



**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 EXECUTIVE ORDER GOVERNING CIA
INTERROGATIONS**

**A REPORT OF THE ASSOCIATION OF
THE BAR OF THE CITY OF NEW YORK
TASK FORCE ON NATIONAL SECURITY AND THE RULE OF LAW**

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The United States has a long and honorable tradition of humane treatment of detainees in armed conflict stretching back to the Revolutionary War. That tradition has been shattered by revelations of brutal treatment of detainees in the wars in Afghanistan and Iraq and in the “global war on terror.” This departure from our tradition has been attributed, at least in part, to a decision made by the President in February, 2002, interpreting the Geneva Conventions, including the minimal humanitarian standards of Article 3 common to all four Conventions (“Common Article 3”), as inapplicable to suspected members of Al Qaeda and the Taliban captured in Afghanistan.

Four years later, the Supreme Court held that Common Article 3 did apply to armed conflicts with non-state entities, and in that case, to an alleged member of Al Qaeda captured in Afghanistan. The Administration immediately recognized that the Court’s interpretation of Common Article 3 made its requirements applicable to the treatment of detainees, including techniques used to interrogate them.

This Report, prepared by the Task Force on National Security and the Rule of Law of the New York City Bar Association (the “Association”), evaluates the Administration’s effort to interpret its obligations under Common Article 3 through the enactment of the Military Commissions Act of 2006 (“MCA”) and the issuance of the Executive Order providing “an Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central

Intelligence Agency” (the “Executive Order”).¹ The Report concludes that the MCA and the Executive Order appear to be inconsistent with U.S. obligations under Common Article 3 and may undermine compliance with those obligations. The Report makes recommendations that will help assure that the United States fully complies with Common Article 3 and restores its moral leadership in the world community.

Executive Summary and Introduction

Common Article 3 of the Geneva Conventions provides a minimal humanitarian standard for treatment of detainees in armed conflicts, among other things, prohibiting torture and cruel and degrading treatment.² In 2006, the United States Supreme Court rejected the Bush Administration’s position, under which it had operated since February, 2002, that Common Article 3 did not apply to members of Al Qaeda and the Taliban. The Court held that Common Article 3 did apply to an alleged member of Al Qaeda captured in Afghanistan and detained at Guantanamo and to other detainees in armed conflicts involving non-state parties.³

This decision was of enormous significance. Other treaties and domestic laws prohibit U.S. officials from engaging in torture and cruel, inhuman and degrading

¹ The members of the Task Force on National Security and the Rule of Law are Peter Barbur, James Benjamin, David Bowker, Miles Fischer, Martin Flaherty, Scott Horton, Aziz Huq, Michael Mernin, David Nachman, Sidney Rosdeitcher (Chair), Margaret Satterthwaite, Wendy Schwartz, Hina Shamsi, Mark Shulman, Margaret Stock, and Ona Wang. The Report was written primarily by Sidney Rosdeitcher and Sarah Jackel, Secretary of the Task Force, with assistance from Liza Velazquez, a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Invaluable input and comments were received from Peter Barbur, James Benjamin, Miles Fischer, Martin Flaherty, Mark Shulman, Aziz Huq, Michael Mernin, Scott Horton, Wendy Schwartz and Association General Counsel Alan Rothstein.

² Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, [1955] 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364.

³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-96 (2006).

treatment including the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment⁴ (“CAT”), the U.S. Anti-Torture Statute,⁵ and the Detainee Treatment Act of 2005⁶ (“DTA”), but the Administration has given these treaties and laws restrictive interpretations, which have been used to authorize interrogation practices that would violate Common Article 3’s prohibition of torture and cruel, humiliating and degrading treatment. Thus, the Department of Justice’s Office of Legal Counsel (“OLC”) has so narrowly interpreted U.S. obligations under CAT and the Anti-Torture Statute that it has approved the CIA’s “enhanced interrogation techniques,” which reportedly include methods, such as waterboarding, which are widely considered to be cruel, inhuman and degrading, if not torture. The DTA, like U.S. reservations to CAT, defines cruel, inhuman and degrading treatment as conduct prohibited by the Fifth, Eighth and Fourteenth Amendments, an uncertain and ambiguous standard, which OLC has interpreted to permit abusive interrogation practices to be balanced against the need to obtain information to protect national security. Significantly, DTA provisions incorporating explicit prohibitions of waterboarding and other brutal interrogation techniques specified in the Army Field Manual apply *only* to Department of Defense personnel and not to the CIA. Moreover, the DTA has no enforcement mechanism, and it purports to deny to the most likely victims of brutal interrogation methods any resort to the courts for protection. Hence, like CAT and the Anti-Torture Statute, the DTA is apparently considered no obstacle to the CIA’s “enhanced interrogation” program.

⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, 1465 U.N.T.S. 85, *reprinted in* 23 I.L.M. 1027 (1984)(“CAT”) (ratified by the U.S. Oct. 21, 1994).

⁵ 18 U.S.C. § 2340.

⁶ 42 U.S.C. § 2000dd.

The Supreme Court's conclusion that Common Article 3 is applicable to members of Al Qaeda or other non-State persons in an armed conflict, however, created an entirely different situation. Under the War Crimes Act,⁷ as it read at the time, *any* violation of Common Article 3's straightforward, unqualified prohibitions of torture, cruel, or humiliating and degrading treatment was a federal crime. The Administration acknowledged the special significance of the Court's interpretation of Common Article 3, declaring that it exposed CIA personnel employing the "enhanced interrogation techniques" to prosecution under the War Crimes Act and suspending that program until Congress enacted legislation "clarifying" Common Article 3.

In September 2006, Congress responded by enacting the MCA,⁸ which, among other things, amended the War Crimes Act to limit the violations of Common Article 3 constituting a crime to a list of narrowly defined "grave breaches" and delegating to the President the authority to define violations of Common Article 3 other than "grave breaches." Thereafter, the President issued an Executive Order providing "an Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency."⁹

This Report concludes that the MCA and the Executive Order are not adequate to assure U.S. compliance with its obligations under Common Article 3. The MCA's complicated and ambiguous definitions of cruel or inhuman treatment

⁷ Pub. L. No. 105-118, § 583, 111 Stat. 2386, 2436 (1997).

⁸ Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

⁹ Exec. Order, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence (July 20, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>.

constituting “grave breaches” are virtually indistinguishable from the definition of torture under the Anti-Torture Statute and are open to interpretations that would penalize only the most barbaric treatment. While the MCA also purports to prohibit cruel, inhuman and degrading treatment not rising to the level of “grave breaches,” it gives the same uncertain and ambiguous definition contained in the DTA and provides no means to enforce this prohibition. The MCA delegates to the President the authority to proscribe conduct violative of the Geneva Conventions not amounting to “grave breaches” and to provide for compliance. The Executive Order, issued pursuant to this authority, for the most part, however, does little more than incorporate by reference the provisions of the MCA, DTA and Anti-Torture Statute. It does provide a definition of humiliating and degrading treatment. But that definition is so ambiguous that it can be interpreted to permit even the most humiliating and degrading treatment, if it is motivated by a need to obtain information to protect national security. Not surprisingly, recent testimony before Congress by DOJ and intelligence officials indicates that the Administration may still believe that, at least in some circumstances, even waterboarding could be lawfully employed, notwithstanding U.S. obligations under Common Article 3.¹⁰

The United States’ treatment of detainees following the attacks of September 11, 2001 has violated our Nation’s traditions of decency and humanity and severely damaged our reputation throughout the world. Strict compliance with Common Article 3’s standards for the treatment of detainees is one important means of restoring our values and our international reputation. The MCA and the Executive Order are not

¹⁰ See *infra* notes 73 and 74.

adequate to ensure such compliance. We therefore make the following recommendations:

1. The provisions of the MCA amending the War Crimes Act and limiting its application to “grave breaches” of Common Article 3 as defined by the MCA should be repealed. The War Crimes Act should be restored to read as it did prior to the enactment of the MCA, making criminal all violations of Common Article 3. We submit that attempts to further define cruel or inhuman treatment or “humiliating” and “degrading” treatment are unnecessary. The definitions supplied by Congress in the MCA and by the President in the Executive Order have merely introduced ambiguities that offer opportunities to evade the commonly understood meanings of Common Article 3’s humanitarian standards. Any attempt to devise general rules that further define Common Article 3’s standards are likely to have that result, inviting a search for loopholes that permit an evasion of its prohibitions or the creation of new forms of cruel and degrading treatment that are not captured by a more specific rule.

Nor are we persuaded by the claim that Common Article 3’s standards expose interrogators to prosecutions for crimes they could not have anticipated: prosecutors are unlikely to seek criminal penalties except in cases where there is little question that the practices involved amount to cruel, humiliating or degrading treatment. At the same time, any risk that Common Article 3’s standards may cause interrogators to err unduly on the side of refraining from practices of uncertain legality is offset by the need to discourage abuses which come too close to the line of prohibited conduct or efforts to find loopholes that permit conduct which violates international humanitarian standards. By insisting on adherence to the plain terms of Common Article 3, rather than

some legislative or Executive substitute definition of those terms, we send a signal to the world of our renewed commitment to the Geneva Conventions. We therefore recommend that the Executive Order be withdrawn, and that the DTA be amended to make the Army Field Manual applicable to all government personnel. Given past history of OLC opinions authorizing abusive treatment of detainees and recent testimony before Congress, we believe it would be appropriate by way of example only and without in any way limiting the terms of Common Article 3, to list specific practices, such as those explicitly prohibited by the Army Field Manual, as violations of Common Article 3 and the War Crimes Act.

