

AMERICAN BRANCH
of the
INTERNATIONAL LAW ASSOCIATION

October 19, 2009

The Honorable Harold Hongju Koh
Legal Adviser
U.S. Department of State
2201 C Street, NW
Washington, DC 20520

Dear Dean Koh:

We want to offer you our most heartfelt congratulations on your confirmation as Legal Adviser. The Office of the Legal Adviser enjoys a longstanding reputation as a major influence on the development of international legal norms, and we are pleased that someone with your deep commitment to international law and to the rule of law in American foreign policy has taken on its leadership.

As chairpersons of the committees on International Human Rights and International Humanitarian Law (IHL) of the American Branch of the International Law Association (ABILA), we recognize that the tasks in front of you carry a heavy burden. We are particularly aware that one of the foundational tasks will be to assert American engagement and leadership in the fields of IHL and human rights and to reassert the United States' commitment to the norms with which our committees are concerned. Members of our committees consider that there are a number of specific areas where restatements of America's commitment to international legal norms could advance those objectives.

We have identified three areas in particular: treaty actions in the areas of IHL and human rights; the application of the Convention Against Torture (CAT) during armed conflict; and the basis and scope of the right to detain hostile combatants. It is not our goal to provide you with a lengthy brief on these topics but merely to articulate positions that, we believe, are consistent with contemporary international legal thought and would assist you as the United States reasserts human rights leadership around the globe.

I. TREATY ACTIONS IN SUPPORT OF ENGAGEMENT IN IHL AND HUMAN RIGHTS

The second term of the Bush Administration, to its credit (and the credit of your predecessor), pressed the Senate to clear the deck and approve a number of treaties in our Committees' areas of concern. For instance, the United States has recently ratified a number of important protocols to the 1980 Convention against Certain Conventional Weapons ("CCW") and the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict ("Hague Convention"). However, the United States remains outside a number of major instruments in international human rights and humanitarian law.

Instruments in IHL

With respect to IHL, and without prejudice to any other treaties to which the United States is not yet party, we would urge the Obama Administration to consider the following:

- *Reprioritize the 1977 Additional Protocol II to the Geneva Conventions.* Submitted to the Senate for approval by President Reagan and yet dropped from the Obama Administration's first list of Treaty Priorities in May, Additional Protocol II provides basic rules for combatants in the event of non-international armed conflict, rules which the United States has long considered reflective of customary norms already binding on all states. Neither the previous nor the current administration has explained the U.S. reluctance to approve this important treaty in humanitarian law. In this light, continued failure to ratify – or to urge the Senate Foreign Relations Committee to consider its ratification – is inexplicable. Ratification would advance U.S. interests in ensuring that non-international armed conflict be governed by fundamental, humane norms of international law.
- *Move forward a ratification transmittal package for the 1999 Second Protocol to the 1954 Hague Convention.* This treaty also largely codifies customary international humanitarian law with respect to cultural property and updates the 1954 Convention to ensure its consistency with norms adopted since the updating of the Geneva Conventions by the 1977 Additional Protocols and the CCW. To date, no serious objections to this protocol have been advanced. It reflects the strong American presence in The Hague at the time the instrument was negotiated by the Clinton Administration, involving a deep partnership between State Department and Pentagon lawyers. Particularly at a time when the United States and its allies are engaged in combat in places rich with historic and religious meaning, acceding to the Second Protocol would demonstrate American commitment to the distinction between military and civilian objectives in armed conflict.
- *Initiate a review of the 1977 Additional Protocol I to the Geneva Conventions.* The perceived problems with Additional Protocol I are well-known and undoubtedly familiar to you. Previous administrations had concluded that much of Additional Protocol I reflected customary international humanitarian law. As a result, key guidance for U.S. military forces typically draws on the language of this instrument, to which 163 States are now party. Most of the significant concerns with the Protocol deal with issues of irregular forces waging the kinds of insurgent warfare to which the United States has sadly become accustomed during the past eight years. Given U.S. experience with application of a variety of IHL norms during this period, we think that a top-to-bottom review of Additional Protocol I should be initiated, focusing as much as possible on those norms previously considered problematic. We would encourage that any such review be open to the possibility of submitting Additional Protocol I to the Senate for advice and consent to ratification. Such a move would engender very strong support internationally as you attempt to reengage U.S. leadership in this area of international law. This would be particularly so in places, such as Afghanistan, where NATO airstrikes have occasionally imposed a heavy toll on civilians; restating U.S. commitment to norms of proportionality and distinction would undoubtedly be well-received.

Instruments in Human Rights

With respect to human rights instruments, we were heartened to see that the Obama Administration has reprioritized ratification of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. In addition to the treaties mentioned below, we wish to add our strong support to the priority the Administration has placed on Senate approval of CEDAW, the ratification of which should be urgently sought. We also wish to add our support to this past July's U.S. signature of the UN Convention on the Rights of Persons with Disabilities and urge the transmittal of the Convention to the Senate for approval as soon as possible.

We would encourage the Administration to consider these other steps, among others, to demonstrate the U.S. commitment to international human rights:

- *Recommit to the Optional Protocol to the Vienna Convention on Consular Relations.* The United States, as you know, deployed the Optional Protocol to great effect in 1979, bringing a claim against the Government of Iran following its detention of Americans at the U.S. Embassy. The claim helped mobilize international opinion against the outrageous behavior of the Iranian Government. Yet in the wake of several cases brought under the Protocol against the United States, the previous administration withdrew from the Optional Protocol, stating the following:

. . . we will continue to live up to our obligations under the Vienna Convention. We will continue to believe in the importance of consular notification. But this particular optional protocol was in our federal system being interpreted in ways that we thought were inappropriate for a system in which there is a jurisdictional issue between the federal government and the states. And that's really what this is about.

See Briefing En Route to Mexico, Secretary Condoleezza Rice, Mexico City, Mexico, Mar. 10, 2005. The federalism excuse should be seen as a hurdle to overcome rather than a solid barrier that precludes U.S. participation. And it is solvable through concerted federal action to educate local law enforcement officials, as the previous administration wisely did. Fair or not, the withdrawal has been seen as part of a broader rejection by the United States of international treaty-making. At the same time, the withdrawal reduces the levers for the United States when dealing with future hostile entities that wish to detain and possibly abuse American citizens. Returning to the Protocol would be a mark of American leadership, likely encouraging others to join and thus expanding the U.S. ability to defend Americans abroad.

- *Consider transmittal to the Senate of the American Convention on Human Rights:* The American Convention on Human Rights has been in force since July 18, 1978. The Commission and Court created under the Convention have developed basic jurisprudence in international human rights law without the participation of the U.S. Government. The United States signed the treaty in 1977 but remains marginalized for failure to ratify the Convention. The United States should consider whether the marginalization of U.S. concerns serves American interests. An assessment of whether ratification of the Convention might be possible – including whether any understandings, declarations or reservations might be necessary – would be a strong step toward eventual ratification.

- *Carefully study the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, with an eye toward submitting to the Senate for ratification.* The Convention, which has not yet entered into force, prohibits enforced disappearances, defining the crime and requiring States Parties to enforce its prohibition as a matter of domestic law. While the previous administration participated in the negotiations, led by the Office of the Legal Adviser, it objected to the treaty on numerous grounds that we think are either overprotective of asserted U.S. equities or surmountable in a ratification process. Among other things, the United States should support the treaty's definition of the crime, accept its rejection of a defense of superior orders and welcome the broad-based right to know at the heart of its object and purpose. Acceptance of the Convention would contribute to international understanding that the United States has moved away from certain policies of the previous administration and that, as it has for decades, the United States stands with those around the world who are or have been subjected to this crime against humanity.

II. THE APPLICATION OF THE CAT DURING ARMED CONFLICT

The Bush Administration suggested that the CAT does not apply in times of armed conflict. At a meeting of the CAT Committee in 2006, the U.S. Delegation to the Committee made the following statement:

It is the view of the United States that these detention operations [in Guantanamo Bay, Cuba, and in Afghanistan and Iraq] are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations. As a general matter, countries negotiating the Convention were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes and were not attempting to craft rules that would govern armed conflict. At the conclusion of the negotiation of the Convention, the United States made clear "that the convention . . . was never intended to apply to armed conflicts . . ." The United States emphasized that having the Convention apply to armed conflicts "would result in an overlap of the different treaties which would undermine the objective of eradicating torture." No country objected to this understanding.

See U.S. Meeting with U.N. Committee Against Torture: Opening Remarks of John B. Bellinger III, May 5, 2006.

We recognize that the notion of the laws of armed conflict as a *lex specialis* may play an important interpretive role where both IHL and human rights law apply. Unfortunately, the cited remarks were widely interpreted as suggesting that the laws of war displaced the obligations of the CAT during wartime. That plainly is not so. Moreover, given the widespread concerns about U.S. adherence to the CAT in view of certain practices of the last administration, it is particularly important that the State Department clarify its understanding that the CAT in general and its prohibition on torture in particular are fully applicable even in wartime and within theatres of active combat. The CAT itself admits of no exceptions. Article 2(2) provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war . . . may be invoked as a justification of torture."

The CAT Committee, in 2006, urged the United States to recognize that the Convention does apply during armed conflict. *See Conclusions and Recommendations of Committee Against*

Torture Relating to Report Submitted by the United States, CAT/C/USA/CO/2, 25 July 2006.

We submit that, in keeping with the Committee's recommendations, the appropriate understanding of the scope of the CAT's application and the need to restate American commitment to the fundamental norms against torture, the Obama Administration should explicitly recognize the application of the CAT at all times, whether in armed conflict or in peace.

III. THE BASIS AND SCOPE OF THE RIGHT TO DETAIN A HOSTILE COMBATANT

We understand that the Administration's Special Interagency Task Force on Detainee Disposition has been looking at legal questions surrounding long-term detention operations outside of the United States, immediately in connection with the conflicts in Iraq and Afghanistan, but with a view towards establishing a uniform government practice for such detentions, perhaps enabled through special congressional legislation. It is reasonable to assume that, aside from the circumstances specifically envisioned in the Geneva Conventions, international law recognizes a right of capture and detention of individuals who present an immediate threat to the safety or security of forces deployed in a contingency operation outside of the United States. It is also clear that international law does not provide a basis for long-term detention without charge outside the rules of the Third and Fourth Geneva Conventions.

We caution against the idea that the United States can fill this void with unilateral United States policy, perhaps bolstered with legislation. Instead, the United States should pursue long-term detention arrangements with proper deference to the host nation and its laws—and not in circumvention of those laws or applicable international law, including the customary norms reflected in article 75 of Additional Protocol I. We reject the notion that the United States should create an autonomous long-term detention regime on a one-size-fits-all basis that ignores the legal regime of the host state, customary and conventional international law and basic legal protections and guarantees contained in United States law. Diplomacy, and not special legislation, provides the surest path forward. The United States should negotiate the terms of its detention arrangements with the host government, guaranteeing the prisoners their rights under the host government's legal regime. In so doing, the United States should also be conscious of our own legal traditions and values, without however seeking to project American law and legal norms onto the territory of the host state.

In closing, let us again congratulate you on your appointment and confirmation as Legal Adviser. We and our committees stand ready to assist you and your staff should you seek any clarification or further material on the topics we have raised above.

Respectfully submitted,

Scott Horton, Chair
COMMITTEE ON INTERNATIONAL HUMAN RIGHTS

David Kaye, Chair
COMMITTEE ON IHL