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U.S. Department of State

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Thank you very much for the opportunity to discuss with the Commission today the Administration's views on the issues raised by our continued detention of enemy combatants at the Department of Defense facility at Guantanamo Bay, and specifically, the Department of State's efforts with the international community on these matters. Currently, there are approximately 375 members of al Qaida and the Taliban detained at Guantanamo, including senior al Qaida planners like Khalid Sheikh Mohammed and al Qaida fighters who have personally attacked Americans. The Administration is acutely aware of concerns that have been raised both at home and abroad about long-term detentions of individuals at Guantanamo. Our challenge has been to explain to the world that the United States and other democracies around the world share a common problem in dealing with dangerous terrorists intent on harming our civilian populations, while at the same time being mindful of the need to operate lawfully and in a manner that preserves our commitment to principles of human rights and international humanitarian law. As Legal Adviser to the Department of State, I would like to explain to you today

the international legal background for our detention of enemy combatants at Guantanamo, as well as the significant efforts the Department has undertaken to address the concerns raised by our friends and allies.

Let me begin by emphasizing that the majority of detainees in Guantanamo were detained by U.S. and coalition forces in or near Afghanistan during the armed conflict between the United States and Afghanistan in 2001 and 2002. Our military forces were acting in self-defense in response to the attacks by al Qaida against our country on September 11. The Taliban had refused the request of the United States to turn over those responsible for those vicious attacks to face justice in the United States, choosing instead to harbor al Qaida. This inherent right to act in self-defense was recognized by the international community, including the U.N. Security Council and NATO.

Because the United States was and is in an armed conflict with al Qaida, the Taliban its affiliates and supporters, it was proper and continues to be lawful and appropriate for the United States and its allies to detain individuals who are fighting us in that conflict. One of the most basic precepts in the law of armed conflict is that states may detain enemy combatants until the cessation of hostilities. It is not consistent with international law to argue that the United States and its allies had the right to use force in self-defense but did not have the right to detain individuals incident to that use of force unless we planned to charge them with a criminal offense. The Supreme Court has confirmed this authority in the *Hamdi* and *Hamdan* decisions.

The legal authority to detain enemy combatants dovetails with a practical reality: many of the people we have captured in this conflict are extremely dangerous individuals who by their past actions have proven their ruthlessness, destructive intent, and flagrant

disregard for universally accepted norms of armed conflict. These include the architects of 9/11, the Bali bombings, the attacks on the U.S.S. Cole, and the Embassy bombings in Africa. It is not reasonable or responsible to suggest that these individuals should simply be released to rejoin the fight, where they could further harm our nation or our allies.

Despite this general recognition that the United States acted lawfully in detaining the Taliban and al Qaida combatants incident to the armed conflict in Afghanistan, and is justified in continued detention of dangerous terrorists like Khalid Sheikh Mohammed and Abu Zubaydah, the Administration understands fully that the detention facility at Guantanamo Bay has been a lightning rod for international and domestic criticisms. Many of these criticisms stem from misperceptions about the conditions at Guantanamo Bay. While critics continue to imagine orange-jump suited detainees in cages, visitors to Guantanamo, such as Madame Lizin who will speak after me, have recognized that the true conditions there mirror, and in some respects improve upon, those of high security prisons in Europe and the United States. And the horrifying images of detainee abuse at Abu Ghraib caused many to conclude that widespread detainee abuse takes place at Guantanamo, when in fact U.S. and international groups have found no evidence of ongoing detainee abuse there. The Detainee Treatment Act, the Department of Defense Detainee Directive, and the revised Army Field Manual on interrogation collectively provide detainees at Guantanamo a robust set of treatment protections that are fully consistent with, and in some respects exceed, our international obligations, including Common Article 3 of the Geneva Conventions.

Other criticisms stem from a sense that detainees at Guantanamo are in a “legal black hole,” because they are not being prosecuted domestically. It is simply incorrect to

suggest that the detainees have no legal protections absent criminal prosecution. All detainees at Guantanamo have received Combatant Status Review Tribunals confirming that they are properly detained as enemy combatants, and under the Detainee Treatment Act detainees have the opportunity to challenge that determination in the U.S. Court of Appeals for the D.C. Circuit. To our knowledge, these procedural protections are more extensive than those used by any other nation to determine a combatant's status.

And the Administration remains committed to trying by military commission those who have violated the laws of war or committed other serious offences under the MCA. After the Supreme Court in *Hamdan* set aside the original system of military commissions, we worked with the Congress to create a new set of military commission procedures that are fully consistent with U.S. law and Common Article 3 of the Geneva Conventions. While the Department of Defense can describe to you the latest developments regarding military commissions, it remains important as a matter of international law that we hold those responsible for serious war crimes to account.

