

NEW YORK CITY BAR

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Prof. Jose E. Alvarez
Columbia University School of Law
435 West 116th Street
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Dear Professor Alvarez:

This Association of the Bar of the City of New York was “established for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession, and cherishing the spirit of collegiality among the members thereof.”¹ In this spirit, the Association has long worked with other organizations and members of the legal profession to promote the rule of law throughout the United States and abroad.

Over the five years since the tragic events of September 11, 2001, various Committees of this Association have worked to clarify the law governing the use of force and the treatment of detainees and to ensure that the United States and other states adhere to these principles of law and the dictates of humanity. Much of this work has entailed exhaustively researched Committee reports that examine contested areas of the law.² Some of this work took the form of brief letters reminding a government official of the official’s obligations under the law and

¹ Constitution of the Association of the Bar of the City of New York, art. II.

² See for example: Committee on International Human Rights, Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,” 60 *Rec. Ass’n B. City N.Y.* 13 (2005) (with NYU Center for Human Rights and Global Justice); Committee on International Human Rights & Committee on Military Affairs and Justice, Human Rights Standards Applicable To the United States’ Interrogation of Detainees, 59 *Rec. Ass’n B. City N.Y.* 183 (2004); Committee on Federal Courts, The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror, 59 *Rec. Ass’n B. City N.Y.* 41 (2004); Committee on Immigration and Nationality Law & Committee on Communications and Media Law, Dangerous Doctrine: The Attorney General’s Unfounded Claim Of Unlimited Authority to Arrest and Deport Aliens in Secret, 59 *Rec. Ass’n B. City N.Y.* 5 (2004); Committee on Professional Responsibility, Statement Regarding the United States Department of Justice Final Rule Allowing “Eavesdropping” on Lawyer/Client Conversations (ABCNY), 57 *Rec. Ass’n B. City N.Y.* 228 (2002); Committee on Communications and Media Law, The Press and the Public’s First Amendment Right of Access to Terrorism on Trial, 57 *Rec. Ass’n B. City N.Y.* 94 (2002); and Committee on Military Affairs and Justice, *Inter Arma Silent Leges: In Times of Armed Conflict Should the Laws Be Silent? A Report of the President’s Military Order of November 13, 2001 Regarding “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,”* 57 *Rec. Ass’n B. City N.Y.* 39 (2002).

expressing the Association's interest in supporting and adhering to the requirements of the relevant law.³

We applaud and support the Resolution recently passed by the American Society of International Law ("ASIL") on the Use of Armed Force and the Treatment of Detainees (the "ASIL Resolution"). The ASIL Resolution comes at a critical juncture as the White House and Congress debate how to react to the Supreme Court's June 2006 ruling in *Hamdan v Rumsfeld* 548 U.S. ___, 126 S.Ct. 2749. In this case, the Court held that the U.S. government did not have the authority to establish Article I military commissions for trying detainees and that the existing commissions violated U.S. obligations under the Geneva Conventions as incorporated by statute, as well as other provisions under domestic law. Significantly, the Court also clarified the limits of Presidential authority in time of war. In doing so, it iterated that most basic principle of the rule of law – that no one is above it.⁴ As Walter Dellinger recently noted, "Hamdan is simply the most important decision on presidential power and the rule of law ever. Ever. The court has rejected the central constitutional claim of this presidency: that no president is bound to comply with laws passed by the United States Congress if those laws limit any exercise of an astonishingly broad category they call 'inherent Presidential power.'"⁵ Now the political branches are working to identify or create a tribunal that meets the tests explained in *Hamdan*. The ASIL Resolution explains basic legal obligations that all states must meet and from which no derogation is permitted.

The ASIL Resolution presents widely applicable conclusions of law.⁶ The United States is not alone in facing serious challenges from those who use force to influence political outcomes, as recent events in the Middle East, Central Africa, and South Asia readily attest. Nor is the United States alone in its efforts to effectively prevent attacks on its homeland by detaining

³ See: Letter to Congress expressing serious concerns with the Graham Amendment and the indefinite detention of persons whose status as an enemy combatant has not been adequately examined as well as the treatment of those detainees (Nov. 17, 2005); Letter to Congress urging rejection of the military appropriations bill that would remove from the United States courts the authority to consider a habeas petition from any alien detainee being held by the Secretary of Defense as an enemy combatant (Nov. 9, 2005); Letter to Congress urging that the McCain Amendment which seeks to codify and preserve long-established basic standards of treatment for enemy detainees by the United States Government in times of war be included in H.R. 2863, the Fiscal Year 2006 Department of Defense Appropriations Conference Report (Oct. 14, 2005); Letter to Representative Edward Markey in Support of H.R. 952, which Would Ban US Involvement in Extraordinary Rendition (Feb. 24, 2005); Letter to Attorney General Nominee Alberto Gonzales Posing Questions Regarding Bush Administration Legal Positions on Detainees (Dec. 22, 2004); Letter to Representative Edward Markey supporting HR 4674 which would end the extra-judicial transfer of individuals to countries in which they may be tortured or subject to cruel inhuman punishment (Aug. 4, 2004); Letter to Joseph E. Schmitz, Inspector General, Department of Defense, on enemy prisoners of war and other detainees (Apr. 18, 2003); Letter to William Haynes, General Counsel, US Department of Defense Commenting on Military Commission Instruction - Crimes and Elements for Trials by Military Commissions (March 21, 2003); and Letter to Immigration and Naturalization Service, re: INS No. 2171-01 Custody Procedures, 66 Fed. Reg. 48334 (Sept. 20, 2001).

⁴ *Hamdan v Rumsfeld*, Slip Opinion at 72 ("in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.")

⁵ Walter Dellinger to Dahlia Lithwick, Slate.Com, June 29, 2006, available at <http://www.slate.com/id/2144476/entry/2144825/>.

⁶ For more background and a thoughtful discussion of the ASIL Resolution, see Mary Ellen O'Connell, ASIL Insight, *The ASIL Centennial Annual Meeting Adopts a Resolution on the Use of Armed Force and the Treatment of Detainees* available at <http://www.asil.org/insights/2006/05/insights060519.html>.

and interrogating suspected terrorists. As the Association itself has documented, many states confront these issues today – and many have over the centuries. The laws governing the use of force and the treatment of detainees evolved over the centuries in light of experience.⁷ And each generation has adopted those laws to respond to changed circumstances. The expectation that laws require updating from time to time does not, however, imply that they are antiquated.

In adopting the ASIL Resolution, this Association evinces its position on the importance that the legal profession must occasionally speak as one voice – on particularly urgent topics upon which there can be no substantial dissent. Thereby, this Association also advances its objective of improving the administration of justice and promoting the spirit of collegiality among members of this learned profession.

This Association, therefore, adopts the ASIL Resolution in its entirety. To wit:

1. Resort to armed force is governed by the Charter of the United Nations and other international law (*jus ad bellum*).
2. Conduct of armed conflict and occupation is governed by the Geneva Conventions of August 12, 1949, and other international law (*jus in bello*).
3. Torture and cruel, inhuman, or degrading treatment of any person in the custody or control of a state are prohibited by international law from which no derogation is permitted.
4. Prolonged, secret, incommunicado detention of any person in the custody or control of a state is prohibited by international law.
5. Standards of international law regarding treatment of persons extend to all branches of national governments, to their agents, and to all combatant forces.
6. In some circumstances, commanders (both military and civilian) are personally responsible under international law for the acts of their subordinates.
7. All states should maintain security and liberty in a manner consistent with their international law obligations.

Very truly yours,



Barry Kamins

⁷ See MICHAEL HOWARD ET AL. THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD.