numerous inculpatory statements that independently have the force of proving by a preponderance of the evidence that the petitioner was "part of" al-Qaeda, the Court concludes that the government has satisfied its burden of establishing the lawfulness of the petitioner's detention under the AUMF.⁸

⁸ The petitioner also argues that his failure to complete the basic training at al-Farouq is substantial and persuasive evidence that he was not "part of" Al-Qaeda after leaving al-Farouq

1.3- [REDACTED]
 1.3 [REDACTED]
 1,3 [REDACTED]
 1,3 [REDACTED] he "had to make it through [al-Farouq] before [he was] trusted ... by al[-]Qaeda," Hr'g Tr. at 72:3-6. This argument is without merit. To be sure, the Court has serious questions about the petitioner's claim that he failed to complete the basic training at al-Farouq because, as discussed above, his overall credibility as a witness is utterly non-existent. But even assuming that the petitioner did not become a member of al-Qaeda due to his failure to complete the training curriculum at al-Farouq, this fact alone is not dispositive on the question of whether the government may detain him under the AUMF because there may be other avenues one may take to become a member of the organization. For instance, one could fight on behalf of, and thus be "part of," al-Qaeda without even having to attend an al-Qaeda training

IV. Conclusion

As counsel for the petitioner candidly acknowledged at the merits hearing, “the most effective way to lie is to mix truth and falsehood.” Hr’g Tr. at 214:16-18; see also Williamson, 512 U.S. at 599-600 (observing that “[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature”). The Court agrees and finds that the petitioner did just that—his inculpatory admissions regarding his desire to prepare for jihad, that he received training at the al-Farouq training camp, and that he continued to associate himself with al-Qaeda operatives while going to and from various al-Qaeda-affiliated guesthouses—are credible, while his attempt to place

camp,

1.3

1.3

1,3

1,3

And here, where the petitioner knew that Mansour desired to take him to Chechnya for additional military training, and he accompanied Mansour throughout Afghanistan fully aware of his brother’s intent to procure a passport that would allow for their entry into Chechnya, combined with the petitioner’s continued stays at al-Qaeda-affiliated guesthouses and his continued association with al-Qaeda operatives after leaving al-Farouq, there is overwhelming evidence from which the Court concludes that regardless of whether the petitioner completed the training at al-Farouq, he became, and was perceived by others to be, “part of” al-Qaeda. See Awad, 608 F.3d at 9 (upholding the district court’s conclusion that detainee was “part of” al-Qaeda because, inter alia, it found compelling the detainee’s intention to “join the fight against U.S. and allied forces,” along with “additional evidence of conduct consistent with an effectuation of that intent”).

“an innocuous gloss over these ... facts,” Al Odah, 611 F.3d at 15, by stating that he had no intention of engaging in jihad upon arriving in Afghanistan, and that he intended to travel back to Saudi Arabia or Yemen upon leaving al-Farouq, fails to have the ring of truth. Accordingly, from the testimony presented by the petitioner at the merits hearing, his declaration, and the stipulations agreed to in the Joint Pre-Trial Statement, the Court concludes that the government has provided more than enough evidence to satisfy its burden of establishing the lawfulness of the petitioner’s detention under the AUMF. And, because the petitioner has failed to meet his burden of producing evidence sufficient to rebut the government’s prima facie showing, the petitioner’s petition for a writ of habeas corpus must be denied.

SO ORDERED this 22nd day of September 2010⁹

/s/ Reggie B. Walton

REGGIE B. WALTON
United States District Judge

⁹ An order will accompany this memorandum opinion, denying the petitioner’s petition for a writ of habeas corpus.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)	Misc. No. 08-442 (TFH)
In re:)	
)	05-763 (JDB)
Guantanamo Bay)	05-1646 (JDB)
Detainee Litigation)	05-2378 (JDB)
)	
)	

RESPONDENTS' MEMORANDUM
REGARDING THE GOVERNMENT'S
DETENTION AUTHORITY RELATIVE TO
DETAINEES HELD AT GUANTANAMO BAYINTRODUCTION

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

Rumsfeld, 548 U.S. 557, 603-04 (2006).

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

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

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-

Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

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

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

multi-agency effort is underway to develop a comprehensive detention policy with respect to individuals captured in connection with armed conflicts and counterterrorism operations, and the views of the Executive Branch may evolve as a result. *See* Declaration of Attorney General Eric H. Holder, Jr., ¶¶ 3, 11. The effort has been undertaken at the direction of the President and is a major priority of the Executive Branch. *Id.*, ¶ 3. The Government will apprise the Court of relevant developments resulting from this ongoing process.