2. The MCA's purported delegation of authority to the President to define the conduct prohibited by Common Article 3 beyond "grave breaches" should be stricken. The President's authority to interpret treaties in the course of executing and enforcing them and the deference to be accorded such interpretations is already well-established. To the extent the MCA may be read to provide greater authority or force to such interpretations, it interferes with the judiciary's ultimate authority to interpret treaties and violates separation of powers principles.

3. 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 in actions against government officials, should be repealed. These provisions undermine confidence in the United States' commitment to its obligations under Common Article 3 and deprive the courts of accepted sources for interpretation of U.S. treaty obligations. Foreign and international decisions interpreting the language of Common Article 3 are

established sources for understanding the meaning attached to it by other signatories to the Geneva Conventions, and the inability of victims of violations of Common Article 3 to invoke it as a source of rights in actions against responsible government officials renders Common Article 3 effectively unenforceable.

For similar reasons, we also recommend repeal of Section 7(a)(2) of the MCA, which bars courts from entertaining actions by certain alien detainees alleged to be “enemy combatants” relating, among other things, to their treatment or conditions of confinement, at least insofar as this provision bars suits for equitable relief protecting such detainees from treatment or conditions that violate Common Article 3 or other applicable treaties or laws.¹¹

4. The question of whether victims of violations of Common Article 3 should be permitted to bring damage actions against responsible U.S. officials seeking monetary compensation is more difficult. There are concerns that the threat of private damage actions against officials authorizing or conducting interrogations might chill legitimate efforts to obtain information needed to protect the nation against terrorism. Courts have consistently rejected such claims, without considering their merits, based on the state secrets privilege, Westfall Act immunity, qualified immunity and other legal

¹¹ In *Boumediene v. Bush*, No. 06-1195, 553 U.S. ____ (2008), the Supreme Court held Sections 7’s bar to habeas corpus actions by such Guantanamo detainees a violation of the Suspension Clause of the Constitution. The Court, however, found it unnecessary to address the “reach of [habeas] with respect to claims of treatment or conditions of confinement.” *Id.*, slip op. at 64. As we discuss later, there is a Circuit split on whether such claims can be addressed in habeas or only under the civil rights laws. Congress should make it clear that such an action, at least for equitable relief, is available, no matter how designated.

grounds.¹² This has resulted in the dismissal of suits, such as those brought by Maher Arar and Khaled El Masri, that appear to be well founded. A Canadian government investigation confirmed the accuracy of Mr. Arar's claims that Canadian and U.S. officials were responsible for his wrongful detention and deportation to, and torture in, Syria.¹³ Canada subsequently awarded him approximately \$9 million in compensation.¹⁴ A Council of Europe investigation confirmed as true Mr. El Masri's claims that the CIA and others conspired to abduct him to Afghanistan, where he was subjected to abusive interrogation and mistreatment.¹⁵ A German criminal investigation reached similar conclusions and issued indictments of CIA agents believed to be involved.¹⁶ Nevertheless, both Mr. Arar's and Mr. El Masri's claims were summarily dismissed by U.S. courts without ever reaching their merits.¹⁷

We have concluded that some system of compensation is necessary, both to compensate victims of torture or cruel, inhuman and degrading treatment and to deter

¹² *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (U.S. Oct. 9, 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, No. 06-4216 (2d Cir. June 30, 2008).

¹³ *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar* (2006).

¹⁴ See Beth Duff-Brown, *Canada Apologizes, Compensates Deportation Victim*, Assoc. Press, Jan. 27, 2007, available at http://www.accessmylibrary.com/coms2/summary_0286-29397888_ITM.

¹⁵ See Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* § 3.1 (draft report 2006), available at http://www.news.bbc.co.uk/1/shared/bsp/hi/pdfs/07_06_06_renditions_draft.pdf.

¹⁶ See Craig Whitlock, *Germans Charge 13 CIA Operatives*, Wash. Post, Feb. 1, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/31/AR2007013100356.html>.

¹⁷ *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (U.S. Oct. 9, 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff'd*, No. 06-4216 (2d Cir. June 30, 2008).

violations of Common Article 3. Recognizing that Congress is unlikely to accept private damage actions against individual officials and fears that private damage actions might be subject to misuse, we propose the establishment of an administrative tribunal that has the power to award compensation by the United States to persons who establish that they were victims of violations of Common Article 3. Protection against misuse of this process can be implemented through heightened pleading requirements and penalties for the filing of objectively groundless claims. Problems created by classified evidence and state secrets can be addressed in a manner similar to that proposed in Senate and House bills seeking to regulate the use of the state secrets privilege.¹⁸

Discussion

Background

Following the attacks of September 11, 2001 and the U.S. invasion of Afghanistan, the United States began detaining members of Al Qaeda and the Taliban captured on the battlefield and other suspected members of Al Qaeda or allegedly affiliated groups captured elsewhere in the so-called “war on terror.” The Bush Administration’s views of the requirements governing its treatment of these detainees has been a subject of criticism from the outset and continues to this day.

Common Article 3 of the Geneva Conventions and the War Crimes Act

The treatment of detainees in armed conflict is governed by the four Geneva Conventions of 1949. In a statement released by the White House in February 2002, however, President Bush took the position that, although the U.S. would treat members of Al Qaeda “humanely” and “*to the extent appropriate and consistent with*

¹⁸ See S. 2533 and H.R. 5607, 110th Congress, 2d Sess. (2008).

military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949,” the Geneva Conventions had no application to members of Al Qaeda captured by the U.S. in Afghanistan “and elsewhere.”¹⁹ Of special relevance here, the Administration rejected the widely-held view that even if the protections for prisoners of war did not apply to members of Al Qaeda, at the very least, Common Article 3 of the Geneva Conventions applied to them.

Common Article 3 provides in pertinent part that detainees “shall in all circumstances be treated humanely” and prohibits the following acts “at any time and in any place whatsoever”:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.²⁰

Unlike other provisions of the Geneva Conventions, which govern armed conflicts between nation-states, Common Article 3 applies to armed conflicts “not of an international character.”²¹ Many commentators interpreted this to mean simply conflicts not between nations. President Bush, however, maintained that Common Article 3 did not apply to Al Qaeda or the Taliban because, he declared, they are engaged in conflicts “international in scope” and hence not conflicts “not of an international character.”²²

¹⁹ White House Fact Sheet: Status of Detainees at Guantanamo, Feb. 7, 2002, *available at* <http://geneva.usmission.gov/press2002/0802detainees.htm> (emphasis added).

²⁰ *See, e.g.*, Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, [1955] 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364.

²¹ *Id.*

²² *Supra* note 19.

Accordingly, while the War Crimes Act, as amended in 1997, made all violations of Common Article 3 a crime under U.S. law, under the President's interpretation, the War Crimes Act had no application to the treatment of suspected members of Al Qaeda or other groups allegedly affiliated with Al Qaeda.

The United States, however, was, and continues to be, bound by other treaties, and domestic laws, prohibiting torture and cruel, inhuman and degrading treatment, as discussed below.²³

The Convention Against Torture and Other Forms of
Cruel, Inhuman and Degrading Treatment

Foremost among these treaties is CAT.²⁴ CAT requires that "each State Party" "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" and "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."²⁵ CAT defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he

²³ The Association previously published a report comprehensively examining the international and domestic standards applicable to the interrogation of detainees as of 2004. See Committee on International Human Rights and Committee on Military Affairs and Justice, *Human Rights Standards Applicable to the Interrogation of Detainees*, 59 The Record of the Association of the Bar of the City of New York, 183 (2004).

²⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, 1465 U.N.T.S. 85, *reprinted in* 23 I.L.M. 1027 (1984) ("CAT") (ratified by the U.S. Oct. 21, 1994).

²⁵ *Id.*

or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁶

CAT also specifically provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”²⁷

The United States ratified CAT, subject to certain understandings and reservations that differed from the language of CAT. Thus, it attached an understanding defining torture as an act:

*specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.*²⁸

The United States also attached a reservation limiting its obligation to refrain from cruel, inhuman or degrading treatment to “cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”²⁹

²⁶ *Id.*

²⁷ *Id.*

²⁸ U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990) (emphasis added).

²⁹ *Id.*

The U.S. Anti-Torture Statute

To fulfill its obligation under CAT to enact laws criminalizing torture, the United States enacted the Anti-Torture Statute, 18 U.S.C. § 2340, which provides for the prosecution of a U.S. national or anyone present in the United States who, while outside the U.S., commits or attempts to commit torture. The statute's definition of torture reflects the U.S. "understanding" that varies from the language of CAT in that it defines torture as an "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."³⁰ Severe mental pain or suffering is defined by the statute as "the prolonged mental harm caused by or resulting from . . . the intentional infliction or threatened infliction of severe physical pain or suffering."³¹ Severe physical pain or suffering is not further defined.

The Detainee Treatment Act

In December, 2005, Congress also enacted the DTA. The DTA provides:

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment or punishment.³²

The DTA defines cruel, inhuman and degrading treatment as:

the cruel, unusual, and inhuman treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to [CAT].³³

³⁰ 18 U.S.C. § 2340.

³¹ *Id.* § 2340(2).

³² 42 U.S.C. § 2000dd(a).

³³ 42 U.S.C. § 2000dd(d).

