

ethnic cleansing in Rakhine State.”²² She called on the “Burmese government to allow a UN fact-finding mission and the Special Rapporteur into the country,” and further for the “immediate and unconditional release” of two Reuters reporters who had documented the massacre of ten Rohingya men and boys.²³ Haley also called on the secretary-general to “quickly appoint a Special Envoy for Burma” and criticized the Security Council more broadly for thus far “fail[ing] in its responsibility to act in response to the clear threat to international peace and security that has resulted from recent events in northern Rakhine State.”²⁴

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

President Trump Issues Executive Order Keeping the Guantánamo Bay Detention Camp Open
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On January 30, 2018, President Trump signed Executive Order 13,823, directing officials to keep the Guantánamo Bay detention camp open and permitting additional detainees to be transported to the facility.¹ In announcing his decision during the State of the Union address to Congress, Trump stated, “I am asking Congress to ensure that, in the fight against ISIS and Al Qaida, we continue to have all necessary power to detain terrorists . . . And in many cases, for them, it will now be Guantánamo Bay.”² Section 2 of the order provides:

- (a) Section 3 of Executive Order 13492 of January 22, 2009 . . . , ordering the closure of detention facilities at U.S. Naval Station Guantánamo Bay, is hereby revoked.
- (b) Detention operations at U.S. Naval Station Guantánamo Bay shall continue to be conducted consistent with all applicable United States and international law, including the Detainee Treatment Act of 2005.
- (c) In addition, the United States may transport additional detainees to U.S. Naval Station Guantánamo Bay when lawful and necessary to protect the Nation.³

The executive order departs from the approach taken by former President Obama. On the second day of his presidency, Obama had ordered the future closure of the detention camp,⁴ and throughout his presidency he viewed this camp as contrary to American values and

²² Nikki Haley, Remarks at a UN Security Council Briefing on Burma (Feb. 13, 2018), at <https://usun.state.gov/remarks/8303> [<https://perma.cc/2QNS-L6L7>] [hereinafter Haley Remarks].

²³ *Id.* The U.S. government had previously called for the release of the two Reuters journalists in a State Department press release. U.S. Dep’t of State Press Release, Prosecution of Reuters Reporters Wa Lone and Kyaw Soe Oo (Jan. 10, 2018), at <https://www.state.gov/r/pa/prs/ps/2018/01/277385.htm> [<https://perma.cc/U3QW-RF7X>].

²⁴ Haley Remarks, *supra* note 22.

¹ Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Jan. 30, 2018).

² Donald J. Trump, Address Before a Joint Session of the Congress on the State of the Union, 2018 DAILY COMP. PRES. DOC. 64 (Jan. 30, 2018).

³ Exec. Order No. 13,823, *supra* note 1, at 4831.

⁴ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

harmful to U.S. foreign policy.⁵ Specifically, Section 3 of Obama's executive order had directed that remaining detainees be returned to their home country, transferred to another country or a U.S. detention facility, or released by January 2010.⁶ Because of political opposition, this was not accomplished by January 2010 or indeed during Obama's tenure,⁷ and Trump's executive order now formally revokes this provision.⁸ Still, under Obama's direction, 196 detainees were transferred from the facility, leaving forty-one detainees by the end of his presidency.⁹ These forty-one individuals are still detained today,¹⁰ although several have been cleared for transfer.¹¹ Despite the continuation and geographic expansion in the war on terror, no new detainees have been brought to the detention facility since 2008.¹²

In Section 1 of the executive order, Trump deemed the use of the Guantánamo detention camp to be consistent with domestic and international law obligations and necessary in the context of the continued war on terror:

- (a) Consistent with long-standing law of war principles and applicable law, the United States may detain certain persons captured in connection with an armed conflict for the duration of the conflict.
- (b) Following the terrorist attacks of September 11, 2001, the 2001 Authorization for Use of Military Force (AUMF) and other authorities authorized the United States to detain certain persons who were a part of or substantially supported al-Qa'ida, the Taliban, or associated forces engaged in hostilities against the United States or its coalition partners. Today, the United States remains engaged in an armed conflict with al-Qa'ida, the Taliban, and associated forces, including with the Islamic State of Iraq and Syria.
- (c) The detention operations at the U.S. Naval Station Guantánamo Bay are legal, safe, humane, and conducted consistent with United States and international law.
- (d) Those operations are continuing given that a number of the remaining individuals at the detention facility are being prosecuted in military commissions, while others

⁵ Barack Obama, Remarks on Closing the Detention Facilities at the United States Naval Base in Guantánamo Bay, Cuba, 2016 DAILY COMP. PRES. DOC. 94 (Feb. 23, 2016) [hereinafter Obama Remarks] (also noting that "15 years after 9/11, . . . we're still having to defend the existence of a facility and a process where not a single verdict has been reached in those attacks").

⁶ Exec. Order No. 13,492, *supra* note 4, at 4898.

⁷ Obama Remarks, *supra* note 5 (noting that since the time of this executive order, "Congress has repeatedly imposed restrictions aimed at preventing us from closing this facility").

⁸ Exec. Order No. 13,823, *supra* note 1.

⁹ Letter to Congressional Leaders on the Detention Facility at Guantánamo Bay, Cuba, 2017 DAILY COMP. PRES. DOC. 56 (Jan. 19, 2017). At one point, the facility held approximately eight hundred detainees. *See id.*

¹⁰ Human Rights First, *Guantánamo by the Numbers* (Feb. 2018), available at <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf>.