DISCUSSION

In response to the attacks of September 11, 2001, 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” AUMF, § 2(a). The September 11 attacks were carried out by al-Qaida, which was harbored by the Taliban regime in Afghanistan. In October 2001, under the authority of the AUMF, the United States launched Operation Enduring Freedom to remove the Taliban regime from power and to suppress al-Qaida. The United States and its coalition partners continue to fight resurgent Taliban and al-Qaida forces in this armed conflict. Below, we set out the Government’s position regarding the detention authority provided by the AUMF as it applies to those captured during that armed conflict and held at Guantanamo Bay.

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

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

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

Under international law, nations lawfully can use military force in an armed conflict against irregular terrorist groups such as al-Qaida. The

United Nations Charter, for example, recognizes the inherent right of states to use force in self defense in response to any “armed attack,” not just attacks that originate with states. United Nations Charter, art. 51. The day after the attacks, the United Nations Security Council adopted Resolution 1368, which affirmed the “inherent right of individual or collective self-defence in accordance with the Charter” and determined “to combat by all means threats to international peace and security caused by terrorist acts.” U.N. General Assembly Security Council Resolution of Sept. 12, 2001 (S/RES/1368). “Since no one was seriously suggesting a State was behind the attacks, the Council was by definition implicitly acknowledging the acceptability of using military force against terrorists under the law of self-defense.” Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 Harv. J.L. & Pub. Pol’y 737, 748 (2004). The North Atlantic Treaty Organization and the Organization of American States treated the attacks as “armed attacks” for purposes of their collective self-defense provisions.¹ The AUMF invokes the internationally recognized right to self-defense. *See* AUMF, Preamble (it is “both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad”). Other nations joined or cooperated closely

¹ *See* Organization of American States, Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas (Sept. 21, 2001), <http://www.oas.org/OASpage/crisis/RC.24e.htm>; North Atlantic Council, Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm>; Statement by NATO Secretary General, Lord Robertson (Oct. 2, 2001), <http://www.nato.int/docu/speech/2001/s011002a.htm>.

with the United States' military campaign against al-Qaida and the Taliban. See Schmitt, 27 Harv. J.L. & Pub. Pol'y at 748-49.

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

[A] number of prior authorizations of force have been directed at non-state actors, such as slave traders, pirates, and Indian tribes. In addition, during the Mexican-American War, the Civil War, and the Spanish-American War, U.S. military forces engaged military opponents who had no formal connection to the state enemy. Presidents also have used force against non-state actors outside of authorized conflicts.

Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2066-67 (2005) (citing U.S. use of military force in the Chinese Boxer Rebellion, against the Mexican rebel leader Pancho Villa, and in the 1998 cruise missile attacks against al-Qaida targets in Sudan and Afghanistan). Thus, consistent with U.S. historical practice, and international law, the AUMF authorizes the use of necessary and appropriate military force against members of an opposing armed force, whether that armed force is the force of a state or the irregular forces of an armed group like al-Qaida. Because the use of force includes the power of detention, *Hamdi*, 542 U.S. at 518, the United States has the authority to detain those who were part of al-Qaida and Taliban forces. Indeed, long-standing U.S.

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

² Moreover, courts should defer to the President’s judgment that the AUMF, construed in light of the law-of-war principles that inform its interpretation, entitle him to treat members of irregular forces as state military forces are treated for purposes of detention. *See* AUMF, § 2(a) (authorizing the President to use “all necessary and appropriate force” against those that “he determines” planned, authorized, committed, or aided the September 11 terrorist attacks or harbored those organizations); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (court construes customary international law *de novo* only in the absence of a “controlling executive or legislative act or judicial decision”). A deferential approach in this context is consistent with the commonsense understanding that “[t]he war power of the national government ‘is the power to wage war successfully,’” *Lichter v. United States*, 334 U.S. 742, 767 n.9 (1948) (citation omitted), as well as the Supreme Court’s directive in *Boumediene* that “[i]n considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded

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

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

to the political branches," 128 S.Ct. at 2276 (2008) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

Finally, the AUMF is not limited to persons captured on the battlefields of Afghanistan. Such a limitation “would contradict Congress’s clear intention, and unduly hinder both the President’s ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary.” *Khalid*, 355 F. Supp. 2d at 320; *see also Ex parte Quirin*, 317 U.S. at 37-38. Under a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself. Such activities may also constitute the type of substantial support that, in analogous circumstances in a traditional international armed conflict, is sufficient to justify detention. *Cf. Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008) (upholding lawfulness of detaining a facilitator who planned to send recruits to fight in Afghanistan, based on “credible and reliable evidence linking Mr. Bensayah to al-Qaida and, more specifically, to a senior al-Qaida facilitator” and “credible and reliable evidence demonstrating Mr. Bensayah’s skills and abilities to travel between and among countries using false passports in multiple names”).

