

## **Senate Committee on Foreign Relations**

### **“Authorization for Use of Military Force After Iraq and Afghanistan”**

#### **Statement of Mary E. McLeod**

#### **Principal Deputy Legal Adviser, U.S. Department of State**

**May 21, 2014**

Thank you very much Chairman Menendez, Ranking Member Corker, and members of the committee, for the invitation to speak at this hearing. The Administration looks forward to engaging with this Committee and the Congress on this important topic.

I will begin with some introductory remarks before discussing briefly a few international law aspects of the Administration’s legal framework for conducting operations pursuant to the 2001 Authorization for Use of Military Force (AUMF). I will conclude by laying out a few relevant considerations for establishing our legal framework beyond 2014. My colleague Stephen Preston, General Counsel of the Department of Defense, will then address the current framework under U.S. law for military counterterrorism operations.

As an initial matter, the President has made clear his desire to engage with Congress about the future of the AUMF. The President expressed his commitment to “move [America] off a permanent war footing” one year ago in his speech at the National Defense University (NDU), and reaffirmed this commitment in this year’s State of the Union address. And the President made clear in his NDU speech that his goal is to engage with Congress and the American people to “refine, and ultimately repeal” the AUMF.

As we begin our dialogue on this issue, it will be critical to assess our legal authorities not only within the context of our current military operations, but also in light of future needs, which as of today’s hearing may not be fully apparent. At the same time, as the President has said, we must keep in mind going forward that not every collection of thugs that label themselves al Qaeda will pose a threat to the United States that requires the use of military force in response.

## *International Legal Considerations*

Turning now to international legal considerations, as we consider the future of the AUMF, it will be critical to ensure that U.S. actions continue to be grounded firmly in international law. Under international law, the United States has an inherent right of self-defense to use force to respond to an armed attack, or the imminent threat of an armed attack. And, when in an armed conflict, the United States may use force, in accordance with the law of war, to prosecute that conflict. Our use of military force must comply with international law's requirements of necessity, proportionality, distinction, and humanity.

United States use of force abroad is carried out in furtherance of these international law rights and requirements, and the law of war specifically has and will continue to provide the legal framework for U.S. military actions taken in the armed conflict against al Qaeda, Taliban, and associated forces. Going forward, the Office of the Legal Adviser at the State Department will continue to work to ensure that we exercise our rights consistent with these and other applicable international law principles.

I also want to note that there is a firm basis in international law to support our friends and partners facing the threat of terrorism within their own borders. Even where violent extremists pose a greater threat to these countries than they do to the United States, we can draw from all elements of national power – including military force, in appropriate cases – to help them counter these threats. In Mali, for example, we have been providing military aid to French forces to push back terrorists and other extremists. As the President stated in his speech one year ago, “we must define our effort not as a boundless global war on terror, but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.” Indeed, targeted efforts undertaken in partnership with other countries can be highly effective in countering terrorist threats, without keeping the United States on a permanent wartime footing.

## *Post-2014 Legal Framework*

With these principles in mind, let me now outline a few considerations regarding a future legal framework. We are currently working to identify an appropriate U.S. military presence in Afghanistan after 2014. We are also working toward the closure of the detention facility at Guantanamo Bay, which the President has reaffirmed will further our national security, our international standing, and our ability to cooperate with allies in counterterrorism efforts. We

also continue to work with our allies and partners to provide assistance and training to increase their capacity to take effective measures against terrorist organizations.

The State Department is joined by many other U.S. agencies in implementing this comprehensive strategy, which includes a broad range of military and other foreign assistance, law enforcement cooperation, intelligence sharing, and diplomatic engagement. All of these efforts are vital to countering threats. This is true even at times – such as the present – when we are using military force as part of our response to the terrorist threat. In the long term, the success of our efforts will depend not exclusively on the use of military force, but also on sustained attention to achieving effective governance and the rule of law in countries where terrorist threats proliferate.

We also bear in mind what Department of Homeland Security Secretary Jeh Johnson, then in his capacity as General Counsel of the Department of Defense, stated in his November 2012 speech at the Oxford Union. He noted that there will come a “tipping point” when our efforts to disrupt, dismantle, and defeat al Qaeda have succeeded to such an extent that we will no longer describe ourselves as being in an “armed conflict” with al Qaeda to which the law of war applies. At that point, we will rely primarily on law enforcement, intelligence, foreign assistance, and diplomatic means – in cooperation with the international community – to counter any remaining threat posed by al Qaeda and its affiliates. And as we do so, we will retain the authority, under both international and domestic law, to act in national or collective self-defense against armed attacks or imminent threats thereof posed by terrorist groups.

Based on all of these considerations, we would suggest that our efforts to identify a future legal framework be guided by the following principles:

- First, any domestic authority that we rely on to use military force should reflect the President’s clear direction that we must move America off a permanent wartime footing. As the President stated, this means that we will engage with Congress and the American people to “refine, and ultimately repeal” the AUMF, and that the President will not sign a law designed to expand the AUMF’s mandate further.
- Second, any authorization to use military force, including any detention operations, must be consistent with international law.

- Third, we must continue to enhance our cooperation with partner nations to take action within their own borders, including law enforcement action and other forms of engagement, where those methods provide the most effective and sustainable means of countering terrorist threats.
- Fourth, the President has made clear that now is the time to close the detention facility at Guantanamo Bay, and any future legislation should lift all remaining restrictions on the Commander in Chief's authority to transfer detainees held under the law of war.
- Finally, we must keep in mind that the President's authority to defend the United States would remain part of any framework that emerges.

\* \* \*

Thank you very much. I will now turn to Stephen Preston to make his statement. After that, we would be happy to address any questions you might have.