The DTA also provides that:

No person in the custody or under the effective control of the Department of Defense . . . shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.³⁴

As it then read, the Army Field Manual on Intelligence Interrogation specifically prohibited “acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.”³⁵ According to the manual, “examples of physical torture include – Electric shock. Infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape). Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time. Food deprivation. Any form of beating.”³⁶ The Field Manual on Intelligence Interrogation further instructed military interrogators to consider the following rule in attempting to determine if a contemplated approach was permissible: “If your contemplated actions were perpetrated by the enemy against US PWs, you would believe such actions violate international or US law.”³⁷

U.S. Interpretations of Governing Interrogation Standards

These treaties and laws, however, were narrowly interpreted by the Department of Justice (“DOJ”)’s Office of Legal Counsel (“OLC”), which gave opinions reportedly authorizing conduct widely considered torture or cruel, inhuman and degrading treatment. Disclosures of documents following the shocking revelations in 2004 concerning the treatment of detainees at Abu Ghraib indicated that the

³⁴ Added by the Defense Appropriation Acts of 2005 and 2006, Section 1002 of Pub. L. No. 109-148 and Section 1403 of Pub. L. No. 109-163.

³⁵ Field Manual 34-52, Intelligence Interrogation (Sept. 1992).

³⁶ *Id.*

³⁷ *Id.*

Administration was authorizing harsh interrogations practices at Abu Ghraib, Guantanamo, Bagram Airbase in Afghanistan and elsewhere.³⁸ An August 2002 memorandum from OLC gave an astonishingly narrow definition of torture, under U.S. reservations to CAT and as used in the Anti-Torture Statute, limiting torture to acts specifically intended to cause pain so severe that it accompanied “death or organ failure.”³⁹

Moreover, the memorandum, emphasizing the requirement of “specific intent” used in the U.S. reservation to CAT and the Anti-Torture Statute, argues that “even if the defendant knows that severe pain will result from his actions, if causing such harm is not his *objective*, he lacks the requisite specific intent even though the defendant did not act in good faith.”⁴⁰ While the memorandum recognizes that, as a practical matter, a jury could infer from the circumstances that the defendant did have the required specific intent, as shown later in this Report, the concept that “the objective” of securing information to protect national security could justify conduct known to cause severe pain

³⁸ See Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia University Press, 2007); Hina Shamsi, Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*, at Appendices B and C (Feb. 2006), available at <http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf>; Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, The New Yorker, Feb. 27, 2006; *The Torture Papers: The Road to Abu Ghraib* (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

³⁹ Memorandum from Jay Bybee, Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel to Alberto R. Gonzalez, Counsel to the President, dated Aug. 1, 2002, available in *The Torture Papers: The Road to Abu Ghraib* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

⁴⁰ *Id.* at p. 175.

shows up repeatedly in Administration officials' attempts to defend the legality of brutal interrogation techniques.⁴¹

A very recently disclosed memorandum prepared in March 2003 gave an equally narrow definition of cruel, inhuman and degrading treatment. In that memo, OLC opined that under the U.S. reservation to CAT limiting cruel, inhuman or degrading treatment, the Eighth Amendment prohibition on cruel and unusual punishment turned not only on the severity of the treatment, but on the subjective question of whether the treatment was administered maliciously or sadistically and without any other purpose than to cause harm or whether it was administered to protect a legitimate government interest – in the case of interrogation methods, to obtain information to protect national security.⁴² It read the Due Process Clauses of the Fifth and Fourteenth Amendments to prohibit only conduct that “shocks the conscience.” Although recognizing that this standard “is not pellucid,”⁴³ here too the opinion concludes that whether the conduct “shocks the conscience” turns in part on whether it is without justification. It also opines that such conduct must be undertaken in conscious disregard of the risk to health and safety of the prisoner; that it does not preclude “a shove or a slap as part of an interrogation”; and that the detainee must sustain some sort of injury, *e.g.*, physical injury or severe mental distress.⁴⁴ Moreover, both the August 2002 and March 2003 memos

⁴¹ See, *e.g.*, notes 42, 74 *infra*.

⁴² Memorandum from John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel to William J. Haynes, General Counsel to the Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, dated Mar. 14, 2003, at 60-65, *available at* http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

⁴³ *Id.* at 68.

⁴⁴ *Id.*

opined more broadly that the President could overrule *any* legal restriction on torture or other interrogation practices if he considered it necessary in the exercise of his war powers as Commander in Chief.⁴⁵

Against this background, in December 2002 and in March 2003, the Secretary of Defense and a “working group” organized by the Secretary prepared a list of harsh interrogation tactics first for use at Guantanamo and later for use at Abu Ghraib that included hooding, exploitation of phobias, stress positions, and the deprivation of light and auditory stimuli.⁴⁶

Disclosures were also made about the CIA’s “enhanced interrogation” program.⁴⁷ Members of President Bush’s cabinet, including Vice President Dick Cheney, Condoleezza Rice, and Donald Rumsfeld, reportedly conducted top secret meetings in the White House, with the President’s approval, to discuss and approve specifically the “enhanced” interrogation techniques to be employed by the CIA against

⁴⁵ See *supra* note 39, at 200-07; *supra* note 42, at 4-19.

⁴⁶ Memorandum from Jerald Phifer, LTC, to Commander, Joint Task Force 170, Re: Request for the Approval of Counter-Resistance Strategies, dated Oct. 11, 2002, available in *The Torture Papers: The Road to Abu Ghraib* 218 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Memo from William J. Haynes, General Counsel, U.S. Department of Defense, to Donald Rumsfeld, Secretary of Defense, dated Nov. 27, 2002 (approved by Rumsfeld Dec. 2, 2002), available in *The Torture Papers: The Road to Abu Ghraib* 218 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); see also Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, *The New Yorker*, Feb. 27, 2006.

⁴⁷ See, e.g., Dana Priest, *CIA Puts Harsh Tactics On Hold; Memo on Methods Of Interrogation Had Wide Review*, *Wash. Post*, June 27, 2004, available at <http://www.washingtonpost.com/ac2/wp-dyn/A8534-2004Jun26?language=printer> (noting that the CIA’s enhanced interrogation techniques were approved in 2002 by the Department of Justice and National Security Council lawyers); Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, *ABC News Online*, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

top Al Qaeda suspects.⁴⁸ Although the details of the methods used in the CIA's "enhanced interrogation" program are classified, in the past the program allegedly included techniques such as waterboarding, stress positions, sensory deprivation, sleep deprivation and prolonged isolation.⁴⁹ Several Judge Advocates General, among others, have publicly stated that these techniques amount to torture and cruel or inhuman treatment and constitute violations of Common Article 3.⁵⁰

In a December 2004 legal opinion, the Justice Department withdrew its August 2002 opinion and publicly declared torture to be "abhorrent."⁵¹ Nevertheless, a footnote to that opinion states:

While we have identified various disagreements with the August, 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe any of their conclusions would be different under the standards set forth in this memorandum⁵²

Moreover, the memorandum's entire thrust is to narrowly limit the meaning of torture. It also expressly evades the question of whether the President's powers would enable him to override prohibitions on torture, and it makes no mention of the more sweeping March,

⁴⁸ *Top Bush Aides Approved Interrogation Tactics: Report*, ABC News, Apr. 9, 2008, available at <http://abcnews.go.com/US/wireStory?id=4622940>; *Bush Aware of Advisers' Interrogation Talks*, ABC News, Apr. 11, 2008, available at <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175&page=1>.

⁴⁹ See, e.g., articles discussed *supra* note 47; Karen DeYoung, *Bush Approves New CIA Methods*, Washington Post, July 21, 2007, at A01.

⁵⁰ See 151 Cong. Rec. S8794 (daily ed. July 25, 2005) (statement of Sen. Graham) (introducing into the congressional record memos prepared by service JAG officers), available at http://www.humanrightsfirst.org/us_law/etn/pdf/jag-memos-072505.pdf.

⁵¹ Memorandum from Daniel Levin, Assistant Attorney General, Office of Legal Counsel to James B. Comey, Deputy Attorney General, dated Dec. 30, 2004, available at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/levin-memo-123004.pdf.

⁵² *Id.* at 2, n. 8.

2003 Yoo memorandum or its discussion of the meaning of cruel, inhuman and degrading.

Finally, notwithstanding the December, 2004 memorandum, the New York Times recently reported that in February 2005, the Justice Department issued a secret opinion which endorsed as lawful the harshest interrogation techniques ever used by the CIA.⁵³ According to officials, that opinion provided explicit authorization to employ a combination of painful physical and psychological tactics upon terrorist suspect detainees, including head-slapping, waterboarding and exposure to frigid temperatures.⁵⁴ These officials also claimed that later in 2005, the Justice Department issued another secret opinion, declaring that none of the CIA “enhanced” interrogation methods violated the “cruel, inhuman and degrading” standard, including, in some circumstances, waterboarding, if the suspect was believed to possess crucial intelligence about a planned terrorist attack.⁵⁵

The Hamdan Decision

In June, 2006, the Supreme Court, in *Hamdan v. Rumsfeld*,⁵⁶ rejected the Bush Administration’s interpretation of Common Article 3, initially set forth in the President’s February, 2002 declaration. *Hamdan* involved a challenge to the President’s authority to create military commissions to try detainees for war crimes. In the course of deciding that such authority was lacking, the Court held that Common Article 3’s application to “conflicts not of an international nature” referred to armed conflicts not

⁵³ Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 126 S. Ct. 2749 (2006).

between nations, and that accordingly, Common Article 3 did apply to a suspected member of Al Qaeda captured in Afghanistan.⁵⁷

This decision had an enormous impact beyond the specific issue of trial by military commission. As noted, the War Crimes Act, as it then read, made *all* violations of Common Article 3 a federal crime. The Court's interpretation of Common Article 3 meant that Common Article 3's prohibitions on torture and cruel, inhuman and degrading treatment and outrages against personal dignity applied to the treatment of suspected members of Al Qaeda and that, therefore, violations of those prohibitions could be prosecuted under the War Crimes Act as it then read.