Accordingly, the AUMF as informed by law-of-war principles supports the detention authority that the United States is asserting with respect to the Guantanamo detainees.

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

Petitioners have sought to restrict the United States' authority to detain armed groups by urging that all such forces must be treated as civilians, and that, as a consequence, the United States can detain only those "directly participating in hostilities."³ The argument should be rejected. Law-of-war principles do not limit the United States' detention authority to this limited category of individuals. A contrary conclusion would improperly reward an enemy that violates the laws of war by operating as a loose network and camouflaging its forces as civilians.

It is well settled that individuals who are part of private armed groups are not immune from military detention simply because they fall outside the scope of Article 4 of the Third Geneva Convention, which defines categories of persons

³ The "direct participation in hostilities" standard is taken from two additional protocols to the Geneva Conventions that the United States has not ratified. *See* Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 51(3), 1125 U.N.T.S. 3 ("Civilians shall enjoy the protection afforded by this Section unless and for such time as they take a direct part in hostilities."); Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), art. 13(3), 1125 U.N.T.S. 609. The United States recognizes the standard for targeting but its scope is unsettled.

entitled to prisoner-of-war status and treatment in an international armed conflict. See Third Geneva Convention, art. 2, 4. Article 4 does not purport to define all detainable persons in armed conflict. Rather, it defines certain categories of persons entitled to prisoner-of-war treatment. *Id.*, art. 4. As explained below, other principles of the law of war make clear that individuals falling outside Article 4 may be detainable in armed conflict. Otherwise, the United States could not militarily detain enemy forces except in limited circumstances, contrary to the plain language of the AUMF and the law-of-war principle of military necessity.

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

Moreover, the Commentary to Additional Protocol II draws a clear distinction between individuals who belong to armed forces or armed groups (who may be attacked and, *a fortiori*, captured at any time) and civilians (who are immune from direct attack except when directly participating in hostilities). That Commentary provides that “[t]hose who belong to armed forces or *armed groups*

may be attacked at any time.” *See* ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), ¶ 4789, <http://www.icrc.org/ihl.nsf/COM/475-760019?OpenDocument> (emphasis added). Accordingly, neither the Geneva Conventions nor the Additional Protocols suggest that the “necessary and appropriate” force authorized under the AUMF is limited to al-Qaida leadership or individuals captured directly participating in hostilities, as some petitioners have suggested.

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

III. THE GOVERNMENT IS CONTINUING TO DEVELOP A COMPREHENSIVE DETENTION POLICY.

Through this filing, the Government has met the Court's March 13, 2009 deadline to offer a refinement of its position concerning its authority to detain petitioners. The Court should be aware, however, that the Executive Branch has, at the President's direction, undertaken several forward-looking initiatives that may result in further refinements. Although the Government recognizes that litigation will proceed in light of today's submission, it nevertheless commits to apprising the Court of any relevant results of this ongoing process.

On January 22, 2009, the President issued two Executive Orders initiating Reviews addressing issues related to prospective detention policy. *See* Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009); Executive Order 13493, 74 Fed. Reg. 4901 (Jan. 22, 2009). This effort is a Government priority. *See* Holder Decl. ¶ 3.

Pursuant to Executive Order 13,493, the Government is undertaking "a comprehensive review of the lawful options available to the United States with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." Exec. Order No. 13,493, § 1(e). Fully developing the Government's prospective detention policy implicates important national security interests, including diplomatic interests. Exec. Order No. 13,492, § 2(b); Holder Decl. ¶ 11.

Because the detainees are citizens of foreign countries, these detentions and their legal justification necessarily affect the United States' relations with other nations. Cooperation of the country's international partners is central to the United States' anti-terrorism efforts. And detention policy raises important national security and humanitarian issues. *See id.* Such issues are also being considered in connection with Executive Order 13,492, pursuant to which the Government is examining "the factual and legal bases for the continued detention of all individuals currently held at [Guantanamo Bay]" on an ongoing basis. Exec. Order No. 13,492, § 2(d). Highlighting the urgency and importance of the Review, the Executive Order required that the Review process "commence immediately." *Id.* at § 4(a); *see also id.* at §§ 2(b), 2(d), 4(c)(1), 4(c)(2), 4(c)(4).

