

Statement for the Record of Human Rights First Authorization for the Use of Military Force Against ISIL

Before the Senate Committee on Foreign Relations

December 9, 2014

INTRODUCTION

Human Rights First welcomes the Senate Foreign Relations Committee's hearing on the Authorization for the Use of Military Force Against ISIL. We encourage the Committee to pay particular attention at this and subsequent hearings to the appropriate legal authority for the Obama Administration's military campaign against the Islamic State in Iraq and the Levant (ISIL). Several members of the Committee have publicly discussed the need for the administration and Congress to prepare a specific authorization of force to address the conflict with ISIL. After an initial pronouncement by President Obama that no additional legal authorities were necessary to mount a campaign against ISIL, the president has indicated his support for a new congressional authorization, stating that it "makes sense for us to make sure that the authorization from Congress reflects what we perceive to be not just our strategy over the next two or three months, but our strategy going forward."¹

Human Rights First welcomes this discussion. The legal authorities on which the President has relied to launch the campaign to "degrade and ultimately destroy ISIL"²—Article II of the U.S. Constitution, the 2001 Authorization for the Use of Military Force (AUMF) passed in response to the 9/11 attacks and the 2002 AUMF passed to authorize force against Saddam Hussein's government in Iraq—are insufficient or have no connection to ISIL.

Since 9/11, there has been considerable ambiguity regarding what Congress has or has not authorized in response to the 9/11 attacks and how that relates to ongoing terrorist threats and groups, as well as developments in ongoing armed conflicts in Iraq and Syria. Congress has a duty to clarify the situation and put ongoing and future use of force on a firm legal footing.

The experience of the AUMFs from the last decade has also shown that the vagueness of these instruments and their failure to ensure adherence to international law and human rights norms have weakened the effectiveness of U.S. efforts to combat

¹ President Barack Obama, *Transcript: President Obama's Nov. 5 news conference on midterm election results*, Wash. Post, Nov. 5, 2014 [hereinafter Obama Midterm Comments], available at http://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-midterm-election-results/2014/11/05/491a02b2-6524-11e4-9fdc-d43b053ecb4d_story.html.

² President Barack Obama, *Statement by the President on ISIL*, Sep. 10, 2014 [hereinafter Obama ISIL Statement], available at <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>.

terrorism and harmed U.S. standing in global public opinion. They have also eaten away at the rule of law, upon which human rights and successful U.S. leadership both rely.

Human Rights First does not take a position on the appropriateness of the use of military force in any specific instance. However, we do believe that the current debate offers an important opportunity for Congress to clarify with whom the United States is at war and ensure that the administration is operating under an appropriately narrow legal authorization that adheres to international law and human rights norms—and strengthens U.S. global legitimacy as a result.

Human Rights First endorses the “Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL,”³ which were prepared by several prominent legal experts, including those who held senior legal positions in the U.S. government. These Principles share much in common with other proposals put forward by former Bush Administration lawyers⁴ and represent an emerging consensus among national security law experts, who believe that there should be increased transparency and congressional debate and oversight regarding the mission, location(s), and parties against whom the administration believes the United States to be in an armed conflict, and the legal basis for these claims. These experts also agree that in addition to the need to more narrowly tailor force authorizations, the 2001 AUMF should be sunset and the 2002 AUMF should be repealed.

LEGAL AUTHORITIES AND THE ISIL CONFLICT

President Obama initially asserted that his inherent Article II constitutional powers, as Commander in Chief, provided the legal basis for U.S. air strikes against ISIL, when these began in August 2014. Article II of the Constitution permits the president to use military force to repel imminent threats to the United States, without first seeking approval from Congress. Sustained military campaigns are outside the purview of this authority, even when the initial use of force was to repel an imminent threat. The obligation to seek authorization from Congress was codified in the 1973 War Powers Resolution, which requires the president to obtain such authorization within 60 or 90 days of first using force.⁵

The president subsequently announced that existing congressional authorities—the 2001 AUMF, passed in the days after the 9/11 attacks and the 2002 AUMF, which targeted Saddam Hussein’s regime—provided the necessary congressional authorization for the administration’s planned campaign to “degrade and ultimately,

³ Harold Koh, et. al., Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL, Nov. 10, 2014, available at <http://justsecurity.org/wp-content/uploads/2014/11/ISIL-AUMF-Statement-FINAL.pdf>; <http://justsecurity.org/17257/aumf-principles/>.