Common Article 3's prohibition on torture is virtually universally considered to apply to the waterboarding of detainees,⁵⁸ a practice the United States has admitted it applied in the past, and the prohibition on torture could well apply to other brutal practices undertaken since 2002. Some of the practices authorized for use at Guantanamo and Abu Ghraib by the Defense Department and the military and reportedly included in the CIA's "enhanced interrogation" program, such as sleep deprivation, stress positions, and exposure to extremes of heat and cold have been held to be cruel, inhuman

⁵⁷ The Court did not decide the question of whether Common Article 3 was self-executing. It found it unnecessary to address that question because it concluded that the President's creation of military commissions conflicted with Congress' direction that military commissions, unless authorized by statute must be authorized by "the law of war," which includes Common Article 3 of the Geneva Conventions. It found that the military commissions created by the President did not conform to Common Article 3 or to the applicable statute, the Uniform Code of Military Justice. 126 S. Ct. at 2789-2798.

⁵⁸ The United States Department of State itself has characterized waterboarding as torture when performed by other nations. *See, e.g.*, Dep't of State, 1999 Country Reports on Human Rights Practices: Tunisia (1999) ("forms of torture included electric shock, submersion of the head in water, beatings with hands, sticks, and police batons, cigarette burns, and food and sleep deprivation.").

and degrading treatment by international courts and agencies.⁵⁹ Moreover, while *Hamdan* involved the application of Common Article 3 to a detainee captured in the Afghanistan war, many commentators consider it equally applicable to the U.S. treatment of detainees who have been captured far from Afghanistan and outside any conventional war zone and who are being held indefinitely as “unlawful enemy combatants” in the so-called “war on terror.”⁶⁰ Without conceding that the “war on terror” is a “war” that is governed by law of war principles, the Association does agree that so long as the U.S. detains persons based on law of war doctrines, its treatment of those detainees should be governed by Common Article 3.

The Government’s Response to *Hamdan*

Following the Supreme Court’s decision in *Hamdan*, in September 2006, the U.S. Department of Defense released a revised Field Manual for Human Intelligence Collector Operations (the “Revised Field Manual”) to provide guidance to armed services personnel in conducting lawful interrogations. The Revised Field Manual provides for

⁵⁹ See, e.g., *The Republic of Ireland v. The United Kingdom*, (1979-80) 2 E.H.R.R. 25 (finding methods of sensory deprivation and disorientation referred to as the “five techniques”—including, wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink—constituted inhuman and degrading treatment); *Judgment Concerning The Legality Of The General Security Service’s Interrogation Methods*, 38 I.L.M. 1471 (Sept. 9, 1999) (concluding that shaking, the “frog crouch,” the “shabach” position, cuffing, causing pain, hooding, the consecutive playing of powerfully loud music and the intentional deprivation of sleep for a prolonged period of time are prohibited interrogation methods).

⁶⁰ Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65, 98 (2006); Center for Defense Information, *Terrorism Detainees: Geneva Convention Common Article 3*, Sept. 12, 2006, available at <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=3662>; Human Rights Watch, *U.S.: Pentagon Applies Geneva Rules to Detainees, Those in CIA Custody Must Also Be Covered*, July 11, 2006, available at <http://hrw.org/english/docs/2006/07/11/usdom13727.htm>.

compliance with Common Article 3 in its entirety and specifically lists interrogation methods, that are forbidden, including:

forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee; using duct tape over the eyes; applying beatings, electric shock, burns, or other forms of physical pain; waterboarding; using military working dogs; inducing hypothermia or heat injury; conducting mock executions; or depriving the detainee of necessary food, water, or medical care.⁶¹

Much like the earlier Field Manual, the revised Field Manual also instructs armed services personnel to consider the “golden rule” in determining whether a contemplated approach is permissible, namely whether he or she would consider the interrogation technique to be abusive if used by the enemy against a fellow soldier.⁶²

President Bush, however, expressed concern that the language of Common Article 3 was too vague a standard to provide guidance to CIA interrogators and that certain practices engaged in by the CIA in its “enhanced interrogation” program might retroactively be subject to prosecution under the War Crimes Act.⁶³ The President asked

⁶¹ Field Manual 2-22.3, Human Intelligence Collector Operations (Sept. 2006) (“Revised Field Manual”). The specific standards for conduct set forth in the Field Manual are enforceable under the Uniform Code of Military Justice (the “UCMJ”), 10 U.S.C. § 801 *et seq.* (2000 ed. and Supp. III), which may be used to prosecute in courts-martial certain acts of ill-treatment carried out, whether within the United States or overseas, by American military personnel and certain civilians accompanying such personnel.

⁶² Revised Field Manual 2-22.3.

⁶³ White House Press Release: President Discusses Creation of Military Commissions to Try Suspected Terrorists, September 6, 2006, *available at* <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (“[P]rovisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American or foreign judges. And some believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act -- simply for doing their jobs in a thorough and professional way.”)

Congress to provide more specific guidance to the CIA. Congress responded in September 2006 in the course of enacting the MCA.

In the MCA, Congress amended the War Crimes Act to narrow the conduct that may be prosecuted thereunder as violations of Common Article 3 to certain specified “grave breaches,” namely: torture; cruel or inhuman treatment; performing biological experiments; murder; mutilation or maiming; intentionally causing serious bodily injury; rape; sexual assault or abuse; and taking hostages.⁶⁴ As we discuss below, grave breaches involving “cruel or inhuman treatment” and intentionally causing “serious bodily injury” are given such narrow definitions that they are virtually indistinguishable from torture. Beyond the listed “grave breaches,” Congress gave the President the authority to interpret Common Article 3 and to issue regulations defining conduct that Common Article 3 forbids.⁶⁵ These amendments to the War Crimes Act are made retroactive to November 26, 1997, the date the War Crimes Act was amended to criminalize all violations of Common Article 3.⁶⁶ Thus, past violations of the pre-MCA War Crimes Act predicated on Common Article 3 are immunized unless the conduct fell within the MCA’s narrow definition of “grave breaches.” Congress also barred the courts from considering foreign or international sources of law in interpreting “grave breaches” under the War Crimes Act⁶⁷ and barred resort to the Geneva Conventions as a source of rights in actions against government officials.⁶⁸

⁶⁴ MCA § 6(b) (amending 18 U.S.C. § 2241).

⁶⁵ MCA § 6(a)(3)(A) and 6(C).

⁶⁶ MCA § 6(b)(2).

⁶⁷ MCA § 6(a)(2).

⁶⁸ MCA § 5(a).

In accordance with the interpretive authority granted to the President in the MCA, on July 20, 2007, the President issued the Executive Order, which applies to detainees in CIA (not military) custody, purports to be “authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States,” including Common Article 3, and indirectly confirms the existence of the CIA’s detention and interrogation program.⁶⁹ The Executive Order incorporates the prohibitions of the federal Anti-Torture Statute and the War Crimes Act as amended by the MCA, the prohibitions on cruel, inhuman and degrading treatment as set forth in the MCA and the DTA (but not including section 1003 of the DTA incorporating the Field Manual), and prohibits acts denigrating religion, religious practices, or religious objects of the individual. It then *interprets* Common Article 3’s prohibition of “outrages against personal dignity, in particular, humiliating and degrading treatment” to prohibit:

Willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield.⁷⁰

Both the MCA and the Executive Order claim that their provisions reflect full U.S. compliance with Common Article 3. The MCA states that “[t]he provisions of [the War Crimes Act], as amended by [the MCA], fully satisfy the obligation under

⁶⁹ Exec. Order § 3(b)(i)(E); *see also* White House Press Release: President Bush Signs Executive Order, July 20, 2007, *available at* <http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html> (noting that “the interpretation of Common Article 3 set forth in this Order is applied to the Central Intelligence Agency’s detention and interrogation program whose purpose is to question captured Al Qaeda terrorists . . .”).

⁷⁰ Exec. Order § 3(b)(i)(E).

Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in Common Article 3.”⁷¹

Likewise, in the Executive Order, the President “determine[s] that a program of detention and interrogation approved by the Director of the [CIA] fully complies with the obligations of the United States under Common Article 3” provided that it is in compliance with the Executive Order.⁷²

* * *

For the reasons discussed below, the Association believes that the MCA and the Executive Order are open to interpretations that undermine compliance with Common Article 3. We believe that conclusion is borne out by recent testimony before Congress which left open the possibility that waterboarding might be considered a lawful

⁷¹ MCA § 6(a)(2). It is not clear whether the requirements of Article 129 actually apply to violations of Common Article 3. Article 129 incorporates the grave breaches listed in Article 130, which applies to “protected persons.” “Protected persons” is defined in the Fourth Geneva Convention in a way that would exclude persons covered only by Common Article 3. The Third Geneva Convention, to which the MCA refers, contains no definition of “protected persons,” but it might be argued that it is anomalous to read that term differently from its use in the Fourth Convention. Nevertheless, Congress believed that Article 129 applies to Common Article 3 and we therefore will examine below whether the MCA does live up to the requirements of Article 129. *See infra* at pp. 33-35.