¹¹ Missy Ryan & Ellen Nakashima, *Trump, Reversing 2009 Move, Vows to Keep Guantánamo Open Indefinitely*, WASH. POST (Jan. 31, 2018), at https://www.washingtonpost.com/world/national-security/trump-revoking-2009-order-moves-to-keep-guantanamo-open-indefinitely/2018/01/30/c45a0b02-061b-11e8-8777-2a059f168dd2_story.html?utm_term=.4d1d3659f34e (noting that five have been approved for transfer); *see also* Charlie Savage, *Stranded at Guantánamo, a Cooperative Detainee Criticizes Saudi Arabia*, N.Y. TIMES (Feb. 28, 2018), at <https://www.nytimes.com/2018/02/28/us/politics/guantanamo-detainee-saudi-arabia.html> (noting that the terms of another detainee's plea agreement provided for transfer to Saudi Arabia by February 20, 2018, but that this transfer did not occur as scheduled).

¹² Felicia Schwartz, *Trump Signs Executive Order to Keep Guantánamo Bay Open*, WALL ST. J. (Jan. 30, 2018), at <https://www.wsj.com/articles/trump-signs-executive-order-to-keep-guantanamo-bay-open-1517370533>.

must be detained to protect against continuing, significant threats to the security of the United States, as determined by periodic reviews.¹³

The positions taken here are the subject of robust debate and, in some instances, legal challenge. For example, in January 2018, lawyers representing eleven of the detainees facing the prospect of seemingly endless detention moved for an order granting a writ of habeas corpus, alleging that Trump's refusal to release detainees violates U.S. constitutional law and is unjustified by the 2001 AUMF as interpreted through law-of-war principles.¹⁴ The extent to which the 2001 AUMF applies to "associated forces, including . . . the Islamic State of Iraq and Syria" has also received considerable attention and is the subject of an ongoing lawsuit originally brought during the Obama administration.¹⁵ The conditions of confinement at Guantánamo have also been the subject of criticism, as by the United Nations Special Rapporteur on Torture who raised concerns in December 2017 about the ongoing treatment of detainees, including allegations of torture.¹⁶

Although Trump's executive order formally reverses Obama's pronounced policy of closing the camp and sends a very different signal of presidential priorities, it remains to be seen how much effect this order will have in practice. The Trump administration has yet to send any new detainees to Guantánamo, although a State Department official has been quoted as saying that two captured ISIS fighters (both with ties to the United Kingdom) allegedly implicated in the 2014 beheadings of two American journalists might end up being sent there.¹⁷ The executive order further requires an interagency review headed by the U.S. secretary of Defense to "recommend policies to the President regarding the disposition of individuals captured in connection with an armed conflict, including policies governing transfer of individuals to U.S. Naval Station Guantánamo Bay."¹⁸ This process must be completed by April 30, 2018.¹⁹ Asked in February about whether "Guantánamo will be a solution," U.S. Secretary of

¹³ Exec. Order No. 13,823, *supra* note 1, at 4831. The periodic review process referred to is set out in Executive Order 13,567 from the Obama administration and applies to detainees subject to ongoing detention who have not been charged or convicted. *See id.* at 4831–32; Exec. Order No. 13,567, 76 Fed. Reg. 13,277, 13,278 (Mar. 10, 2011).

¹⁴ *Jabbarov v. Bush*, No. 5-cv-2386-RBW (D.D.C. 2018), *petition for habeas corpus filed, available at* https://ccrjustice.org/sites/default/files/attach/2018/01/AlBihani_et_al_v_Trump_MotionforOrderGrantingWrit.pdf.

¹⁵ *See* Sabrina McCubbin, *Smith v. Trump: AUMF Challenge Pretrial Motion Summaries*, LAWFARE BLOG (Oct. 23, 2017) (describing this case, which was brought by a U.S. soldier, found non-justiciable by a federal district court, and is presently on appeal in the D.C. Circuit with respect to justiciability).

¹⁶ "US Must Stop Policy of Impunity for the Crime of Torture" – *UN Rights Expert*, UN HUM. RTS. OFF. HIGH COMM'R, (Dec. 13, 2017), at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E> (focusing on the case of one detainee for whom "noise and vibrations are reportedly still being used against him, resulting in constant sleep deprivation and related physical and mental disorders, for which he allegedly does not receive adequate medical attention"); *see also* Tom Miles, *U.N. Expert Says Torture Persists at Guantánamo Bay; U.S. Denies*, REUTERS (Dec. 13, 2017), at <https://www.reuters.com/article/us-usa-guantanamo-torture/u-n-expert-says-torture-persists-at-guantanamo-bay-u-s-denies-idUSKBN1E71QO> (noting that the Pentagon denies these allegations).

¹⁷ Paul Sonne, Devlin Barrett & Ellen Nakashima, *U.S. and Britain Are Divided over What to Do with Captured ISIS Fighters*, WASH. POST (Feb. 14, 2018), at https://www.washingtonpost.com/world/national-security/us-and-britain-are-divided-over-what-to-do-with-captured-isis-fighters/2018/02/14/8ad4786e-0f7f-11e8-827c-5150c6f3dc79_story.html?utm_term=.53fa00ddadc7 (further noting both that the United States has been encouraging the United Kingdom to take custody and that trial in a U.S. federal court is also a possibility).

¹⁸ Exec. Order No. 13,823, *supra* note 1, at 4831.

¹⁹ *Id.*

Defense James Mattis responded that “I’m not willing to say anything on that right now. I think the best thing is to define the problem and then we’ll get the solution.”²⁰

²⁰ U.S. Dep’t of Defense Press Release, Media Availability with Secretary Mattis en Route to Brussels (Feb. 13, 2018), *at* <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1441004/media-availability-with-secretary-mattis-en-route-to-brussels> [<https://perma.cc/S95P-VJS8>].