⁴ Ryan Goodman & Steve Vladeck, *Avoiding Unnecessary Wars and Preserving Accountability: Principles for an ISIL-Specific AUMF*, Just Security, Nov. 10, 2014, available at <http://justsecurity.org/17257/aumf-principles/>.

⁵ War Powers Resolution of 1973 (50 U.S.C. 1541–1548).

destroy ISIL.”⁶ At the same time, the president stated that the use of force would not include any U.S. ground troops, with all U.S. force being limited to air strikes.

National security law experts were quick to counter the president’s assertion that these two current authorizations were sufficient to target an enemy that has no operational connection to the targets of either the 2001 or 2002 AUMF. It was also noted that while the president had stated that he would limit the type of force used in the conflict, neither authorization would actually cabin the president’s use of military force within these parameters.

In the confusion that emerged around whether and how one or both AUMFs might apply, it became clear that both authorizations are highly problematic and that Congress should act to ensure that neither this nor any future president would be able to claim broad war authorities to engage in future unforeseen hostilities with unknown groups without further congressional authorization. As Jack Goldsmith, former legal counsel under the Bush Administration, said, “If Congress wants to limit its authorization of force as applied to the Islamic State concerning geography, ground troops, and associated forces, it must also specifically amend the 2001 AUMF to make plain that the 2001 AUMF itself does not authorize force against the Islamic State outside of Iraq and Syria, or against associated forces of the Islamic State, or involving ground troops against the Islamic State.”⁷

Recently, President Obama indicated his support for a new congressional authorization, recognizing that the conflict with ISIL is different than those authorized by the previous AUMFs and stating that it therefore “makes sense for us to make sure that the authorization from Congress reflects what we perceive to be not just our strategy over the next two or three months, but our strategy going forward.”⁸

The 2001 and 2002 AUMFs

The 2001 AUMF, passed three days after the unprecedented attacks of September 11, 2001, is, on paper, confined to the “nations, organizations, or persons” that either executed the attacks or harbored those who did.⁹ The resolution has since been interpreted to apply to al Qaeda, the Taliban, and their “associated forces,” and used to justify the use of force against groups and in situations that Congress never intended.¹⁰

⁶ Obama ISIL Statement.

⁷ Jack Goldsmith, *The Draft AUMFs for the Islamic State Do Not Limit congressional Authorization on Ground Troops, or Geography, or Associated Forces*, Lawfare, Sept. 18, 2014, available at <http://www.lawfareblog.com/2014/09/the-draft-aumfs-for-the-islamic-state-do-not-limit-congressional-authorization-on-ground-troops-or-geography-or-associated-forces/>.

⁸ Obama Midterm Comments.

⁹ Authorization for Use of Military Force § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note) (2001).

¹⁰ See, e.g., 147 CONG. Rec. H5654–H5676 (Sept. 14, 2001) (Rep. Jan Schakowsky: “This resolution has been carefully drafted to restrict our response to those we know to be responsible for this atrocity. It is not a carte blanche for the use of force.” Rep. David Wu: “I would have strong reservations about a resolution authorizing the use of force in an open ended manner reaching far beyond responding to this specific terrorist attack on America. This is not that resolution.” Rep. Diane Watson: “I should also note that the resolution is not a carte blanche endorsement for the use of force against any suspected terrorist group anywhere in the world, but is more narrowly crafted to endorse all necessary and appropriate use of force against nations, organizations, and persons that participated in the attacks

Yet, even with this broadened definition, ISIL does not fall into any of these categories; al Qaeda has officially and publicly declared that it “has no links to the ISIL group”¹¹ and the two groups have engaged in hostilities against each other, with ISIL killing key al Qaeda leaders. With no operational connection to al Qaeda or the Taliban, ISIL cannot be considered an “associated force” and is not a legitimate target under the 2001 AUMF.

The 2002 AUMF was not written for the current situation in Iraq. That AUMF permitted the president to use force against Iraq in order to address concerns that Saddam Hussein had breached United Nations (UN) Security Council resolutions by stockpiling weapons of mass destruction. The Obama Administration has repeatedly supported repeal of this legislation—even when asserting that it provides authority for current U.S. air strikes in Iraq against ISIL.¹²

Constitutional Requirements for an ISIL AUMF

The Constitution requires that Congress, not the executive, declare war. If an AUMF is not narrowly tailored to a particular group or threat, it risks creating a carte blanche for use of force by the executive that will undermine the Constitution’s intention that this power rest with Congress.¹³ As noted above, where a group poses an imminent threat to the United States, the president has the authority to target that group under his inherent Article II authority. This authority may be sufficient to provide the domestic legal justification for U.S. strikes against the al-Nusra Front and the Khorasan Group in Syria on September 22, 2014 based on official statements suggesting the groups were then plotting imminent attacks. However, Article II does not provide a sufficient basis to conduct an extended bombing campaign to degrade and destroy ISIL.