⁷² Exec. Order § 3(b).

method of interrogation, depending on the circumstances,⁷³ recent reports that the Justice Department has informed Congress that whether abusive or degrading interrogation techniques are unlawful may depend on the purpose of the interrogator,⁷⁴ and the President's recent veto of legislation⁷⁵ that would have made the specific prohibitions of the Army Field Manual applicable to all government personnel, including the CIA.⁷⁶

⁷³ Oversight Hearing of the Justice Department's Office of Legal Counsel, Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Comm. on the Judiciary, 110th Cong. (2008) (testimony of Steven G. Bradbury) (testifying that waterboarding was not unlawful at the time it was committed in 2002 and refusing to state whether waterboarding is lawful under current law, but conceding that "the Military Commissions Act . . . would make it much more difficult to conclude that the practice were lawful today"); Oversight Hearing of the Department of Justice, House Comm. on the Judiciary, 110th Cong. (2008) (testimony of Michael B. Mukasey) (refusing to say one way or the other whether waterboarding is unlawful under current law); Hearing of the Senate Select Committee on Intelligence, 110th Cong. (2008) (testimony of Adm. Michael McConnell) ("if there was a reason to use such a technique [as waterboarding], you would have to make a judgment on the circumstances and the situation regarding the specifics of the event, and if such a desire was generated on the part of -- in the interests of protecting the nation").

⁷⁴ See Mark Mazzetti, *Letters Give C.I.A. Tactics a Legal Rationale*, N.Y. Times, Apr. 27, 2008, available at http://www.nytimes.com/2008/04/27/washington/27intel.html?_r=1&emc=eta1&oref=slogin (reporting that the Justice Department wrote a letter to Congress on March 2, 2008 stating that "[t]he fact that an act is undertaken to prevent a threatened terrorist attack, rather than for the purpose of humiliation or abuse, would be relevant to a reasonable observer in measuring the outrageousness of the act.").

⁷⁵ See Section 327 of H.R. 2082, 110th Congress, 2d Sess. (2008). This Association supported a similar provision in a bill proposed last fall, Section 102 of H.R. 4156, the Orderly and Responsible Iraq Redeployment Appropriations Act, 2008 establishing the United States Army Field Manual FM2-22.3 Human Intelligence Collector Operations as the standard for interrogation by all government personnel, either as employees or agents, including private contractors. See Letter of the Association of the Bar of the City of New York to Nancy Pelosi, Re: Section 102 of H.R. 4156, Nov. 14, 2007.

⁷⁶ See 154 Cong. Rec. H1503-01 (2008).

We turn first to a detailed examination of the pertinent provisions of the MCA and Executive Order that we believe undermine Common Article 3 and then to our recommendations.

The MCA May Undermine U.S. Obligations Under Common Article 3.

Common Article 3 protects all detainees captured in situations of armed conflict not between nation-states against inhumane treatment, including: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment.”⁷⁷

The legislative history of the MCA indicates that at least some members of Congress believed that the MCA was drafted so as to leave intact all U.S. obligations under the Geneva Conventions.⁷⁸ Nevertheless, as written, the MCA may be read to undermine those obligations in a number of respects. The President has stated that the CIA’s “enhanced interrogation” program is permitted under domestic law as expressed by the MCA.⁷⁹ But, as noted, recent reports and testimony before Congress indicate that the Administration continues to consider harsh interrogation techniques, including

⁷⁷ See Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, [1955] 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364.

⁷⁸ See Statement of Sen. John McCain, 152 Cong. Rec. S10,354, S10, 413-14 (Sept. 28, 2006) (“[T]his legislation before the Senate does not amend, redefine, or modify the Geneva Conventions in any way. The conventions are preserved intact [T]his bill makes clear that the United States will fulfill all of its obligations under those Conventions.”)

⁷⁹ President Bush’s Radio Address, Mar. 8, 2008, *available at* <http://www.whitehouse.gov/news/releases/2008/03/20080308.html> (referring to the CIA’s “specialized interrogation procedures” as lawful).

waterboarding to be lawful,⁸⁰ even though those techniques are widely considered to be torture or cruel or inhuman treatment.⁸¹ At the same time, Senators McCain, Graham and Warner have declared that waterboarding is “incontestably” a violation of the MCA.⁸² As evidenced by these divergent interpretations, notwithstanding the legislative history, the MCA as enacted is sufficiently ambiguous so that it can be read to exclude from its prohibitions conduct that violates Common Article 3. In this respect and others, the MCA calls into question the United States’ commitment to Common Article 3.

1. The MCA’s Definition of Cruel and Inhuman Treatment May Exclude Conduct Prohibited Under Common Article 3.

As noted, the MCA amended the War Crimes Act to limit its unqualified prohibition of violations of Common Article 3 to conduct the MCA defines as “grave breaches.” These “grave breaches” include “torture,” “cruel or inhuman treatment” and

⁸⁰ Karen DeYoung, *Bush Approves New CIA Methods*, Wash. Post, July 21, 2007, at A01 (noting that since the July 20, 2007 Executive Order, certain CIA interrogation techniques have been re-authorized and officials report that the CIA is again holding prisoners in “black sites” overseas); Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1. *See supra* notes 73 and 74.

⁸¹ *See supra* note 58.

⁸² *See* Letter from Senators John McCain, Lindsey Graham and John Warner to the Honorable Michael B. Mukasey (Oct. 31, 2007), *available at*: http://warner.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=f4780eff-a101-4721-ac60-ac0da9f0cd70 (noting that “[w]aterboarding, under any circumstances, represents a clear violation of U.S. law. . . . It is, or should be, beyond dispute that waterboarding ‘shocks the conscience.’”); *see also* U.S. Senator John McCain, Press Release: *Senators McCain and Graham urge Attorney General Mukasey to Review “Repugnant” Interrogation Technique*, Nov. 9, 2007, *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=49D2ADEC-DA16-99A1-322F-7E0B8E19D486 (“Whether or not the Administration took a contrary view, it is incontestable that [waterboarding is] outlawed by the 2006 Military Commissions Act. Indeed, during the negotiations that led to the MCA, we were personally assured by Administration officials that waterboarding was prohibited under the new law.”).

“intentionally causing serious bodily injury”.⁸³ However, the MCA’s definitions of “cruel and inhuman treatment” and “serious bodily injury” are so narrow that the MCA could be interpreted to exclude from the War Crimes Act conduct that unquestionably violates Common Article 3’s prohibition of cruel and inhuman treatment.⁸⁴

The MCA’s definition of “cruel or inhuman treatment” is almost identical to its definition of torture.⁸⁵ “Cruel or inhuman treatment” is defined as conduct “intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse.”⁸⁶ The intentional infliction of “severe physical pain” is torture, so this portion of the definition of “cruel and inhuman treatment” adds nothing. The definition of “serious physical pain or suffering” is limited to “*bodily injury* that involves-- (i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty.”⁸⁷ Under this definition, it is difficult to see how any conduct inflicting physical pain short of torture could amount to cruel or

⁸³ MCA § 6(b) (amending 18 U.S.C. § 2441).

⁸⁴ Common Article 3 refers to “cruel treatment,” but the word “inhuman” mentioned elsewhere in the Geneva Conventions, including its “grave breaches” provision, does not appear in Common Article 3. However, “cruel” and “inhuman” have been interpreted as interchangeable terms for purposes of Common Article 3 and no difference is believed to exist between the terms. *See* Cordula Droege, “*In Truth the Leitmotiv*: the Prohibition of Torture and Other Forms of Ill-treatment in International Humanitarian Law,” 89 *International Review of the Red Cross* 515, 520 (2007).

⁸⁵ MCA § 6(b)(1)(B). The MCA’s definition of “torture” uses the same language as the Anti-Torture Statute, defining torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” MCA § 6(b)(1)(B).

⁸⁶ MCA § 6(b)(1)(B).

⁸⁷ MCA § 6(b)(2)(D) (emphasis added).

inhuman conduct – thus rendering this latter category superfluous. Moreover, by making “bodily injury” a prerequisite, this definition would exclude conduct—even conduct inflicting “extreme pain”—that is widely considered prohibited by Common Article 3, but that arguably does not involve the infliction of bodily injury – such as waterboarding, exposures to extreme heat and cold, stress positions, and sensory deprivation.⁸⁸

The MCA’s definition of “serious mental pain or suffering” amounting to “cruel or inhuman treatment” is also overly restrictive. Under the MCA, “serious mental pain or suffering” is defined as “serious and non-transitory mental harm (which need not be prolonged)” caused by or resulting from: (i) the intentional infliction or threatened infliction of severe physical pain or suffering; (ii) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (iii) the threat of imminent death; or (iv) the threat that another person will imminently be subjected to the conduct set forth in (i) through (iii).⁸⁹ The requirement that “serious mental pain or suffering” will not be considered “cruel or inhuman treatment” unless it is accompanied by “serious and non-transitory mental harm” also could be read to permit practices like waterboarding, prolonged isolation, exposures to extreme temperatures, and sensory deprivation, so long as any mental harm that those practices cause is temporary, no matter

⁸⁸ See, e.g., Human Rights First, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (Aug. 2007), available at <http://www.humanrightsfirst.info/pdf/07801-etn-leave-no-marks.pdf>.