The Government commits to apprise the Court of any relevant results of these ongoing processes.

CONCLUSION

For the foregoing reasons, the Government's new explication of who may be detained in this armed conflict is consistent with the AUMF and the laws of war that inform the scope of "necessary and appropriate" force the AUMF authorizes the President to use. If the judges of the Court desire oral argument relating to the scope of the Government's detention authority in these cases, the Government urges the Court to consider conducting a single argument in a consolidated manner before the Court and that the Court endeavor, to the extent possible, to reach a common ruling regarding the framework to apply to these cases.

41a

Dated: March 13, 2009 Respectfully submitted,

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APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)	
LAKHDAR)	
BOUMEDIENE, et al.)	
)	
<i>Petitioners,</i>)	
)	CIVIL ACTION NO.
		04-cv-1166(RJL)
v.)	
)	
GEORGE WALKER)	
BUSH, et al.,)	
)	
)	
<i>Respondents.</i>)	
)	

DECLARATION OF GARY D. SOLIS, J.D., Ph.D.

I, Gary D. Solis, hereby declare:

1. My name is Gary D. Solis. I am over 18 years old and I am prepared to testify to the facts and opinions stated herein, if called upon to do so.

2. This Declaration is a complete statement of opinions that I hold in connection with this case, as well as the bases and reasons for them, including information that I considered in forming my opinions. I am prepared to testify about the knowledge, skill, training,

education and experiences that I have acquired which informs my opinions, and the principles and methods I applied in reaching them.

3. I have not received any compensation or benefit of any kind for providing this Declaration.
4. I am a citizen of the United States. I am an adjunct professor of law at Georgetown University Law Center, and at the United States Military Academy, at West Point, New York. A copy of my *curriculum vitae* is attached as Exhibit A. My qualifications are summarized in this Declaration and are also contained in my *curriculum vitae*, which includes all publications I have authored in the previous ten years[.]

Background and Experience

- 5.a. I hold a Juris Doctorate (1971) from the University of California at Davis, where I am a Distinguished Graduate. My LL.M. (1978, criminal law) is from George Washington University law school. My Ph.D. (1992, law of war) is from The London School of Economics & Political Science, where I taught law for three years.
- 5.b. For seven years (1996-2001, 2004-2006) I taught at the United States Military Academy, from where I retired as a Professor of Law in 2006. For six of those years I headed

West Point's law of war program. Courses I taught included the law of war, advanced law of war, and military law. I continue to teach the USMA Philosophy Department's law of war instruction block. For my teaching I was awarded the Anny's Meritorious Civilian Service, Superior Civilian Service, and Outstanding Civilian Service Medals, and was selected West Point's 2006 outstanding instructor.

- 5.c. At the Georgetown University Law Center I teach a law of war seminar for LL.M. candidates. I taught a semester-long law of war course at Catholic University's Columbus School of Law. I am on the teaching staff of the International Institute of Humanitarian Law, in San Remo, Italy, where I teach law of war courses, including one for military and diplomatic officers responsible for training their nations' armed forces in the law of armed conflict.
- 5.d. I was the 2007-2008 scholar in residence at the Law Library of the Library of Congress, in Washington D.C.
- 5.e. I have written two books: *Marines and Military Law in Vietnam*; and, *Son Thang: An American War Crime*, the U.S. Naval Institute's 1997 Book of the Year. I am writing a law school textbook, *The Law of Armed Conflict*, to be published by Cambridge University Press in 2009. An incomplete draft of my textbook is currently in use in the Law

Departments of West Point and the U.S. Air Force Academy. I have published war-related book chapters and peer-reviewed articles. A recent piece on targeted killing was selected the *Naval War College Review's* best 2007-2008 article.

- 5.f. I lecture on law of war topics at the Army's Judge Advocate General's School, the Marine Corps' Command and Staff College, the U.S. Naval War College, National Defense University, Canadian Forces College, the Royal Military College of Canada, the Council on Foreign Relations, the Aspen Institute, the Library of Congress, the Smithsonian Institution, the Rand Corporation, and various law schools, universities and institutions, including Harvard University Law School, Columbia University, and the University of Virginia Law School.
- 5.g. I have testified as an expert witness in two Marine Corps general courts-martial involving law of war crimes against detainees. In *U.S. v. Sgt. Gary Pittman*, (Camp Pendleton California, 22-25 August 2004), involving charges of dereliction of duty and multiple assaults resulting in the death of an Iraqi prisoner. I provided expert testimony for the government regarding the standard of care due a detainee. In *U.S. v. Cpl. Marshall Magincalda*, (Camp Pendleton California, 31 May 2007), a general court-martial Article 32 investigation involving the homicide of an Iraqi noncombatant. I testified telephonically

for the defense regarding *the* effect extended combat might have on an individual's judgment and the place such effect should have in a subsequent trial. I have also been consulted on other war-related courts-martial and civilian cases.