An ISIL-focused AUMF that also permitted the president to target groups which do not target the United States—such as groups that shared the ideology of ISIL or other violent extremists—could potentially run afoul of separation of powers principles.

that occurred on September 11.” Rep. Lamar Smith: “This resolution should have authorized the President to attack, apprehend, and punish terrorists whenever it is in the best interests of America to do so. Instead, the resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday.”) See also Jennifer Daskal and Stephen I. Vladeck, *After the AUMF*, Lawfare, May 2013, available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/After-the-AUMF-Final.pdf>.

¹¹ Translation of al-Qaeda Statement on Feb. 3, 2014 Acknowledging ISIL officially isn’t part of AQ, Feb. 2014, available at http://azelin.files.wordpress.com/2014/02/al-qc481_idah-22on-the-relationship-of-qc481idat-al-jihc481d-and-the-islamic-state-of-iraq-and-al-shc481m22-en.pdf.

¹² Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, NY Times, Sep. 12, 2014, available at <http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html?module=Search&mabReward=relbias%3Ar%2C%7B%22%22%3A%22RI%3A13%22%7D&r=0..>

¹³ The Constitution Project, *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, The Constitution Project, 2005, available at http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf.

International Law Requirements for an ISIL AUMF

Throughout our history, the United States has worked to codify a clear separation between wartime and peacetime in our laws and international law. During wartime, these laws afford the country more flexibility in the use of force, detention, and trial of the enemy. However, perpetuating this state is dangerous. It skews our policy framework towards immediate and often shortsighted responses, rather than long-term policy efforts, which prevent threats from emerging. The more the United States invokes a state of armed conflict to take advantage of these relaxed constraints, the more likely it is that extraordinary powers become the norm and, in the worst case, policies drift towards those of dictatorships and enemies of human rights: detentions without charge or trial, extrajudicial killings, torture, military tribunals, and mass surveillance.

To ensure this does not occur, the United States government's power to use lethal force should be cabined to the groups that are engaged in armed conflict under international law. The existence of an armed conflict against a non-state armed group, like ISIL, under international law is determined by two criteria: (1) there must be hostilities, which reach a minimum level of intensity, such as when hostilities are of a collective character or when the government is obliged to respond with military force, rather than with mere police forces; and (2) the non-state groups involved in the conflict must be considered "parties to the conflict," meaning that their armed forces are sufficiently organized, as evidenced by the existence of a certain command structure, and are capable of sustaining military operations.¹⁴

There is little doubt that the conflict with ISIL presently satisfies the requirements for an armed conflict against a non-state armed group under international law. An ISIL-focused AUMF should ensure that lethal force is only permitted while this state of armed conflict exists, thereby ensuring the president's wartime powers are limited to situations of actual war and ensuring that the United States remains a rights-respecting nation, which upholds the rule of law.

RECOMMENDATIONS

Human Rights First recommends that any new congressional AUMF be specific to ISIL, include a sunset clause for the 2001 AUMF against al Qaeda and the Taliban, and repeal the 2002 AUMF for Iraq. This will give the president the authority he needs to combat the ISIL threat now, and the sunset of the 2001 AUMF ensures that Congress will look again soon—not waiting a decade or more as has been the case—at the nature of terrorist threats and whether or not an authorization of force is necessary to confront them. In the past decade, war-making authorities for one mission have been stretched and contorted to cover a different set of threats, without congressional oversight and without due regard to the costs of using force in response to all of those threats. Thus, Congress should also put a premium on oversight and transparency with any new

¹⁴ ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997 [hereinafter *Tadic*], para. 561-568.

AUMF, so as to avoid the ambiguity that has plagued force authorizations since 9/11, to the detriment of U.S. counterterrorism effectiveness.