⁸⁹ MCA § 6(b)(2)(E). “Severe mental pain or suffering” amounting to torture under the MCA is defined, also by reference to the Anti-Torture Statute, as “prolonged mental harm” resulting from the same enumerated causes. MCA § 6(b)(2)(A).

how severe the mental pain.⁹⁰ Moreover, the conduct that is covered by this definition is indistinguishable from torture. For example, the intentional infliction of severe physical pain or the threat of imminent death would amount to torture under both domestic and international standards, regardless of whether it results in mental harm.

In sum, although the MCA's inclusion of "cruel or inhuman treatment" as a "grave breach" separate and apart from "torture" presumably was intended to capture a range of harsh and painful treatment less severe than torture, its definition of "cruel or inhuman treatment" is so restrictive that it is difficult to imagine what conduct would fall within its scope unless it also constitutes "torture" anyway.

The MCA's prohibition against "intentionally causing serious bodily injury" is similarly narrow. The MCA defines "serious bodily injury" as "bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."⁹¹ Here too conduct covered by this definition would amount to torture.

In short, aside from extreme acts like murder, rape, and mutilation, "grave breaches" under the MCA seem to be limited to conduct that would be considered torture. It contains no meaningful definition for harsh and painful treatment that might not be

⁹⁰ The requirements of "prolonged" or "non-transitory" mental harm, in any event, are problematic. They require predictions that an interrogator is surely incapable of making concerning both the mental harm, and the duration of mental harm, resulting from the infliction of harsh interrogation techniques, no matter how severe the immediate pain they inflict and which will vary between individual subjects of interrogation. Neither CAT nor the Geneva Conventions include resulting mental harm as requisite to a determination of whether a practice amounts to torture or cruel, inhuman or degrading treatment.

⁹¹ MCA § 6(b)(2)(B) (defining "serious bodily injury" by reference to 18 U.S.C. § 113(b)(2)).

considered torture but would be considered “cruel treatment” under Common Article 3. Meanwhile, its exclusion of conduct causing extreme pain unless it inflicts bodily injury or non-transitory mental harm, suggests that it could exclude from “cruel treatment” waterboarding and other conduct considered to be torture.

2. The MCA May Violate U.S. Obligations Under Section 129 of the Third Geneva Convention and Raises Questions About U.S. Commitment to Common Article 3.

These narrow definitions also seem to contradict the MCA’s statement that it satisfies “the obligation under Article 129 of the Third Geneva Convention . . . to provide penal sanctions for grave breaches encompassed in Common Article 3.”⁹² As noted, there are questions as to whether the requirements of Article 129 apply to persons who are protected only by Common Article 3.⁹³ Congress evidently thought that Article 129 did apply to such persons. Assuming that it does, Congress’ assertion that the MCA’s amendments fulfill U.S. obligations under Article 129 is doubtful.

Article 129 refers to “grave breaches” as defined in Article 130 of the Third Geneva Convention.⁹⁴ Article 130’s definition includes “inhuman treatment,” which in turn includes, among other things, “willfully causing great suffering or serious

⁹² MCA § 6(a)(2).

⁹³ See note 71, *supra*. We also note that the War Crimes Act, as amended in 1997, made *all* “grave breaches” of the Geneva Conventions a “war crime,” and then separately made any violation of Common Article 3 a “war crime.” 18 U.S.C. § 2441(c)(1) and (c)(3) respectively. The MCA only amends the War Crimes Act provision relating to Common Article 3. Persons, such as suspected Al Qaeda and other detainees in the “war on terror” could be protected only by Common Article 3. Hence, the more general prohibition in section (c)(1) of “grave breaches” of the Geneva Conventions would not cover treatment of such persons.

⁹⁴ Geneva Convention Relative to the Treatment of Prisoners of War, Art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

injury to body or health.”⁹⁵ Yet, the MCA’s narrow definition of “cruel or inhuman treatment” as a grave breach would appear to exclude at least some conduct causing great suffering. For example, as noted, under the MCA, even conduct causing “extreme pain” would not amount to “cruel or inhuman treatment” unless it inflicts “bodily injury” or “non-transitory” serious mental harm.

Moreover, the perception of U.S. commitment to enforce the prohibitions of Common Article 3 and the requirements of Article 129 is severely undermined by the provision of Section 6(a)(2) that bars U.S. courts from looking to foreign or international sources of law in interpreting the War Crimes Act provisions incorporating the Geneva Conventions.⁹⁶ It is an established canon of interpretation of treaties that courts should take account of the interpretations of other signatories.⁹⁷ As Justice Scalia has explained: “the object of a treaty being to come up with a text that is the same for all countries, we should defer to the views of other signatories, much as we defer to the view of

⁹⁵ *Id.*, Art. 130.

⁹⁶ Section 6(a)(2) provides: “No foreign or international sources of law shall supply a basis for a rule of decision in the courts of the United States in interpreting provisions of [the War Crimes Act].”

⁹⁷ *See United States v. Stuart*, 489 U.S. 353, 369 (1989); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *see also* Miles P. Fischer, *Applicability of the Geneva Conventions to “Armed Conflict” in the War on Terror*, 30 Fordham Int’l L. J. 509, 523 (2007) (“It is one thing to debate the influence of foreign precedent on United States domestic law, but the exclusion of international sources to understand a statute implementing an international obligation is absurd.”).

agencies.”⁹⁸ By barring courts from looking to foreign or international sources of law, the MCA prevents the courts from assuring that “grave breaches” prohibited by the War Crimes Act in fact encompass some of the most egregious violations of Common Article 3, as understood by other signatories to the Geneva Conventions.

The perception of U.S. commitment to Common Article 3 is further undermined by Section 5(a) of the MCA, which provides:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.⁹⁹

By barring victims of violations of Common Article 3 from invoking the Geneva Conventions in habeas corpus proceedings or civil actions, this provision renders Common Article 3 unenforceable, except for conduct that theoretically could be prosecuted under the War Crimes Act, if it falls within the MCA’s excessively narrow definition of “grave breaches.” And enforcement respecting such “grave breaches” depends entirely on the Executive’s discretion to prosecute under the War Crimes Act.

⁹⁸ See *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 Int’l J. Const. L. 519, 521 (2005); see also *Medellin v. Texas*, 128 S. Ct. 1346, 1357-58 (2008) (“Because a treaty ratified by the United States is ‘an agreement among sovereign powers,’ we have also considered as ‘aids to its interpretation’ the negotiation and drafting history of the treaty as well as ‘the post-ratification understanding’ of signatory nations.”) (internal quotation marks and citations omitted).

⁹⁹ MCA § 5(a). We note that Section 5(a) unfairly allows the government to invoke the Geneva Conventions to defend its conduct, while denying its protections to victims of violations of human rights.

3. The MCA Improperly Delegates to the President Unfettered and Unreviewable Discretion to Define Conduct Beyond “Grave Breaches” That Violates Common Article 3

The MCA provides that its definitions of “grave breaches” of Common Article 3 do not define “the full scope of United States obligations under [Common Article 3].”¹⁰⁰ But apart from a provision that specifies an “additional prohibition” on cruel, inhuman and degrading treatment that constitutes “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments,” as defined in the U.S. reservations to CAT,¹⁰¹ it specifies no other prohibitions encompassed by Common Article 3 and provides no mechanism for enforcing them.

As noted, “cruel, unusual and inhumane treatment prohibited by the Fifth, Eighth and Fourteenth Amendments” is itself an uncertain and ambiguous standard, especially as it applies to detainees in the “war on terror.” This standard has been read by OLC to permit consideration of whether the interrogation practices in issue had the purpose of protecting national security.¹⁰² Moreover, the MCA fails to identify or define conduct that violates Common Article 3’s prohibition of “outrages upon personal dignity, in particular, humiliating and degrading treatment.”¹⁰³ Instead Congress delegated to the President the authority to “ensure compliance with [the additional prohibitions of cruel or inhuman treatment] . . . through the establishment of administrative rules and procedures¹⁰⁴ and otherwise provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to

¹⁰⁰ MCA § 6(b)(1).

¹⁰¹ MCA § 6(c). The United States made no such reservation to the Geneva Conventions.

¹⁰² See pp. 17-18, *supra*, discussing the March, 2003 John Yoo memo.

¹⁰³ MCA § 6(b).

¹⁰⁴ MCA § 6(c)(3).

promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”¹⁰⁵

The MCA also provides that nothing in this delegation of authority “shall be construed to affect the constitutional functions of Congress and the judicial branch of the United States.”¹⁰⁶ The reality, however, is to the contrary. Congress has imposed no standards to guide the President’s interpretations of Common Article 3 and by barring the invocation of the Geneva Conventions as a source of rights in any action against the government or its officials, Congress has assured that the judicial branch will never have an opportunity to review the President’s interpretation of Common Article 3. Congress thus has abdicated its responsibility to legislate and given the President unfettered and unreviewable authority to interpret Common Article 3 (except for “grave breaches”).¹⁰⁷

The Executive Branch thus has been given the exclusive authority to police itself. But the President can hardly be expected to be a neutral judge of the standards prohibiting interrogation methods that violate individual rights under Common

¹⁰⁵ MCA § 6(a)(3)(A).

¹⁰⁶ MCA § 6(a)(3)(D).

