



NEW YORK
CITY BAR

TASK FORCE ON THE RULE OF LAW

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Hon. Lloyd J. Austin III
Secretary of Defense

Hon. Merrick Garland
Attorney General of the United States
Department of Justice

Hon. Caroline Krass
General Counsel
Department of Defense

Rear Admiral Melissa Bart
Judge Advocate General & Chief Counsel
United States Coast Guard

Major General David J. Bligh
Staff Judge Advocate to the Commandant of
the Marine Corps

Vice Admiral Darse E. "Del" Crandall
Judge Advocate General
United States Navy

Lieutenant General Stuart W. Risch
Judge Advocate General
United States Army

Lieutenant General Jeffrey A. Rockwell
Judge Advocate General
United States Air Force

Re: Compensation for Victims of Torture

Dear Secretary Austin, Attorney General Garland, Ms. Krass, Rear Admiral Bart,
Major General Bligh, Vice Admiral Crandall, Lieutenant General Risch, Lieutenant General
Rockwell:

The New York City Bar Association (the "City Bar") has taken note of the outcome of the prosecution in *United States v. Majid Khan* before a military commission convened in Guantánamo, and particularly of the uncontroverted evidence of torture that was received in those proceedings and the memorandum issued collectively by seven of the eight officers who were convened as a panel to hear and assess the evidence and render a verdict. While the City Bar expresses no view on the particular outcome in the Khan case, it does commend the panel members for their fortitude in assessing the case and noting the gravity of the evidence which was adduced.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

In particular, we take note of these lines in the recommendation of clemency to the Convening Authority:

“Mr. Khan was subjected to physical and psychological abuse well beyond approved enhanced interrogation techniques, instead being closer to torture performed by the most abusive regimes in modern history. This abuse was of no practical value in terms of intelligence, or any other tangible benefit to U.S. interests. Instead, it is a stain on the moral fiber of America; the treatment of Mr. Khan in the hands of U.S. personnel should be a source of shame for the U.S. government.”¹

The Kahn case is significant in that it is one of the few instances in the vexatious history of proceedings in Guantánamo in which clear testimonial evidence of torture suffered by prisoners in the hands of the U.S. government has been permitted to be placed on the public record. This is important because, as a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (“CAT”), one of the first obligations of a party is to allow an honest and open accounting for conduct which occurred which constitutes torture or cruel, inhuman and degrading conduct within the meaning of CAT. It is to be expected that this precedent of transparency will be followed in all subsequent cases handled by the Guantánamo military commissions.

Beyond this, the City Bar has consistently urged the investigation and prosecution of those officials responsible for the torture that was carried out, at Guantanamo and elsewhere, under the guise of “enhanced interrogation.” Our focus here, however, is on the CAT’s further requirement that victims of torture receive compensation from any government which inflicts torture. We cite for reference the Recommendations the City Bar made to the U.S. Congress in June 2017 concerning compensation for torture victims.² Without in any way modifying the recommendations we then made with respect to the implementation of the United States’ CAT commitments, we note that the military commissions proceedings present a special opportunity to begin to redress our nation’s failure to provide such compensation. In particular,

- (1) Persons held in the custody of U.S. forces, whether on the territory of the United States or abroad must be permitted to assert claims before a competent body for damages suffered as a result of their torture or cruel, inhuman or degrading treatment while in U.S. custody.
- (2) As an alternative, or pending the creation of a proper system for vetting such claims, the U.S. Government should, in cases in which a factual basis exists, consider a practice of making “ex gratia” payments to torture victims. Such compensation need not be

¹ See <https://int.nyt.com/data/documenttools/khan-clemency-letter/c488624ca03d523d/full.pdf>

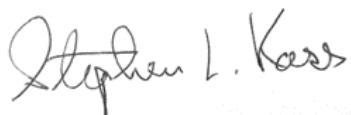
² “Recommendations of the City Bar Regarding Compensation And Treatment For Victims Of Torture, And Cruel, Inhuman And Degrading Treatment,” New York City Bar Association, June 9, 2017, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/recommendations-regarding-compensation-and-treatment-for-victims-of-torture-and-cruel-inhuman-and-degrading-treatment>. (All sites last visited Jan. 24, 2022).

attuned to American tort law notions of compensation, but should rather follow the precedents of other nations, particularly U.S. allies, in compensating victims for torture. In this regard, we take note of the agreement of Lithuania to pay €100,000 in compensation for its role in the torture of a prisoner now detained in Guantánamo, a quantification that follows existing legal precedents under the CAT.³

- (3) As noted in our prior Recommendation, “paying funds to individuals who have been convicted of, or are being actively prosecuted for, terrorist acts may raise national security concerns, and that such damages might be needed to satisfy outstanding judgments in favor of the victims of terrorism. In those cases, existing law provides several means to avoid unjust enrichment or material assistance to individuals who constitute an on-going threat to the nation’s security.”⁴
- (4) Apart from monetary compensation, torture victims also have a right to access proper medical care to address physical and psychiatric damage resulting from torture. It is incumbent upon the authority exercising custody over such persons to ensure that such professional care, including therapy, is made available to them. The observation and comment of the International Committee of the Red Cross should be solicited in this process.

We believe that 10 U.S.C. § 2734 may provide a basis or a template upon which at least some of these issues may be addressed. At the same time, we reiterate the City Bar’s prior reports calling for accountability by those responsible for torture, as well as our recent proposal for a federal court branch in Guantánamo to replace the military commissions, a proposal that would provide a more regular basis for addressing these issues, including victim restitution.⁵

The United States has legal and moral obligations to compensate those whom it has tortured or subjected to cruel, inhuman and degrading treatment. The implementation of these obligations remains incomplete and, as noted by the Kahn panel’s statement, “a stain on the moral fiber” of our nation. The City Bar remains committed to working with you to help remove that stain.



Stephen L. Kass, Chair
Rule of Law Task Force

Respectfully,

Chris Amore /s/

Christopher Amore, Chair
Military and Veterans Affairs Committee

³ Ed Pilkington, “Lithuania pays Guantánamo ‘forever prisoner’ Abu Zubaydah €100,000 over CIA torture,” *The Guardian*, Jan. 10, 2022, <https://www.theguardian.com/us-news/2022/jan/10/lithuania-pays-guantanamo-forever-prisoner-abu-zubaydah-100000-cia-torture>.

⁴ *Id.*, p.5.

⁵ “Report on Converting Guantánamo Bay Military Commissions Into An Article III Court,” New York City Bar Association, May 21, 2020,

<https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/converting-guantanamo-bay-military-commissions-into-an-article-iii-court>.

Cc: Judiciary Committee, U.S. House of Representatives
Judiciary Committee, U.S. Senate
Foreign Affairs Committee, U.S. House of Representatives
Foreign Affairs Committee, U.S. Senate
Armed Services Committees, U.S. House of Representatives
Armed Services Committees, U.S. Senate

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