- 5.h. I am an inactive member of the bars of Virginia, Maryland, the District of Columbia, Pennsylvania, and Texas, and the bars of the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. For five years I was an appointed member, and vice-chairman, of the Board of Governors of the Virginia bar's Military Law Section.
- 5.i. I am a retired United States Marine Corps lieutenant colonel with twenty-six years active service, including seventeen months in Vietnam, where I was a platoon commander and company commander. I dealt with enemy prisoners on a frequent basis.

Opinions

- 6.a. I have been asked to state my opinion regarding State practice - particularly United States practice - under the law of armed conflict with respect to the treatment of combatants and civilians.
- 6.b. At the outset I note that the law of armed conflict concepts of combatants, "enemy combatants," and prisoners of war, arise only

in international armed conflicts - conflicts involving combat between two States. Nevertheless, I accept the government's predicate that it seeks to detain "enemy combatants" under the law of armed conflict, and I tender my opinions based on the concept of "combatant" as it is used in the law of armed conflict applicable in international armed conflicts, including the 1949 Geneva Conventions in their entirety, and 1977 Additional Protocol I thereto.

- 6.c. In the law of armed conflict, the definition of "combatant" is found in Additional Protocol I, Article 43.2: "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . .) are combatants; that is to say, they have the right to participate directly in hostilities." The United States has signed but has not ratified Additional Protocol I, but the Department of State has not objected to this article, as it has several others. The United States has accepted and applied this definition since at least 1988. The International Committee of the Red Cross (ICRC) identifies this definition as being customary international law. Further indicating its customary status, binding all States, Additional Protocol I has been ratified by 168 States, including every ally of the United States, save Israel and Turkey.

The import of being a combatant was first clarified for U.S. forces in the 1863 Lieber Code, adopted as Army General Orders 100.

Lieber wrote that the “combatant’s privilege” is that he or she may kill or wound opposing combatants, and destroy lawful enemy targets or objects, without penalty. Concomitantly, a combatant is a lawful target for opposing combatants, and may be killed or wounded whenever and wherever he/she may be identified. Upon capture in an international armed conflict, a combatant is entitled to treatment as a prisoner of war (POW).

In the war on terrorism, the term “enemy combatant” has come into use. The addition of the word “enemy” has no particular significance in the law of armed conflict, other than to specify that the combatant is a member of a group in armed conflict with the United States or its allies, and is a lawful target who may be killed by United States and allied combatants.

- 6.d. A civilian, on the other hand, is essentially anyone not a member of the armed forces of a State. Additional Protocol I, Article 50.1 defines “civilian” in the negative as anyone not entitled to POW status upon capture, adding, “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Thus, combatants are, in most cases, members of the armed forces of a Party to the conflict. Civilians are not members of any State’s armed forces and they may not lawfully be targeted, except in circumstances described in the following paragraph.

- 6.e. The law of armed conflict recognizes two instances in which civilians lose their protected status. Additional Protocol I, Article 5L3 provides: “Civilians shall enjoy the protection afforded by this Section [General Protection Against Effects of Hostilities], unless and for such time as they take a direct part in hostilities.” Civilians who take a direct part in hostilities in international armed conflict are commonly referred to as “unlawful combatants,” although that term is not found in the 1949 Geneva Conventions or 1977 Additional Protocols. The consequence of being an unlawful combatant in an international armed conflict is that the individual loses his/her civilian immunity and becomes a lawful target who may be killed by opposing combatants. If captured, unlawful combatants are not entitled to POW status and they may be tried for their unlawful acts by a military tribunal or a domestic court. The second instance is a *levée en masse*. Upon invasion by an enemy force, civilians not having time to form into military units may take up arms and they are lawful combatants. This circumstance is obviously not a factor in the present case and will not be further discussed.
- 6.f. As stated in Additional Protocol I, Article 51.3, a civilian may be treated as a combatant (albeit an unlawful combatant) whenever he/she takes a direct part in hostilities. This position is adopted in the U.S. Army’s 1956 Field Manual, FM 27-10, *The Law of Land*

Warfare, paras. 80-81, and in the United Kingdom's *2004 Manual of the Law of Armed Conflict*, para.5.3.2., and all other law of war references with which I am familiar. Absent direct participation in hostilities a civilian is not a combatant, and not a lawful object of either military armed force or detention as a combatant, and he is not subject to prosecution in a military forum.

