

3. *Strong Protection for Investors and Investments:* Governments should provide the highest possible level of legal certainty and protection against discriminatory, arbitrary, and otherwise unfair or harmful treatment to all investors and investments in their territories, both tangible and intangible, such as intellectual property rights. This includes the right to prompt, adequate, and effective compensation in the event of a direct or indirect expropriation or nationalization.
4. *Fair and Binding Dispute Settlement:* Governments should provide access to effective dispute settlement procedures, including investor-to-State arbitration, and ensure that such procedures are open and transparent, with opportunities for public participation.
5. *Robust Transparency and Public Participation Rules:* Governments should ensure the highest levels of transparency and public participation in the development of domestic laws and other measures relating to investment.
6. *Responsible Business Conduct:* Governments should urge that multinational enterprises operate in a socially responsible manner. To this end, the European Union and the United States intend to promote responsible business conduct, in general, and adherence by third countries to the OECD Guidelines for Multinational Enterprises, in particular.
7. *Narrowly-Tailored Reviews of National Security Considerations:* Governments should ensure that their reviews, if any, of the national security implications of foreign investments focus exclusively on genuine national security risks.²

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Military Commission Proceedings Resume at Guantánamo Bay

Following unsuccessful efforts to end detentions at the U.S. naval base at Guantánamo Bay, Cuba, and to bring some major terrorism suspects to trial in U.S. civilian courts,¹ the U.S. administration has resumed military commission proceedings against a small number of Guantánamo detainees charged with serious offenses. (An interagency task force recommended that thirty-six detainees should face charges, either in civilian courts or before military commissions.²) In June 2011, Brigadier General Mark Martins, a prominent and well-regarded military lawyer, was appointed chief prosecutor.³

USS Cole Attack. In September 2011, capital charges were referred against Abd al-Rahim al-Nashiri, the alleged mastermind of the 2000 bombing attack on the USS *Cole* and attacks on other vessels.⁴ He was arraigned before a military commission at Guantánamo Bay in November 2011.⁵ An excerpt from the Department of Defense's September 2011 announcement of the charges follows:

² Statement of the European Union and the United States on Shared Principles for International Investment (Apr. 10, 2012), at <http://www.state.gov/p/eur/rls/or/2012/187618.htm>.

¹ John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 325, 325 (2009); 103 AJIL 575, 575 (2009); 104 AJIL 100, 112 (2010); 104 AJIL 489, 506 (2010); 105 AJIL 333, 351 (2011).

² Peter Finn, *Pentagon Names New Prosecutor for Guantanamo Trials*, WASH. POST, June 24, 2011, at A7.

³ *Id.*; Peter Finn, *Taking on 9/11 Case, and Public Opinion*, WASH. POST, May 5, 2012, at A1.

⁴ John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 568, 596 (2011).

⁵ Peter Finn, *USS Cole Suspect Referred for Trial*, WASH. POST, Sept. 29, 2011, at A8; Peter Finn, *Alleged Leader of USS Cole Attack Is Arraigned*, WASH. POST, Nov. 10, 2011, at A3 [hereinafter *Alleged Leader*].

The Department of Defense announced today that the Convening Authority, Office of Military Commissions referred charges to a military commission in the case of *United States v. Abd Al Rahim Hussayn Muhammad Al Nashiri*. The referred charges allege, among other things, that Al Nashiri was in charge of the planning and preparation for the attack on USS Cole (DDG 67) in the Port of Aden, Yemen, on Oct. 12, 2000. That attack killed 17 sailors, wounded 37 sailors, and severely damaged the ship.

....

The charges also allege that Al Nashiri was in charge of planning and preparation for an attempted attack on USS The Sullivans (DDG 68) as that ship refueled in the Port of Aden on Jan. 3, 2000. The charges further allege that Al Nashiri was in charge of the planning and preparation for attack on the French civilian oil tanker MV Limburg in the Gulf of Aden on Oct. 6, 2002. This attack resulted in the death of one crewmember and the release of approximately 90,000 barrels of oil into the gulf.⁶

September 11 Coconspirators. In June 2011, military prosecutors swore out capital charges against Khalid Shaikh Mohammed, Walid Muhammad Salih bin Attash, Ramzi bin al-Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed al-Hawsawi, all allegedly involved in the September 11, 2001, attacks on New York and Washington.⁷ (These defendants were first arraigned before a military commission in 2008, but the Obama administration halted those proceedings and unsuccessfully sought to try the defendants in federal district court in Manhattan. This effort was abandoned in the face of congressional and public opposition.⁸)

In May 2012, Mohammed and his codefendants were arraigned for a second time before a military commission⁹ and charged with terrorism, hijacking aircraft, conspiracy, murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, and destruction of property in violation of the law of war.¹⁰ The arraignment was tempestuous. The defendants refused to enter a plea or to speak when requested, but they prayed, read magazines, and shouted at the judge. One removed his shirt.¹¹ The next commission proceedings in the case are scheduled for mid-June 2012.

Majid Shoukat Khan. In February 2012, the Department of Defense announced referral of noncapital charges against Majid Shoukat Khan, the first military commission defendant not charged with involvement in the 9/11 attacks or in attacks directed at U.S. forces. An excerpt from the Department of Defense announcement follows:

⁶ U.S. Dep't of Defense Press Release No. 827-11, DOD Announces Charges Referred Against Detainee Al Nashiri, Sept. 28, 2011, at <http://www.defense.gov/releases/release.aspx?releaseid=14821>.

