



NEW YORK
CITY BAR

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July 2, 2008

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Chairman, Senate Judiciary Committee
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Senator Arlen Specter
Ranking Member,
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Hon. Michael B. Mukasey
Attorney General of the United States
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Representative John Conyers
Chairman, House Judiciary Committee
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Representative Lamar S. Smith
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House Judiciary Committee
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Hon. Fred Fielding
Counsel to the President
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Re: Reaffirming the U.S. Commitment to Common Article 3 of the Geneva Conventions

Dear Senators, Representatives, Attorney General Mukasey and Mr. Fielding:

I am enclosing the report of the Association of the Bar of the City of New York entitled “Reaffirming the U.S. Commitment to Common Article 3 of the Geneva Conventions: An Examination of the Adverse Impact of the Military Commissions Act and the Executive Order Governing CIA Interrogations.” The Report examines the provisions of the Military Commissions Act (“MCA”) that affect the application and enforceability of Common Article 3’s humanitarian standards, as well as the Executive Order entitled “An Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by Central Intelligence Agency” (“Executive Order”).

Full compliance by the United States with the humanitarian standards of Common Article 3 is vital to the restoration of America’s tradition of humane treatment of detainees in armed conflicts; to the standing of the United States in the world community; and to protection of American citizens and military personnel who might someday be detained abroad. The Report concludes that in a number of respects the MCA and the Executive Order may undermine compliance with those standards under Common Article 3.

The Report, therefore, makes a number of recommendations to assure that the United States lives up to its commitments under Common Article 3.

1. The Report urges repeal of the provisions of Section 6(a) and 6(b) of the MCA amending the War Crimes Act and limiting its application to certain “grave breaches” of Common Article 3, as defined by the MCA. The War Crimes Act should be restored to read as it did prior to enactment of the MCA, making criminal all violations of Common Article 3. The MCA’s definitions of “grave breaches” is excessively narrow and the attempt to limit the scope of the violations of Common Article 3 subject to the War Crimes Act introduces ambiguities that offer opportunities to evade the commonly understood meanings of Common Article 3’s humanitarian standards. Given past history, however, we also recommend that the War Crimes Act specify, by way of example and without limiting the scope of Common Article 3, certain practices like waterboarding and others specified in the current version of the Army Field Manual that would be violations of Common Article 3 and the Act. The Detainee Treatment Act also should be amended to make the Field Manual applicable to all government personnel, as it does to the Defense Department.

2. The Report urges repeal of the MCA’s delegation of authority to the President to define the conduct (other than “grave breaches”) prohibited by the Common Article 3. The deference accorded to the President’s interpretation of treaties is well established. The delegation of authority might be read to provide greater force to such interpretations, thereby interfering with the judiciary’s ultimate authority to interpret treaties. In fact, as a result of other provisions of the MCA, discussed below, the President’s interpretations of Common Article 3 are completely unreviewable by the courts. We also recommend that the Executive Order be withdrawn, as it provides no meaningful guidance to the CIA and some of its provisions might be read to permit evasion of Common Article 3’s prohibitions.

3. The Report urges repeal of section 6(a) of the MCA, which bars courts from using foreign or international sources of law in interpreting the War Crimes Act and Sections 5(a) and 3, which preclude litigants from invoking the Geneva Conventions as a source of rights. The understandings of other parties to the Geneva Conventions is an established basis for interpreting their meaning and accordingly, foreign and international sources of law are vital to the proper interpretation of Common Article 3. Barring invocation of the Geneva Conventions as a source of rights expresses a lack of commitment to our treaty obligations and renders those obligations unenforceable. In addition, Section 7(a)(2) of the MCA, insofar as it denies courts jurisdiction to entertain habeas or other actions concerning treatment or conditions of confinement brought by certain alien detainees alleged to be enemy combatants, should be repealed, at least to the extent that it denies jurisdiction to seek equitable relief protecting detainees from violations of Common Article 3. All detainees should have access to the courts at least to seek equitable relief protecting them from violations of international humanitarian standards binding on the U.S., including those under Common Article 3.

4. An administrative system to consider claims for monetary compensation to victims of violations of Common Article 3 should be established. Well-founded claims for such compensation, such as those of Khalid El-Masri and Maher Arar, have been dismissed by the courts. The report proposes ways in which concerns underlying those dismissals can be addressed. A failure to provide compensation to victims of unlawful mistreatment is unjust and damages our international reputation. A system for compensation will provide an additional incentive for U.S. compliance with Common Article 3.

We hope the enclosed report will be given careful consideration. For the reasons discussed above, we urge that steps be taken promptly to implement its recommendations.

Sincerely,



Patricia M. Hynes

Enclosure

cc: Hon. John D. Rockefeller
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