- 6.g. Commentators, military and civilian, have offered numerous descriptions and examples of conduct that constitutes taking "a direct part in hostilities." The United States has indicated agreement with the ICRC definition that "direct participation in hostilities" implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place. In my opinion, conduct of a civilian that has a direct harmful effect on the enemy's combat operations constitutes "taking a direct part in hostilities." Conduct having only a tangential effect on an enemy's combat operations does not constitute "taking a direct part in hostilities."

For example, firing a weapon at opposing forces clearly *is* taking a direct part in hostilities. A frequently raised example of taking a direct part in hostilities is the civilian who volunteers to drive an ammunition truck to re-supply combatants engaged in armed conflict. While he drives that truck, he loses his civilian immunity and may be targeted, for

he clearly *is* taking a direct part in hostilities because his actions have an immediate harmful effect on the enemy's combat operations. Similarly, a civilian contractor clearing enemy landmines during an engagement *is* directly participating in hostilities. However, when a civilian clearly ends his direct participation in hostilities, the law of armed conflict is clear that he no longer may be targeted. His actions no longer have any effect on combat operations. Thus, the civilian contractor clearing mines in an area in which there is no enemy present at the time and place of his activities would *not* be taking a direct part in hostilities.

At the other end of the continuum, a civilian going peacefully about her daily business clearly is *not* directly participating in hostilities. Many forms of support civilians commonly provide their State's armed forces do not constitute direct participation in hostilities. As long as the civilian's support does not have a direct harmful effect on the enemy's combat operations that civilian may not be considered, or be treated as, a combatant. Thus, a woman growing vegetables in a victory garden for later donation to the armed forces is *not* directly participating in hostilities. A civilian budget analyst employed by the U.S. Navy and working in the Pentagon is *not* directly participating in hostilities. Supporting a military cause through financial contributions or public speeches does *not* constitute direct participation in hostilities. An individual

considering, planning, or even en route to a combat zone with the intention of becoming a participant in hostilities is not directly participating in hostilities because his considerations, plans and travels do not produce a direct harmful effect on the enemy's combat operations.

There are debatable cases. For example, may the civilian volunteer driver of the military ammunition truck be targeted as he first walks toward the truck? In my opinion, he begins his direct participation in hostilities when he unequivocally commits to an action that has a direct harmful effect on enemy combat operations - driving the truck. May a civilian government employee remotely piloting an armed drone over Afghanistan be targeted? In my opinion, the drone's pilot, no matter where located and whether or not he launches a missile, is directly participating in hostilities and may be targeted because his actions have a direct harmful effect on enemy combat operations.

In my opinion, senior terrorist leaders and terrorist weapons specialists and fabricators should be considered to continually be taking a direct part in hostilities. (In this limited respect, I take a broader view of "for such time as" than does 1977 Additional Protocol I, Article 51.3.) Osama bin Laden, for example, is continually taking a direct part in hostilities and is always a lawful target, no matter where located, no matter what his

activity. Such persons, by virtue of their ongoing special skills or senior leadership positions and involvement in or planning of combat operations, are always combatants, albeit unlawful combatants. Like the uniformed individuals *they* target, they should be considered legitimate targets whenever found. However, individuals whose involvement is unconfirmed, or unrelated to combatant operations, such as financial supporters and vocal advocates of terrorist aims are *not* subject to targeting.

Over the past several years, the JCRC and The Hague's Asser Institute have sponsored several meetings of experts to discuss and define what constitutes "direct participation in hostilities." Their report is due in early 2009. But I agree with the International Criminal Tribunal for the former Yugoslavia's *Tadić* Trial Chamber decision that an exact definition of taking "a direct part in hostilities" is often unnecessary, because in most cases an examination of the facts will indicate the answer.

- 6.h. My opinion is formed, in part, by my experience in the Vietnam conflict where I was a Marine officer (armor) commanding at first a platoon and, eventually, a company of Marines. We often encountered enemy combatants and occasionally captured armed enemy personnel as they approached or entered or departed villages, their status confirmed by informants, by former VC, by

recent wounds, or by their weaponry. We also daily encountered Vietnamese civilians who we were confident were supporting the enemy by providing him shelter, food, and concealment. Captured enemy personnel were apprehended and passed to MPs for processing. The families or villagers with whom our captives were living and associating were sometimes questioned but rarely seized, as we required evidence of the villagers' direct participation in hostilities to do so. It did not take a judge advocate to inform us that our authority to apprehend and detain did not extend to anyone we encountered in the combat zone who might have in any way associated with, or even provided support for, the enemy in hostilities. As does the law of armed conflict, I required my Marines to have knowledge of a specific instance of engagement in hostilities before acting. The mere threat of possible future hostile action was, and remains, an insufficient basis for military apprehension and detention.

