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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT OPINION ON THE POSSIBLE NEED FOR FURTHER DEVELOPMENT OF THE GENEVA CONVENTIONS

by

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REPLY TO THE DRAFT OPINION ON THE NEED FOR FURTHER DEVELOPMENT OF THE GENEVA CONVENTIONS IN LIGHT OF THE NEW CATEGORIES OF COMBATANTS THAT HAVE EMERGED RECENTLY

Respectfully submitted
to the European Commission on Democracy through Law
(Venice Commission)
by Jed Rubenfeld (U.S. Observer)

I. Preliminary Statement

The Parliamentary Assembly has requested an opinion from the Venice Commission ***"on the possible need for a further development of the Geneva Conventions in light of the new categories of combatants that have emerged recently***." The Venice Commission appointed a subcommittee to report on this request and graciously invited this Observer to express his views.

The Draft Opinion now before the Commission argues that there is no need for further development of the Geneva Conventions. This Reply is respectfully submitted to offer another perspective. The views expressed herein are those of the author, not the U.S. government.

The central question presented by the Parliamentary Assembly's request is clear. As the Draft Opinion puts it, ***"the 'new categories of combatants'"*** referred to "***are members of international terrorist organisations, such as al Qaeda.***" Draft Op. at 7. As the Draft Opinion further acknowledges, "members of international terrorist networks, such as al Qaeda, ***will rarely, if ever, be entitled to prisoner of war status***." Draft Op. at 9.

The central question, then, involves the status of "***unlawful combatants***" – combatants who, because of violations of the laws of war or for other reasons, are disqualified from lawful prisoner of war status. In essence, the Draft Opinion argues that the Geneva Conventions already "solve" the problem of unlawful combatants as follows:

> (1) unlawful combatants are generally entitled to the status of ***civilians*** under the Fourth Convention (relative to the Protection of Civilians in Time of War);
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> (2) exceptions exist, however, for many unlawful combatants, such as those who are not nationals of a party to an armed international conflict: the detention of

> these unlawful combatants basically ***falls outside the Geneva Conventions entirely***.[1]

This "solution" to the problem of unlawful combatants is unsatisfactory. It gives unlawful combatants either too much or too little protection.

The Venice Commission has an opportunity to lead the international community toward a better solution. The emergence of highly organized, highly militarized, international terrorist organizations such as al Qaeda has led many thoughtful persons around the world to recognize that the problem of unlawful combatants cannot be resolved through a binary choice between ***prisoner-of-war status*** and ***civilian status***. It is equally unsatisfactory to leave many unlawful combatants without any Geneva Convention protections. Although the Geneva Conventions need not and should not be amended, ***a new, short, supplemental protocol*** is called for, expressly establishing:

> (1) that captured unlawful combatants are ***neither prisoners of war nor civilians, but rather occupy a third status***; and
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> (2) while such combatants are therefore not entitled to the rights set forth in either the Third or Fourth Conventions, certain ***fundamental guarantees of humane treatment and due process*** – similar to those enumerated in Article 75 to the First Additional Protocol – nevertheless apply to them.

It is respectfully suggested that the Venice Commission should appoint a subcommittee to draft such a protocol. The remainder of this Reply presents the pertinent legal analysis.

II. Unlawful Combatants are not, and should not be treated as, Civilians

The Third Geneva Convention – the Convention relative to the Treatment of Prisoners of War (hereafter GC III) – establishes a comprehensive set of protections for prisoners of war. It also sets forth the requirements with which combatants must comply in order to qualify for prisoner-of-war status. These requirements, entailing respect for the most fundamental laws of war, are routinely violated by terrorist organizations. It is for this reason that, as the Draft Opinion acknowledges, "members of international terrorist networks, such as al Qaeda, will rarely, if ever, be entitled to POW status." Draft Op. at 9.

But the Third Geneva Convention is silent about the treatment of captured combatants who fail to qualify for prisoner-of-war status. This silence is the source of the problem referred to above: what rules apply to the detention of unlawful combatants?

Many international lawyers assert that the Geneva Conventions solve this problem by treating unlawful combatants as *civilians* protected by the Fourth Convention (hereafter GC IV). The following statement is representative: "*[P]risoners detained by an enemy in an armed conflict*

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[1] These unlawful combatants, according to the Draft Opinion, instead enjoy "diplomatic protection" and the general coverage of international humanitarian law. Draft Op. at 10.

either are protected by the Third Convention as prisoners of war, or by the Fourth Convention as civilians."[2] In essence, this is the position taken by the Draft Opinion. *See* Draft Op. at 13.

The difficulty with this position is clear. GC IV establishes a comprehensive set of protections for detained civilians. These protections are, naturally, robust both substantively and procedurally, as befits the situation of civilians interned by hostile forces. In many ways, these protections are much stronger and more solicitous than those conferred on prisoners of war: they include, for example, prohibitions on forced transfer, periodic and frequent review of detention "with an eye toward release," restrictions on detention in the absence of criminal charges, and so on. Such protections are thoroughly reasonable in the case of detained civilians.