⁷ *9/11 Defendants Charged at Guantánamo Bay with Terrorism and Murder*, N.Y. TIMES, June 1, 2011, at A18; Peter Finn, *Charges Against 9/11 Suspects Are Re-filed*, WASH. POST, June 1, 2011, at A6.

⁸ Charlie Savage, *At Guantánamo, Trial for 9/11 Defendants, and for a Revamped Tribunal*, N.Y. TIMES, May 5, 2012, at A12.

⁹ U.S. Dep't of Defense Press Release No. 235-12, DOD Announces Charges Referred Against 9-11 Co-Conspirators, Apr. 4, 2012, at <http://www.defense.gov/releases/release.aspx?releaseid=15158>; Peter Finn, *Alleged 9/11 Plotters Will Get New Trial in Military System*, WASH. POST, Apr. 5, 2012, at A3; Savage, *supra* note 8; Peter Finn, *Five 9/11 Detainees to Hear Charges*, WASH. POST, May 5, 2012, at A2; *see also Alleged Leader, supra* note 5.

¹⁰ U.S. Dep't of Defense Press Release No. 235-12, *supra* note 9.

¹¹ Peter Finn, *Detainees Refuse to Speak in 9/11 Arraignment*, WASH. POST, May 6, 2012, at A1; Charlie Savage, *9/11 Defendants Were Protesting 'Unjust System' at Hearing, Their Lawyers Say*, N.Y. TIMES, May 7, 2012, at A12; Peter Finn, *9/11 Detainee's Attorney Vows a Prolonged Fight*, WASH. POST, May 7, 2012, at A3.

The Defense Department announced today that the convening authority, Office of Military Commissions, referred charges to a military commission in the case of “United States v. Majid Shoukat Khan.” The referred charges allege, among other things, that Khan attempted to assassinate former Pakistani President Pervez Musharraf, and delivered \$50,000 in al Qaeda funding to finance the bombing of the J.W. Marriott hotel in Indonesia in August 2003, resulting in the killing of eleven people, wounding at least eighty-one others, and severely damaging the hotel.

Based on these allegations and others outlined in the charge sheet, Khan is charged with conspiracy, murder and attempted murder in violation of the law of war, providing material support to terrorism, and spying.¹²

Detainee Transfers. Many of the 169 detainees remaining at Guantánamo Bay have been cleared by U.S. officials for release or return to their home countries, but their departures have been prevented by congressional enactments limiting the administration’s power to transfer detainees.¹³ In April 2012, two Uighur detainees were transferred to El Salvador, the first transfers from Guantánamo Bay in over fifteen months. A U.S. court had ordered both men released in 2008.¹⁴

In 2011, the U.S. Supreme Court denied certiorari to hear the case of five Uighurs seeking to be settled in the United States. Writing in *Kiyemba v. Obama*, Justice Stephen Breyer, joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, and Sonia Sotomayor, noted that the executive branch was committed to resettling the men in Palau, an offer not acceptable to the five plaintiffs in the case.¹⁵ Nineteen Uighurs detained by the United States have now been transferred from Guantánamo Bay to Albania, Bermuda, El Salvador, Palau, and Switzerland. Three remain at Guantánamo Bay.¹⁶

Military Commission Website. Many military commission documents are currently available on a Department of Defense website, <http://www.mc.mil/LEGALRESOURCES/MilitaryCommissionsDocuments.aspx>.

U.S. Supreme Court Holds Torture Victim Protection Act Does Not Authorize Suit Against Organizations

The Torture Victim Protection Act¹ (TVPA) authorizes suits against “[a]n individual” for acts of torture and extrajudicial killing committed under authority or color of law of any foreign nation.

¹² U.S. Dep’t of Defense Press Release No. 112-12, DOD Announces Charges Referred Against Detainee Majid Shoukat Khan, Feb. 15, 2012, at <http://www.defense.gov/releases/release.aspx?releaseid=15067>.

¹³ Peter Finn, *Detainees Cleared For Release Are Still Waiting*, WASH. POST, Nov. 9, 2011, at A16.

¹⁴ U.S. Dep’t of Defense Press Release No. 291-12, Detainee Transfer Announced (Apr. 19, 2012), at <http://www.defense.gov/releases/release.aspx?releaseid=15202>; Charlie Savage, *Pair of Guantánamo Detainees Freed, the First in 15 Months*, N.Y. TIMES, Apr. 20, 2012; Jane Sutton, *Two Uighur Detainees Sent to El Salvador*, WASH. POST, Apr. 20, 2012, at A9; Editorial, *A Fresh Start in El Salvador*, WASH. POST, Apr. 27, 2012, at A16.

¹⁵ *Kiyemba v. Obama*, 131 S.Ct. 1631, 1631 (2011); see Robert Barnes, *Uighurs’ Resettlement Case Won’t Be Heard*, WASH. POST, Apr. 19, 2011, at A4.

¹⁶ Julian E. Barnes, *Two Uighurs Released from Gitmo, Sent to El Salvador*, WALL ST. J., Apr. 20, 2012, at <http://online.wsj.com/article/SB10001424052702304331204577354310989235228.html>.

¹ 28 U.S.C. §1350 note (2006).