- 6.i. I have read the Government's unclassified legal basis for the detention of the Petitioners in this case, filed 5 September 2008, particularly its description of an "enemy combatant," and I have read the Government's definition contained in its 9 September 2008 filing. Neither of the descriptions/definitions is in accord with accepted law of armed conflict definitions of "enemy combatant." Both reach too broadly to be reasonable, and both are too vague to comport with law of armed conflict notions. No member of the

Armed Forces could be expected to implement the full scope of either.

The Government's description contained in its 5 September 2008 filing allows the application of enemy combatant status to civilians who have never been in any combat zone or theater of operations, and who have never committed or attempted any conflict-related act - ("... even if 'they have not actually committed or attempted to commit any act..."). I am aware of no customary law of war, no law of war multinational treaty, and no case law that supports such an expansive view. The classic little old lady in Dubuque who donates money to a mosque discovered to be funding al Qaeda operations in Iraq would be within the Government's original description as supporting enemy forces, and thus be targetable as an enemy combatant. If an enemy combatant can exist outside any combat zone, without committing or attempting any hostile activity or act, or by merely associating with the enemy, then the use of military force against civilians has virtually no limit. An insubstantial connection between a civilian and an activity a military commander considered to be supporting the enemy would be sufficient for him to order that civilian captured or, if capture was not feasible, killed.

The Government's 5 September 2008 filing refers to persons "who associate themselves with the military arm of the enemy

government,” a phrase employed in *Ex Parte Quirin*. But, *Quirin*, in its two references to the “military arm” refers to the uniformed armed forces of an enemy State in an international armed conflict, not to international or domestic criminal groups, no matter how well armed. The Government misleadingly expands the meaning of the *Quirin* term by adding the phrase, “or enemy organization.” I am unaware of any authority in the law of armed conflict that permits such an expansion. As the law of armed conflict now stands, there is no basis for asserting that merely being a member of, or associating with, an enemy organization is a legal basis for the application of military force.

The Government’s 5 September 2008 filing contains the phrase, “directly supporting hostilities.” It is unclear to me what is meant by those words in the context of the filing. If the Government refers to individuals who are members of groups in armed conflict with the United States and its allies who directly participate in hostilities - that is, individuals who direct large or small groups in actual combat, who fire a weapon, who manufacture a bomb, who actually commit a belligerent act, or who otherwise take a direct part in hostilities within the meaning of Additional Protocol I, Article 5 1.3 - I agree with the description. But if the Government refers to individuals who do less than directly participate in hostilities, its reference conflicts with the law of armed conflict, which prohibits

treating as a combatant any civilian who does not meet the “direct participation” standard.

For similar reasons, the Government’s 9 September 2008 definition, which defines an enemy combatant as an individual “who was . . . *supporting* Taliban or al Qaeda or associated forces,” or who “directly *supported* hostilities,” sweeps more broadly than any law of armed conflict definition.

- 6.j. For the foregoing reasons, I believe the Government’s description and definition of an enemy combatant are incorrect and not in accord with the law of armed conflict, the laws and customs of war, or with U.S. military practice. In my opinion, other than members of the armed forces of an enemy State, a *levée en masse*, and members of enemy State militias and volunteer groups meeting the preconditions of Geneva Convention III, Article 4A.(2), individuals may be considered “combatants” only to the extent that they directly participate in hostilities, as that term is recognized and applied in military and state practice.
7. I have expressed the opinions stated herein in writings, lectures, and laws courses in America and Europe, and have passed them to, and continue to pass them to U.S. Military Academy cadets who are dealing with detainees in combat zones world-wide. In my professional view, and to the best of my knowledge, these opinions accurately reflect

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generally accepted law of armed conflict principles, and are recognized and generally practiced by the United States and its allies.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 10, 2008

/s/ Gary D. Solis

Gary D. Solis, J.D., Ph.D.