But it is highly unsatisfactory to say that *unlawful combatants* – combatants who have not complied with the most fundamental laws of war and who ought to occupy a legal status *inferior* to both civilians and prisoners of war – should be entitled to these special, robust GC IV protections, which are denied to lawful combatants. To be sure, civilians may be prosecuted for acts that would not be criminal in the case of lawful combatants, but this does not alter the basic problem. According to the Draft Opinion, *unlawful combatants are entitled to a panoply of rights and protections denied to lawful combatants*.

The Venice Commission should not endorse an opinion that embraces this very unappealing result. Unlawful combatants are not and should not be treated as civilians.

III. The Draft Opinion leaves the detention of many or most of the newly emerging unlawful Combatants entirely unprotected by the Geneva Conventions.

Paradoxically, even while conferring too much protection on some unlawful combatants, the Draft Opinion's basic conclusions will leave the detention of many others entirely unprotected by the Geneva Conventions. Under GC IV's express terms, an unlawful combatant will be excluded from protected-person status: (i) if his acts were no part of an armed conflict between states; or, in cases where such a conflict did exist, (ii) if he is a national of a state that is not a party to the conflict.[3] For the new categories of combatants, these exceptions will tend to swallow the rule.

International terrorist organizations frequently perpetrate their attacks outside of any armed conflict between states. Even when such a conflict exists, members of international terrorist organizations will frequently be nationals of states not involved in the conflict. For example, many or most of the unlawful al Qaeda combatants captured on the battlefields of Afghanistan are not Afghan nationals. They are therefore expressly excluded from GC IV protection.

The Geneva Conventions were framed at a time before the emergence of the new, highly militarized international terrorist organizations. It is unsurprising, therefore, that many or most

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[2] Erin Chlopak, *Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, 9 HUM. RTS. BR. 6, 7 (2002).

[3] GC IV arts. 2, 4.

members of these organizations will fall outside the Conventions' coverage.[4] The Draft Opinion argues in support of this result, maintaining that these unlawful combatants will still enjoy "diplomatic protection." According to the Draft Opinion, "the best protection for a person vis-à-vis a foreign state has traditionally been the diplomatic protection exercised on that person's behalf by his or her own country." Draft Op. at 10.

It is respectfully submitted that this is not a sufficient reason for the Venice Commission to adopt the Draft Opinion's position. In essence, the Draft Opinion argues that the Geneva Conventions are *not* in need of further development in light of the newly emerging categories of combatants, *despite* the fact that many or most of these combatants will fall outside the Conventions' coverage. A more natural conclusion would be that the Geneva Conventions *are* in need of further development in light of the new categories of combatants *because* many or most of these combatants will fall outside the Conventions' coverage.

IV. The Reasons for treating unlawful Combatants as Civilians under GC IV are not compelling.

The Draft Opinion makes a series of arguments explaining why unlawful combatants are, as a rule, properly treated as civilians under GC IV. None of these arguments is compelling.

A. Language and Legislative History of GC IV.

First, the Draft Opinion argues that the text and history of GC IV indicate that GC IV was intended to cover unlawful combatants. Assuming this to be true, it is not a sufficient reason for the Venice Commission to take the position urged. The question before the Commission is not, "Must unlawful combatants be recognized as civilians under GC IV in its current form?" The question is whether the Geneva Conventions are in need of further development.

B. "Nobody in Enemy Hands May Fall Outside the Law."

Second, the Draft Opinion argues that unlawful combatants must be protected under GC IV, for if not, they will be protected by neither the Third nor the Fourth Convention, a result that international law ought to avoid. But as just noted in the previous section, there are *already* numerous unlawful combatants (e.g., "third-party nationals") who are unquestionably *neither*

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[4] Indeed, with respect to al Qaeda, the Geneva Conventions *may not apply at all*, because under common article 2, states are "bound" by the Conventions in their dealings with a "Power in conflict" that is "not a party" to the Conventions *only* if "said Power . . . accepts and applies the provisions thereof." GC I-IV art. 2. Al Qaeda in no sense "accepts and applies the provisions" of the Geneva Conventions. Thus if al Qaeda is properly regarded as a "Power," the Conventions would seem under article 2 not to bind states in their dealings with it. The Draft Opinion deals with this problem by arguing that "when the Geneva Conventions speak of 'Power' they mean 'State.'" Draft Op. at 4. This position is, however, inconsistent with the practice of the U.N. itself during the Korean War. *See* DOCUMENTS ON PRISONERS OF WAR 564 (Naval War College Int'l L. Studies Vol. 60) (Howard S. Levine ed., 1979) (noting that during the Korean War, the United Nations, although not a state, deemed itself a "Detaining Power" for purposes of the Third and Fourth Geneva Conventions). *See also* FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 350 (1966) (concluding that the U.N. can be considered a "Power" for purposes of the Geneva Convention, in part because use of "Power" rather than "State" in article 2 uses indicates that non-state entities can become parties to an armed conflict).

prisoners of war under GC III *nor* protected persons under GC IV. If only for these individuals, there is already a clear need for a statement of the principles that apply to the detention of unlawful combatants.

