DEVELOPMENTS

Legal Issues in the War on Terrorism – A Reply to Silja N. U. Vöneky

By John B. Bellinger, III[*]

I wanted to begin by thanking Dr. Voneky for her thoughtful contribution to this rapidly developing area of international law.[1] One of the purposes of the ongoing dialogue with my European counterparts on the legal framework for the use of force and detention of combatants in an armed conflict with non-state actors is to spur dialogue to arrive at a common approach on these issues.[2] I agree with many things in Dr. Voneky's article. I am pleased that, unlike many critics of the United States, she recognizes that it is possible to use force in self defense from armed attacks not directly linked to the actions of any state,[3] and that the law of armed conflict would govern that use of force.[4] I also appreciate that she notes that actions against terrorist groups outside a state's country are not necessarily simply transnational police actions.[5] I wanted to take this brief opportunity to note three areas where there may be some misunderstandings regarding the views of the United States, and then discuss my thoughts on the way forward.

First, the article lays out a legal framework for armed conflict with terrorist groups that closely resembles the current U.S. framework for our ongoing conflict with al

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[1] This is a reply to Silja N. U. Vöneky, Response – *The Fight against Terrorism and the Rules of International Law – Comment on Papers and Speeches of John B. Bellinger, Chief Legal Advisor to the United States State Department*, 8 GERMAN LAW JOURNAL 747 (2007), at http://www.germanlawjournal.com/pdf/Vol08No07/PDF_Vol_08_No_07_747-760_Developments_Voeneky.pdf.

[2] *See, e.g.*, John B. Bellinger, III, Speech – *Legal Issues in the War on Terrorism*, 8 GERMAN LAW JOURNAL 735 (2007), at http://www.germanlawjournal.com/pdf/Vol08No07/PDF_Vol_08_No_07_735-746_Developments_Bellinger.pdf.

[3] Vöneky, *supra* note 1, at 749.

[4] *Id*.

[5] *Id*.

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Qaida and the Taliban. There is no question that armed conflicts between States Parties to the Geneva Conventions, including conflicts with terrorist-sponsoring States Parties, constitute international armed conflicts.[6] The President's February 2002 order recognized that the armed conflict with the Taliban was at that time an international armed conflict.[7]

Where we disagree with Dr. Voneky is with her suggestion that Taliban members detained in that conflict would have been entitled to prisoner of war (POW) protections.[8] We believe they do not meet the criteria for protection laid out in Article 4 of the Third Geneva Convention.[9] The armed forces of Afghanistan ceased to exist as such with the dissolution of former President Mohammad Najibullah's armed forces in the mid-nineties, and were replaced by a patchwork of rival armies. Although the Taliban were the most powerful of these rival armies at the time of the U.S. invasion, it is not clear that they ever rose to the level of the official armed forces of Afghanistan entitled to protection under Article 4(A)(1). The Taliban is better conceptualized as a militia belonging to a Party to the conflict, which would be eligible for POW protections under Article 4(A)(2) if they used a command hierarchy; wore a uniform or distinctive sign; carried arms openly; and observed the laws and customs of war. The Taliban, however, fail to meet at least two of these conditions: specifically, the Taliban do not distinguish themselves from the general population, nor do they obey the laws and customs of war. Contemporary news reports from the Allied invasion of Afghanistan indicate that the Taliban dressed like civilians, and in fact used this similar dress to blend into the civilian

[6] I would note that the article misstates Common Article 2's requirements for international armed conflict. That provision applies the bulk of the Convention's provisions to "all cases of declared war or of any other armed conflict between two or more High Contracting Parties, even if the state of war is not recognized by one of them," as well as "all cases of partial or total occupation of the territory of a High Contracting Party." The United States applied the Geneva Conventions to our armed conflict with and subsequent occupation of Iraq, for example.

[7] We are aware that some states and commentators believe that the continuing fighting in Afghanistan evolved into a non-international armed conflict when the new Afghan government, led by President Karzai, was seated. We do not take this position, and ultimately, it is the responsibility of parties to the conflict to determine how it is categorized. Nevertheless, we do not believe that the categorization of the conflict as international or non-international affects our legal authority to continue to detain individuals captured in the conflict. While some groups have suggested we would need to release those individuals we detained in the international armed conflict and then detain them again as part of the non-international armed conflict, such a rule seems an unduly formalistic and impractical interpretation of IHL.

[8] Vöneky, *supra* note 1, at 753.

[9] Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

population to evade capture.[10] Worse still, they have targeted and continue to target civilians as such in violation of the laws of war, having adopted suicide bombing techniques similar to those used by al Qaida.[11] Given these transgressions, the United States continues to believe that Taliban detainees are not POWs.