We make the following specific recommendations for Congress:

1. Any new ISIL AUMF should:

(a) Be limited to ISIL and explicitly define the scope of operations

The experience of the 2001 AUMF has demonstrated that how, where, and when the United States intends to use military force in accordance with domestic and international law can easily become unclear—and that clarity is important for maintaining the legitimacy of a military mission with the American public, with allied and partner countries, and with the people outside the United States who themselves are affected by terrorist groups. Because so much of American leadership is grounded in the perception of American respect for the rule of law, it is vital that any AUMF written to confront the threat posed by ISIL be limited to ISIL and be narrowly crafted to ensure that force is used in ways that are consistent with congressional intent, international law, and human rights norms. A well-articulated and understood strategy is key to achieving this, along with legislative language that limits the time, geography, and groups targeted under the authorization.

The absence of temporal limits in the 2001 AUMF has proven to be a basis for uses of force over many years, which most members of Congress could hardly have anticipated and about which Congress did not deliberate. Congress should include in any new ISIL AUMF a time limit, or sunset clause, which would ensure future timely congressional debate on the nature of the threat and any further response. Such a requirement is not unprecedented: for example, the 1983 AUMF for Lebanon authorized the president to use force for up to 18 months, unless extended by Congress.¹⁵

Geographic limits have been included in many prior congressional force authorizations.¹⁶ An ISIL AUMF should limit the geographic location of the use of force to that associated with the current armed conflict between ISIL, Iraq and the United States. Such limits can help ensure that any current or future administration cannot interpret an ISIL AUMF to apply to other parties in other situations where the United States is not engaged in armed conflict, as required by international law—i.e. where hostilities are of sufficient intensity between the United States and another state or sufficiently organized armed group.¹⁷

¹⁵ Multinational Force in Lebanon Resolution, P.L. 98-119, 97 Stat. 805, October 12, 1983 [S.J.Res. 159].

¹⁶ The National Security Network has determined that 60 percent of historical force authorizations have contained geographic limitations. See http://nwnetwork.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_FINAL.pdf.

¹⁷ *Tadic*, *supra* note 15.

Any new congressional force authorization should be as specific as possible about the objectives for which force is being authorized. The president should communicate these objectives to Congress with a request for the authorities that he considers are necessary to achieve them. Pre-2001 force authorizations have included such objectives, along with the requirement that the president determine when these objectives have been fulfilled and report this determination to Congress.¹⁸

Moreover, an ISIL AUMF should also state whether or not force is also authorized against “associated forces” of ISIL. These groups should be defined to include only those that are actively fighting alongside ISIL, as parties to the armed conflict, in accordance with international law. Military force should not be authorized against other groups that are not parties to the present armed conflict. The president has authority under Article II of the Constitution to use force under certain circumstances and without congressional authorization to repel imminent attacks. Congress should not authorize force pre-emptively against emerging threats or unknown enemies.

(b) Ensure greater transparency and congressional oversight

One key lesson from the United States’ post-9/11 military engagements is the need for additional transparency on the part of the administration as well as oversight by the Congress regarding the use of force. It is a basic principle of democracy that the American public and Congress be informed of the scope, progress and human cost of any conflict in which their armed forces are engaged. Any AUMF should mandate that the president provide to Congress, and to the American people, in unclassified form, regular reports regarding the status of progress towards the mission’s objectives, the groups or nations that fall within the scope of the AUMF, the numbers of civilian and combatant casualties, and the legal basis for targeting particular groups and individuals or using force in particular countries.

(c) Comply with domestic and international law

The Constitution requires that Congress declare war, not the executive. If the AUMF is not narrowly tailored to a particular group or threat, it risks creating a *carte blanche* for use of force by the executive that will undermine the Constitution’s intention that this power rest with Congress. A broad law authorizing force against all alleged terrorists or against groups that espouse a particular ideology runs afoul of separation of powers principles. As noted above, international law demands that states exercise wartime authorities only when

¹⁸ *For example see* Authorization To Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores, and Related Positions, P.L. 84-4, 69 Stat. 7, January 29, 1955; Joint Resolution to Promote Peace and Stability in the Middle East, Public Papers of the Presidents of the United States. Dwight D. Eisenhower. 1957, Washington. U.S. Government Printing Office, 1958, pp. 6, 11-15; and Gulf of Tonkin Resolution, P.L. 88-408, 78 Stat. 384, August 10, 1964.

engaged in a fight whose intensity meets international criteria for an armed conflict, and only for the duration of that armed conflict.¹⁹ In addition, the United States must comply with the international rules governing the interstate use of force, as laid out in the UN Charter. Any new AUMF should send an important signal that the United States abides by the rule of law in using force by explicitly requiring compliance with international law.