¹⁰⁷ Moreover, the MCA makes the President’s Executive Orders interpreting Common Article 3 “authoritative (except as to grave breaches of Common Article 3) as a matter of United States law, in the same manner as administrative regulations.” Section 6(a)(3). Prior to enactment of the MCA, it was well established that deference must be given to the President’s interpretation of treaties, but that the courts have the ultimate authority to interpret treaties. Moreover, the deference given the President’s interpretations can be overcome when it is contrary to the plain language of the treaty, would lead to unreasonable results, or would contradict the understanding of other signatories. *United States v. Stuart*, 489 U.S. 353, 369 (1989); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *see also Medellin v. Texas*, 128 S. Ct. 1346, 1357-58 (2008). Thus, by including a provision making the President’s interpretations of Common Article 3 “authoritative as a matter of law” the MCA implies that the President’s interpretations be given greater deference than is normally accorded. Once again, the Administration’s record over the past six years, makes this especially inappropriate.

Article 3. Given the President’s heavy responsibilities to enforce the law and protect the nation, the President may too readily yield to pressures to permit harsh interrogation methods that violate these standards.¹⁰⁸ The history of the past six years shows that this is more than just probable. Moreover, leaving protection of the fundamental right to be free from cruel or inhuman treatment exclusively to the President is contrary to our constitutional system of checks and balances. As Justice O’Connor stated in *Hamdi v. Rumsfeld*: “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions *a role for all three branches when individual liberties are at stake*.”¹⁰⁹

* * *

In sum, the MCA has too narrowly defined “grave breaches” of Common Article 3 and may shield from prosecution under the War Crimes Act conduct that is widely accepted to amount to “cruel or inhuman treatment” if not torture; it fails to provide a definition of degrading and humiliating treatment; it fails to provide any enforcement mechanism for conduct that violates Common Article 3 beyond its definition of grave breaches; and it has improperly delegated plenary and unreviewable authority to the President to interpret Common Article 3 beyond grave breaches.

As the discussion below shows, the Executive Order issued pursuant to the authority conferred by the MCA is equally deficient.

¹⁰⁸ Cf. *United States v. United States District Court*, 407 U.S. 297, 316-17 (1972) (explaining why Executive cannot be given unreviewable discretion to decide whether domestic wiretaps meet constitutional restrictions on unreasonable searches and seizures).

¹⁰⁹ 542 U.S. 507, 536 (2004) (emphasis added).

4. The Executive Order Is Not Adequate to Ensure Compliance with Common Article 3 and Fails to Provide Guidance to CIA Personnel Conducting Interrogations

In accordance with the authority granted by the MCA, on July 20, 2007, President Bush issued the Executive Order interpreting “the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency.” Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 24, 2007). In an accompanying press release, the President asserted that “the Order has clarified vague terms in Common Article 3, and its interpretation is consistent with the decisions of international tribunals applying Common Article 3.”¹¹⁰ Moreover, the Executive Order was purportedly promulgated to establish “clear legal standards so that CIA officers involved in [a program of detention and interrogation] are not placed in jeopardy for doing their job.”¹¹¹

The Executive Order fulfills none of these objectives. It is so ambiguous and so filled with qualifications that it could be read to provide loopholes that would permit conduct that violates Common Article 3 and it provides no guidance to CIA

¹¹⁰ Press Release, Office of the Press Secretary, President Bush Signs Executive Order (July 20, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html>. The President justifies his interpretation as consistent with the decisions of international tribunals applying Common Article 3: a paradoxical position since the MCA bars courts applying the War Crimes Act to “grave breaches” of Common Article 3 from considering foreign or international decisions interpreting the Geneva Conventions, even though it is the judicial branch that has the ultimate authority to interpret treaties. *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2684 (2006) (“If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department.’”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹¹¹ *Id.*

officials who wish to assure that their conduct of interrogations complies with domestic and international law.

Most of the Executive Order merely incorporates by reference the prohibitions of the Anti-Torture Statute, the MCA, the War Crimes Act (as amended by the MCA) and the DTA (excluding section 1002 of the DTA, applicable only to the Department of Defense, requiring compliance with the Field Manual).¹¹² Aside from its prohibition on conduct denigrating religion,¹¹³ the only other provision of the Executive Order that purports to clarify conduct violative of Common Article 3's prohibition of "outrages against personal dignity, in particular, humiliating and degrading treatment" is Section 3(b)(1)(E) of the Executive Order, which prohibits:

willful and outrageous acts of personal abuse done for the *purpose of humiliating* or degrading the individual in a manner so serious that *any reasonable person, considering the circumstances*, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken *for the purpose of humiliation*, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield.¹¹⁴

This language contains qualifications not found in Common Article 3 and blurs the boundaries between permissible and impermissible interrogation conduct by conditioning the determination of whether an interrogation practice is prohibited only where the acts of personal abuse are done "for the purpose of" humiliating and degrading and "in a manner so serious that any reasonable person, *considering the circumstances*, would deem the acts to be beyond the bounds of human decency." This language appears

¹¹² Exec. Order §§ 2(c), 3(b)(i)(B)-(D).

¹¹³ Exec. Order § 3(b)(i)(F).

¹¹⁴ *Id.* § 3(b)(i)(D) (emphasis added).

to suggest that, in some “circumstances,” personal abuse that might otherwise be unlawful would be permitted. As former Marine Corps Commandant, General Paul X. Kelley (Ret.) stated, under this language: “As long as the intent of the abuse is to gather intelligence or to prevent future attacks, and the abuse is not ‘done for the purpose of humiliating or degrading the individual’—even if that is an inevitable consequence—the President has given the CIA carte blanche to engage in ‘willful and outrageous acts of personal abuse.’”¹¹⁵ Like General Kelley, the Judge Advocates General of all branches of the military have expressed concern that this provision appears to be worded to allow humiliating or degrading interrogation techniques when the interrogators’ purported purpose is to protect national security.¹¹⁶ In fact, Administration officials appear to confirm that they are so construing Common Article 3.¹¹⁷

Moreover, as Senator Durbin noted, under this language, “humiliating and degrading treatment, which Common Article 3 absolutely prohibits, is permitted under the Executive Order as long as it is not ‘willful and outrageous’ or a reasonable person would not consider it ‘beyond the bounds of human decency.’”¹¹⁸ Most significantly, the Executive Order does not specifically address the controversial techniques believed to be

¹¹⁵ P.X. Kelley and Robert F. Turner, *War Crimes and the White House; The Dishonor in a Tortured New 'Interpretation' of the Geneva Conventions*, Wash. Post, July 26, 2007, at A21.

¹¹⁶ See, e.g., Charlie Savage, *Military Cites Risk of Abuse by CIA: New Bush Rules on Detainees Stir Concern*, Boston Globe, Aug. 25, 2007, at A1 (describing a meeting with senators, in which “[t]he JAGs said Bush’s wording [in the Executive Order] appears to make it legal for interrogators to undertake that same abusive action if they had some other motive, such as gaining information.”).

¹¹⁷ See *supra* note 74.

¹¹⁸ See Letter from Senator Richard J. Durbin to the Honorable Alberto R. Gonzales (Aug. 2, 2007), available at http://weblogs.chicagotribune.com/news/politics/blog/2007/08/durbin_questions_gonzales_inte.html.

employed in the CIA's "enhanced interrogation" program, including stress positions, slapping, waterboarding, sleep deprivation, sensory bombardment, violent shaking, sexual humiliation, and prolonged isolation and sensory deprivation.¹¹⁹

This is in marked contrast to the Revised Field Manual, which provides clear guidance to armed services personnel by specifically listing prohibited practices.¹²⁰

Additionally, the Revised Field Manual provides a "golden rule" for military personnel to follow in assessing the legality of an interrogation plan which goes much further than either the MCA or the Executive Order in complying with the spirit and the letter of Common Article 3. Specifically, military personnel considering an interrogation technique must ask themselves: (1) would they consider the interrogation technique to be abusive if used by the enemy against a fellow soldier and (2) would the proposed technique, even if they did not consider it abusive, violate a law or regulation.¹²¹ This "golden rule" provides military interrogators with a clear framework for assessing the appropriateness of an interrogation practice that is *at a minimum* coextensive with existing law and, indeed, inspires an even greater level of care. By contrast, the Executive Order's failure to address specific interrogation practices—and its ambiguous terms which could be read to permit conduct violative of Common Article

¹¹⁹ The only instance in which the Executive Order arguably addresses a specific CIA "enhanced" interrogation technique is in Section 3(b)(iv), which requires that "detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care." It is not clear, however, that this provision is intended to bar interrogation techniques (as distinct from everyday living conditions) involving exposure to extreme cold or withholding food and water and medical care during the course of interrogation.

¹²⁰ See pp. 22-23, *supra*.

¹²¹ Revised Field Manual at 5-76.

3—leaves CIA officers without clear guidance as to how to conduct lawful interrogations that do not violate Common Article 3. As noted, President Bush vetoed legislation that would have required the CIA to follow the Revised Field Manual, claiming that “[i]f we were to shut down this program and restrict the CIA to methods in the Field Manual, we could lose vital information from senior Al Qaeda terrorists, and that could cost American lives.”¹²²

Finally, there is no mechanism for enforcing the prohibitions contained in the Executive Order. Courts have no occasion to even consider whether the regulations contained in the Executive Order are complied with or whether these regulations meet our obligations under Common Article 3, and the Executive Order itself asserts that it does not create any right or benefit enforceable at law or equity except as a defense for a CIA official.¹²³ The clear implication is that the purpose of the Executive Order is to enable CIA personnel to defend themselves against charges that their harsh interrogation techniques violated Common Article 3, rather than to give them guidance as to how to comply.

II. Conclusion

The Association appreciates the importance that intelligence gathering plays in protecting national security. Nevertheless, the goal of national security is only truly achieved if our intelligence operations are consistent with our nation’s tradition of humane treatment of detainees and reflect adherence to international humanitarian obligations essential to preserving respect for the United States in the world community.