In any event, the best way to avoid allowing captured unlawful combatants to fall into a "legal void" would be to create a short supplemental protocol to the Geneva Conventions clearly setting forth the guarantees applicable to them. Enumerating such guarantees would not be as difficult as might at first be imagined. The reason is that such guarantees could be modeled on – indeed they would presumably be similar or essentially identical to those enumerated in – Article 75 of the First Additional Protocol to the Geneva Conventions (not signed by the U.S.). Article 75, implicitly acknowledging the possibility that certain detainees will not be covered by either GC III or IV, establishes certain fundamental, non-derogable rights for such detainees, including the prohibition of torture, guarantees of due process and humane treatment, protections against religious discrimination, and so on.

It is respectfully suggested that the Venice Commission should appoint a subcommittee to draft a protocol on unlawful combatants modeled on Article 75 of Protocol I.

C. State Discretion To Deny Civilians Their GC IV Rights.

Third, the Draft Opinion argues that guaranteeing unlawful combatants the rights of civilians under GC IV is not a serious problem, on the theory that under article 5 of GC IV, a state can always deny civilians most of the rights set forth in GC IV when the state deems that granting such rights would be "prejudicial to [its] security." Draft Op. at 13; GC IV art. 5.

This is a perilous argument. It "cures" the problem created by treating unlawful combatants as civilians under GC IV by championing the power of states to deny civilian detainees most of their rights. For example, the Draft Opinion argues that unlawful combatants can be detained without criminal charges despite their civilian status, because "administrative detention" of civilians is permitted under GC IV art. 5 and not ruled out by international humanitarian law. Draft Op. at 18.

Advocating the possibility of administrative detention for civilians is the wrong way – arguably the worst way – to deal with the problem of unlawful combatants. The great challenge facing states confronting terrorism today is to maintain their commitment to civil rights while finding adequate means of responding to the terrorist threat. Undermining fundamental civil rights is too high a price to pay to cure the problem of treating unlawful combatants as civilians – a problem that ought not to exist in the first place.

Moreover, it is rarely, if ever, legally appealing to (1) grant an individual a right against a state but then, simultaneously, (2) make that right wholly a matter of state discretion (not even requiring an express declaration of derogation). Ironically, the authors of the Draft Opinion recognize this simple point when they discuss article 5 of the Third Convention. This is the provision entitling certain detainees to an individualized determination of their POW status in cases of "doubt." The Draft Opinion argues that this provision should not be interpreted to allow the detaining power sole discretion to decide whether any "doubt" exists. This interpretation would "reduce the protective effect of Article 5 GC III to very little. It would give the detaining

power an easy means to circumvent its obligation under Article 5 by simply declaring that it has no doubt." Draft Op. at 7.

But if this reasoning applies to article five of the Third Convention, it applies far more compellingly to article five of the Fourth Convention, which concerns nearly all the protections, substantive and procedural, guaranteed to civilians. The Venice Commission ought not to endorse a position that undermines – or, at a minimum, could be cited by states that wish to undermine – the fundamental rights of detained civilians.

D. Customary Law.

Finally, the Draft Opinion argues that there is no need for a protocol setting forth the fundamental guarantees applicable to unlawful combatants, on the ground that Article 75 of the First Protocol already achieves this result. With respect to states, such as the U.S., that have not ratified the First Protocol, the Draft Opinion argues that there is still no problem, because Article 75 should be regarded as binding on such states as "customary international law."

The difficulty with this argument is its uncertainty. Although it is easy enough to find statements in support of the view that Protocol I in general, or Article 75 in particular, is or should be "regarded as customary law," the matter is hardly free from doubt. Significantly, neither Protocol I nor Article 75 thereof is included in the United Nations Secretary-General's list of international provisions unquestionably regarded as customary law.[5] Even the Draft Opinion does not definitively state *which* provisions of Article 75 are or should be regarded as customary, because there is no definitive answer to this question. Certainly, the provisions of Article 75 "*arguably* reflect customary international law,"[6] but there can be no certainty that states which have not ratified the First Protocol will take this view. A more certain, more satisfying solution would surely be the promulgation of a new protocol on unlawful combatants, clearly setting forth the fundamental legal principles applicable to them.

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[5] *See* Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 and Annex (May 3, 1993), *reprinted in* 32 ILM 1159, 1192 (1993). It would be a serious misunderstanding of American law to suppose that the statement of some U.S. officers supporting the customary law status of Article 75 demonstrates that the U.S. has authoritatively accepted that proposition.

[6] Brian D. Tittemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J INT'L L. 61 , 98-99 (1997).