Although we may disagree with many of the charges leveled against U.S. detention policies, the Administration recognizes the need to address the concerns that we have heard. As the President said on September 6th of last year, "we will work with the international community to construct a common foundation to defend our nation and protect our freedoms." Secretary Rice has made dialogue with our allies on these difficult issues a priority. We demonstrated continued American commitment to international human rights instruments by leading large interagency delegations presenting reports on U.S. compliance with the Convention Against Torture and International Covenant on Civil and Political Rights last year in Geneva, and we are

currently working on a one-year follow up report to both treaty bodies on our actions in response to their recommendations.

At the Secretary's instruction, I have undertaken extensive bilateral and multilateral efforts to discuss a common approach to counterterrorism policies. I have traveled to a dozen countries to speak with government officials, legal scholars and academics, and the media to answer questions they have about U.S. detention laws and policies and to emphasize the importance the United States attaches to complying with our international legal obligations. I have also engaged in seven rounds of discussions with the legal advisers of the 27 EU countries, and held additional discussions with the legal advisers of the member states of the Council of Europe, with the intention of moving towards a common approach to the international legal issues posed by the conflict with al Qaida.

Together with Under Secretary Hughes and the Office for War Crimes Issues, which has the State Department lead on Guantanamo transfer issues, my office also regularly conducts press briefings and appears in the international media in order to answer questions about Guantanamo, the Military Commissions Act, and other U.S. detention laws and policies. The Department has been the lead on U.S. Government public diplomacy efforts on this issue, and consistent with that role we have engaged in outreach to schools and universities, and to the international bar association. We have also facilitated visits to Guantanamo by international groups including the OSCE, led by the Special Rapporteur for Guantanamo, Anne Marie Lizin, the U.K. Foreign Affairs Committee of the House of Commons, and a group of EU parliamentarians, as well as members of the international media. These visits have led to positive contributions to the

international dialogue, and we will continue to work with the Department of Defense to facilitate future visits.

Although differences remain, I believe there is a growing international recognition that the threat posed by al Qaida does not neatly fit within existing legal frameworks. Madame Lizin's report from last July recognized that "there is incontestably some legal haziness" regarding the legal status of members of international terrorist organizations. Indeed, she recommended the formation of an international commission of legal experts to examine the question. Likewise, at last year's U.S.-E.U. summit, then-Austrian Chancellor Wolfgang Schussel acknowledged that we face "legal gray areas" regarding detention of terrorists. Most recently the Foreign Affairs Committee of the U.K. House of Commons wrote that the Geneva Conventions dealt inadequately with the problems posed by international terrorism, and called on the U.K. government, in connection with state parties to the Geneva Conventions and the International Committee of the Red Cross to work on updating these Conventions for modern problems. Although we do not – and will not – always see eye to eye with our European allies, I am encouraged that we have reached some degree of common ground, and that there is a growing acknowledgment that international terrorist organizations like al Qaida do not fit neatly into the existing international legal system.

Progress on this front aside, the President has stated that he would like to move towards the day when we can eventually close the detention facility at Guantanamo Bay. The Ambassador for War Crimes Issues Clint Williamson and I have worked hard with the Department of Defense to reduce the population of Guantanamo. While the Department of Defense can provide you more information on the current population at

Guantanamo, it is critical to note that more than half of the original population of the facility has now been transferred or released. As of today, approximately 375 detainees remain, and of those, we have approved approximately 75 for transfer or release. Although our critics abroad and at home have called for Guantanamo to be shut immediately, they have not offered any credible alternatives for dealing with the dangerous individuals that are detained there. Our experience has shown that transferring or releasing a detainee from Guantanamo is quite difficult. It is our policy that we do not transfer detainees from Guantanamo to countries where it is more likely than not that they will be tortured, and as news reports have made clear, this has resulted in our inability to transfer or release groups of detainees such as the ethnic-Uighur, Chinese-national detainees to their home countries. In other instances, countries refuse or are unable to take responsibility for mitigating the threat posed by their nationals, meaning that we cannot repatriate them while protecting our nation and our allies. Moving forward, it is critical that the international community recognize, as the UK Foreign Affairs Committee recently did, that many of the detainees at Guantanamo pose a threat not just to the United States but to its allies, and that the longer-term solution to Guantanamo, including resettlement of detainees who cannot be repatriated, is a responsibility shared between the United States and those allies.

Commission members, the United States has long been a beacon of hope and opportunity for people across the world, and we must continue to serve as a leader in protecting human rights. Our history and our values result in the United States being held to a high standard on human rights issues, and we embrace that responsibility. We recognize that many people around the world view Guantanamo as inconsistent with U.S.

values. We have worked hard to address those concerns, both through dialogue and changes to our policies. We will continue to work hard to take the steps necessary to protect Americans and the international community, while at the same time respecting our commitment to the rule of law. I look forward to answering any questions that you might have.