¹²² President Bush’s Radio Address, Mar. 8, 2008, *available at* <http://www.whitehouse.gov/news/releases/2008/03/20080308.html>.

¹²³ Exec. Order § 5.

Failure to comply with these humanitarian obligations puts at risk U.S. military and civilian personnel who may be detained abroad, undermines our nation's ability to obtain international cooperation in combating terrorism, and incites hostility that furthers the goals of our enemies. Contrary to President Bush's stated goal to "compl[y] with both the spirit and the letter of our international obligations,"¹²⁴ the MCA and the Executive Order do not provide "the clarity our intelligence professionals need to continue questioning terrorists and saving lives" nor do they provide confidence that they will "compl[y] with both the spirit and the letter of our international obligations."¹²⁵ Instead, they appear to offer opportunities for finding loopholes that permit the continuation of harsh practices that have violated our nation's traditions and stained our reputation.

Accordingly, the Task Force makes the following recommendations:

1. Amending the MCA to Restore the Earlier War Crimes Act Provision and Withdrawing the Executive Order.

The provisions of the MCA amending the War Crimes Act should be repealed, and the War Crimes Act should be restored to the way it read prior to the enactment of the MCA. This would assure that any violation of Common Article 3 would constitute a federal war crime. The MCA's limitation of the War Crimes Act to the "grave breaches" it defines is too narrow and may be read to permit conduct that plainly violates Common Article 3. Indeed, the Administration's statements and Congressional testimony suggest that this is already occurring. Our proposal would thus criminalize conduct violating Common Article 3 that would not amount to "grave

¹²⁴ Remarks, President Bush Signs Military Commissions Act of 2006, Oct. 17, 2006, *available at* <http://www.whitehouse.gov/news/releases/2006/10/print/20061017-1.html>.

¹²⁵ *Id.*

breaches” within the meaning of Articles 129 and 130 of the Geneva Conventions, assuming those provisions applied to persons covered only by Common Article 3. By applying criminal penalties for all violations of Common Article 3, this would make the scope of the War Crimes Act broader than the obligation to provide penal sanctions required by Article 129. Article 129, however, merely sets a minimum standard. There is no reason why the U.S. should not set a higher standard, applying criminal penalties for all violations of Common Article 3. We do not find persuasive arguments that Common Article 3’s language is too vague to establish criminal liability. There is a substantial body of international authority illustrating the practices that are considered cruel, inhuman and degrading and persons responsible for the treatment of detainees held as “unlawful enemy combatants” should have little difficulty in understanding whether their conduct is cruel, inhuman and degrading.¹²⁶

Notably, the Revised Field Manual, while prohibiting specific practices, goes beyond those practices, requiring military personnel to refrain from any conduct that violates Common Article 3, and the DTA makes the Field Manual a legal standard for all Defense Department personnel. These standards, including the “golden rule” advising military interrogators to ask themselves whether they would consider proposed conduct abusive if applied by the enemy to one of their fellow soldiers is sensible guidance for the CIA. While the Administration has argued that the CIA needs greater clarity about the meaning of terms like “humiliating” and “degrading” and “outrages to personal dignity,”

¹²⁶ The Association recognizes that these recommendations concerning the restoration of the earlier language of the War Crimes Act cannot fairly be applied retroactively to persons who relied on the President’s declaration of February 7, 2002, the MCA’s limitations of the War Crimes Act or the Executive Order.

so that CIA agents can know what they can and cannot do, the definition provided in the Executive Order provides no more clarity than the terms of Common Article 3. Indeed, the ambiguities in the Executive Order seem designed merely to provide interrogators with defenses for conduct that may be unquestionably humiliating or degrading, but are intended to “soften up” the detainee for the purpose of obtaining information allegedly needed for national security.¹²⁷ For this reason, we would recommend that the Executive Order be withdrawn, and instead the Revised Army Field Manual should be made applicable to the CIA as well.¹²⁸ As noted, any attempt to more specifically define the standards of treatment established by Common Article 3 is likely to result in evasion of its prohibitions. As previously discussed, claims that Common Article 3’s humanitarian standards will expose interrogators to unfair prosecutions or will chill their use of interrogation practices of uncertain legality are not persuasive.¹²⁹

Given the history of U.S. government abuses, however, we would recommend that the War Crimes Act be amended to provide by way of example only, a list of brutal practices believed to have been employed that would clearly violate Common Article 3, including waterboarding, stress positions, severe sleep deprivation, exploitation of the fear of dogs or other phobias, exposure to extremes of heat or cold, and sexual humiliation.

¹²⁷ See pp. 36-41 *supra*.

¹²⁸ The Association previously supported a resolution passed by the American Bar Association calling upon Congress to override the July 20, 2007 Executive Order. See American Bar Association Resolution 10-B (2007).

¹²⁹ See pp. 6-7 *supra*.

2. Repealing MCA Provisions Delegating Authority to the President and Which Interfere With The Proper Function and Role of the Judiciary and the Enforceability of Rights to be Protected From Torture and Cruel or Inhuman Treatment.

Section 6(a)(3)(A) of the MCA conferring authority on the President to interpret the Geneva Conventions is unnecessary and appears to confer authority beyond that heretofore recognized. Existing law adequately recognizes the deference due to the President's interpretations of treaties, but under our constitutional system, it is the judicial branch that has the ultimate authority to interpret treaties. To the extent that the MCA precludes litigants from invoking the Geneva Conventions as a source of rights (section 5) and bars courts from making their own judgments regarding the President's interpretations of the Convention and relying upon well-established sources of international law to do so (section 6(a)(2)), it undermines our commitment to Common Article 3 and the constitutional function of our judiciary. Accordingly, these sections should be repealed.

Finally, Section 7(a)(2) of the MCA purports to strip courts of jurisdiction to entertain actions or proceedings by certain alien detainees concerning their treatment or conditions of confinement. This provision thus bars such detainees who are victims of violations of Common Article 3 from enforcing its protections.

As noted, the Supreme Court recently concluded that detainees at Guantanamo Bay have a constitutional right to bring habeas actions challenging their confinement, but left open the question of whether the writ also reaches treatment and conditions of confinement.¹³⁰ Moreover, the Circuits are split as to whether habeas is

¹³⁰ See *supra* note 11.

available to challenge treatment and conditions of confinement.¹³¹ We recommend that Congress should repeal Section 7(a)(2) at least insofar as it bars equitable relief concerning treatment and conditions of confinement. Congress should make it clear that all detainees are entitled to seek equitable relief addressing treatment and conditions of confinement that violate the Geneva Conventions, any other treaty, the Constitution or law, no matter how the action is designated.

3. Providing Compensation for Victims of Torture and Cruel, Inhuman and Degrading Treatment.

Victims of violations of Common Article 3 must have some remedy that compensates them and deters future violations. As noted, U.S. courts have consistently dismissed, at the pleading stage, suits seeking compensation for alleged mistreatment in violation of U.S. and international law, invoking such doctrines as the state secrets privilege, qualified immunity, Westfall Act immunity, political question or “special factors” counseling against a *Bivens* remedy. Congress has provided no express damage remedy to compensate victims of torture or cruel, inhuman and degrading treatment.

While repealing the MCA amendments to the War Crimes Act may make that Act a greater deterrent, no prosecution has ever been brought under that law or the Anti-Torture Statute. Political pressures may deter the Executive from prosecuting

¹³¹ Compare, e.g., *Thompson v. Choinski*, 525 F.3d 205, 209 (2nd Cir. 2008) (“This court has long interpreted § 2241 as applying to challenges to the execution of a federal sentence, ‘including such matters as the administration of parole, ... prison disciplinary actions, prison transfers, type of detention and prison conditions.’”); with, *McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 812 (10th Cir. 1997) (“A habeas corpus proceeding ‘attacks the fact or duration of a prisoner’s confinement and seeks the remedy of immediate release or a shortened period of confinement. In contrast, a civil rights action ... attacks the conditions of the prisoner’s confinement and requests monetary compensation for such conditions.’” (internal citation omitted)).

government officials who used methods violating Common Article 3, but claim to have done so to obtain information needed to protect the nation. Moreover, neither habeas nor criminal statutes provide compensation for the victims of torture or cruel, inhuman and degrading treatment. We recognize the difficulties inherent in private damage actions against U.S. officials claimed to have used methods of interrogation that amount to torture or cruel, inhuman and degrading treatment. But a system can be devised that would compensate victims of torture and cruel or inhuman treatment, while deterring the initiation of frivolous claims and minimizing evidentiary problems inherent in protecting state secrets. An independent administrative agency to handle such claims could develop an expertise in the handling of such claims; pleading standards and procedures for summary dismissal might be developed to weed out frivolous claims; costs could be imposed for claims that prove to have been filed without a reasonable basis; procedures to address the government's invocation of the state secrets privilege could be adopted along the lines of legislation now being proposed to govern the state secrets privilege in federal court proceedings; and liability could be limited to the United States, thereby excluding damage claims against individual personnel. While this system would not have the same deterrent effect as private damage actions against individual personnel, it would provide compensation for victims and give the federal government an incentive to educate personnel about the standards for treatment of detainees imposed by U.S. and international law and discipline those who violate those standards.

We submit that adoption of these recommendations is necessary to assure compliance with our nation's international obligations, to preserve long-established

human rights and moral traditions, and to restore our nation's reputation in the world community.



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July 2, 2008

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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

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