[Exhibit A to Declaration Omitted]

APPENDIX E

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) . . . Adopted at Geneva on 8 June 1977

* * *

Preamble

The High Contracting Parties,

Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949¹ constitute the foundation of respect for the human person in cases of armed conflict not of an international character,

Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,

Emphasizing the need to ensure a better protection for the victims of those armed conflicts,

Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience,

Have agreed on the following:

¹ United Nations, *Treaty Series*, vol. 75, pp. 31, 85, 135 and 287.

PART I. SCOPE OF THIS PROTOCOL

Article 1. MATERIAL FIELD OF APPLICATION. 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)² and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Article 2. PERSONAL FIELD OF APPLICATION. 1. This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as “adverse distinction”) to

² See p. 3 of this volume.

all persons affected by an armed conflict as denned in Article 1.

2. At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

Article 3. NON-INTERVENTION. 1.

Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

PART II. HUMANE TREATMENT

Article 4. FUNDAMENTAL

GUARANTEES. 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) 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;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Slavery and the slave trade in all their forms;

(g) Pillage;

(h) Threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) They shall receive an education, including religious and moral education, in keeping with the wishes of their parents or, in the absence of parents, of those responsible for their care;

(b) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) Children who have not attained the age of fifteen years shall neither be recruited in

the armed forces or groups nor allowed to take part in hostilities;

(d) The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Article 5. PERSONS WHOSE LIBERTY HAS BEEN RESTRICTED. 1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained:

(a) The wounded and the sick shall be treated in accordance with Article 7;

(b) The persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;

(c) They shall be allowed to receive individual or collective relief;

(d) They shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;

(e) They shall, if made to work, have the benefit of working conditions and safe guards similar to those enjoyed by the local civilian population.

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

(a) Except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;

(b) They shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;

(c) Places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;

(d) They shall have the benefit of medical examinations;

(e) Their physical or mental health and integrity shall not be endangered by any

unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (*a*), (*c*) and (*d*), and 2 (*b*) of this Article.

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

Article 6. PENAL PROSECUTIONS. 1.

This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

(*a*) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) No one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was [committed]³ again if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) Anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) Anyone charged with an offence shall have the right to be tried in his presence;

(f) No one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

³ The corrections between brackets were communicated to the States Parties to the Geneva Conventions of 12 August 1949 by the Government of Switzerland on 12 June 1978 and effected by a procès-verbal of rectification dated 6 November 1978. (Information supplied by the Government of Switzerland.)

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

PART III. WOUNDED, SICK AND SHIPWRECKED

Article 7. PROTECTION AND CARE. 1.

All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Article 8. SEARCH. Whenever

circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

Article 9. PROTECTION OF MEDICAL AND RELIGIOUS PERSONNEL. 1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

2. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

Article 10. GENERAL PROTECTION OF MEDICAL DUTIES. 1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.

3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.

4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

Article 11. PROTECTION OF MEDICAL UNITS AND TRANSPORTS. 1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.

2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting,

whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

Article 12. THE DISTINCTIVE EMBLEM. Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

PART IV. CIVILIAN POPULATION

Article 13. PROTECTION OF THE CIVILIAN POPULATION. 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Article 14. PROTECTION OF OBJECTS INDISPENSABLE TO THE SURVIVAL OF THE CIVILIAN POPULATION. Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as food

stuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Article 15. PROTECTION OF WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

Article 16. PROTECTION OF CULTURAL OBJECTS AND OF PLACES OF WORSHIP. Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954,⁴ it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Article 17. PROHIBITION OF FORCED MOVEMENT OF CIVILIANS. 1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory

⁴ United Nations, *Treaty Series*, vol. 249, p. 215.

conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Article 18. RELIEF SOCIETIES AND RELIEF ACTIONS. 1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

PART V. FINAL PROVISIONS

Article 19. DISSEMINATION. This Protocol shall be disseminated as widely as possible.

Article 20. SIGNATURE. This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

Article 21. RATIFICATION. This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

Article 22. ACCESSION. This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Article 23. ENTRY INTO FORCE. 1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.

2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

Article 24. AMENDMENT. 1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.

2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

Article 25. DENUNCIATION. 1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect six months after receipt of the instrument of denunciation. If, however, on the expiry of six months, the denouncing Party is engaged in the situation referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict. Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.

2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

Article 26. NOTIFICATIONS. The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

(a) Signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 21 and 22;

(b) The date of entry into force of this Protocol under Article 23; and

(c) Communications and declarations received under Article 24.

Article 27. REGISTRATION. 1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.

2. The depositary shall also inform the Secretariat of the United Nations of all ratifications and accessions received by it with respect to this Protocol.

Article 28. AUTHENTIC TEXTS. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.