2. Repeal the 2002 AUMF

The 2002 Iraq AUMF should be repealed. An ISIL-focused AUMF would provide the administration with the necessary authorities to use force against ISIL and would eradicate the need for the 2002 AUMF, which was designed for a different enemy in a different conflict.

3. Sunset the 2001 AUMF

The 2001 AUMF should sunset. The continuing relevance of the 2001 AUMF is becoming increasingly questionable, particularly as combat operations in Afghanistan wind down. Establishing a sunset now will require Congress and the administration to consider, at some near future date, whether the 2001 AUMF is an appropriate and lawful authorization to deal with threats to the United States from al Qaeda and the Taliban.

The 2001 AUMF is, on paper, confined to organizations responsible for committing or helping with the 9/11 attacks and those who harbored them. The administration has officially interpreted those organizations to include al Qaeda and “associated forces,” including groups such as al Qaeda in the Arabian Peninsula (AQAP), even though groups such as AQAP have little to no connection to the 9/11 attacks. The vast majority of terrorist groups in the headlines today do not pose the kind or degree of threat to the United States that either necessitates or justifies “war,” even if from time to time, a specific threat may justify use of force. Moreover, the current environment is comprised of a patchwork of entities, with regional interests and divergent goals that are not the same as those posed by the al Qaeda of 2001, and may not require an AUMF. The legal and policy framework to counter current threats must accord with the actual threat posed by each of these groups.

4. Effectively Countering Terrorism Going Forward

Counterterrorism and military leaders agree that a successful U.S. policy will rely far less on the use of force, especially large-scale military engagements and occupations, than was the case in the years immediately following 9/11. Human Rights First reiterates that while there are circumstances in which the proper use of force is an appropriate and lawful response to a threat, the best counterterrorism policy for the post-9/11 era consists of a comprehensive approach, which leverages economic,

¹⁹ *Tadic*, *supra* note 15.

diplomatic, and human resources, as well as intelligence and military assets.²⁰ Such a whole-of-government approach includes providing conditional security assistance to partners to help ensure that terrorist threats are defeated in the countries where they start; funding sustainable democratic institutions in countries facing the threat of terrorism; funding Leahy Law vetting of counterterrorism units for human rights abuse; using counter threat finance as a tool to marginalize extremists; maximizing the role of the U.S. criminal justice system, where more than 500 individuals have been convicted of international terrorism charges since 9/11;²¹ and improving the effectiveness and focus of the intelligence community.

The threat posed by ISIL—a regional insurgent group that uses terrorism among other tactics—should not be conflated with other threats from terrorist groups around the world. Each situation must be analyzed and dealt with separately to determine whether and under what circumstances the use of force would be likely to achieve the desired outcome or be counterproductive, as when it enhances terrorist recruiting or undermines our counterterrorism cooperation with allies. When terrorist groups are not targeting the United States, it is better to pursue terrorist threats primarily through security partnerships and diplomatic, law enforcement, and intelligence tools—reserving the use of military force as a last resort—rather than making the United States a party to a local conflict and risking inciting further acts of terrorism against the United States.

Even in the event that military force is required to respond to a threat from a terrorist group, it does not necessarily mean the United States is engaged in an armed conflict with that group. An armed conflict exists as a matter of international law between the United States and only those groups who are sufficiently organized and engaged in hostilities of sufficient intensity to meet the threshold for armed conflict.²²

CONCLUSION

The experience with the 2001 and 2002 AUMFs has taught us that congressional force authorizations must be concrete and specific with regard to purpose, scope, time, and groups targeted. These limitations ensure that the constitutional war powers between the political branches are properly exercised, as well as compliance with human rights norms and international law, on which successful U.S. global leadership relies.

Congress and the administration now have the opportunity to set a clear precedent for how the use of military force is authorized going forward. Human Rights First welcomes the Senate Foreign Relations Committee's attention to this important issue. Any ISIL-focused AUMF should be carefully tailored to the current threat, while appropriately addressing the AUMFs of the last decade.

²⁰ Human Rights First, Statement for the Record of Human Rights First: Authorization For Use Of Military Force After Iraq And Afghanistan, Before the Senate Committee on Foreign Relations, May 21, 2014 available at <http://www.humanrightsfirst.org/sites/default/files/AUMF-Testimony-May-21-2014.pdf>.

²¹ Adam Serwer, *Courts Can Win Terror Convictions After All*, MSNBC, March 26, 2014, available at <http://www.msnbc.com/msnbc/courts-can-win-terror-convictions-after-all>.

²² *Tadic*, *supra* note 15.