With respect to armed conflicts with non-state groups like al Qaida, the U.S. Supreme Court held in *Hamdan v. Rumsfeld*[12] that such conflicts are by definition non-international, and therefore fall within the rubric of Common Article 3. I have said before that many people would have been less surprised if the Supreme Court in *Hamdan* had based its holding on a determination that Common Article 3 applied as a matter of customary international law rather than treaty law.[13] In any event, the Administration has been clear that we respect the Supreme Court decision and will proceed in a way that is consistent with its ruling.[14] I am pleased that Dr. Voneky's article recognizes the DoD Detainee Directive and Army Field Manual on interrogation as clear steps taken by the Defense Department to implement Common Article 3 in all aspects of its detention operations.[15] I would only add that we have been clear that Common Article 3 applies to all branches of the U.S. government, including intelligence agencies, in the detention and interrogation of combatants in the armed conflict with al Qaida. The President's July 20, 2007 order expressly applies Common Article 3 to the CIA's interrogation and detention program.[16]

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[10] Justin Hugler, *Campaign Against Terrorism: Stallholders Selling out of Afghanistan's New Must-Have Hat*, THE INDEPENDENT-LONDON, November 26, 2001 (stating that the Taliban wore the same basic clothes as Afghan civilians); Jane Perlez, *The Siege; Tenacious Taliban Cling to Power with Tactics, Cunning, and Help from Old Friends*, N.Y. TIMES, October 26, 2001 (noting the Taliban's use of UN vehicles to hide from US warplanes).

[11] Perlez, *supra* note 10 (describing threats made by Taliban commander to civilian homes); Joanna Poncavage, *Afghan Suicide Bombers Would Target Civilians, Guardsman Says*, MORNING CALL, Mar. 5, 2007, at A1.

[12] Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2795-96 (2006).

[13] Posting of John Bellinger, III to Opinio Juris, The Meaning of Common Article III, http://www.opiniojuris.org/posts/1168814555.shtml (Jan. 16, 2007, 6:05am).

[14] *See, e.g.*, Tony Snow, Press Sec'y, The White House, Press Briefing (June 29, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/06/20060629-6.html.

[15] Vöneky, *supra* note 1, at 756.

[16] Exec. Order No. 13,440, 72 Fed. Reg. 40,705-09 (July 20, 2007).

Although we agree on the application of Common Article 3, there appears to be some confusion regarding what application of this article entails. Common Article 3 does not require that detainees held in non-international armed conflict be granted habeas corpus rights or the right to have a "competent tribunal" determine POW status.[17] The Geneva Conventions did not and do not contemplate wide-scale access of combatants to civilian courts. And there is no category of prisoner of war in non-international armed conflict.

As Dr. Voneky correctly notes,[18] the Military Commissions Act eliminated habeas jurisdiction over the claims of Guantanamo detainees.[19] The Congress and the Administration acted together to do so to address the fact that detainees were overloading our courts with claims that were, at best, tangentially related to the central question of whether the U.S. Government was detaining the individuals lawfully. Never in our nation's history have alien enemy combatants detained overseas been given the right to habeas corpus. Nevertheless, to ensure that we are holding the right people, every detainee in Guantanamo has his case reviewed by a Combatant Status Review Tribunal (CSRT), which determines whether a detainee is properly classified as an enemy combatant.[20] The detainee has the assistance of a military officer, may present evidence, and has access to the unclassified reasons for his detention.[21] And most important, the Detainee Treatment Act (DTA) gives every detainee in Guantanamo the right to appeal his CSRT determination to the U.S. Court of Appeals for the D.C. Circuit (and ultimately to the U.S. Supreme Court) for a determination regarding whether the CSRT practices and procedures were followed, and, to the extent applicable, whether those procedures are consistent with the laws and Constitution of the United States.[22] The D.C. Circuit in *Bismullah v. Gates*[23] just interpreted quite broadly the record it will review in these cases; the court held that it is entitled to consider all of the reasonably available information in the government's possession in determining whether all exculpatory evidence was presented to the CSRT, and whether the CSRT decision was supported by a preponderance of the evidence. The Supreme Court has just

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[17] Vöneky, *supra* note 1, at 754.

[18] *See id.* at 755.

[19] Military Commissions Act of 2006, Pub. L. No. 109-366, § 2241(e)(1), 120 Stat. 2600, 2603 (2006).

[20] *Id.* § 948d(c).

[21] *Id.* §§ 948k, 949a(b)(1)(A), 949d(f).

[22] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2740 (2005).

[23] Bismullah v. Gates, 2007 WL 2067938 (C.A.D.C. July 20, 2007).

granted certiorari in the *Boumediene* and *al Odah* cases to interpret the constitutionality and scope of these review processes.[24]

Detainees who have not been charged for prosecution by military commission also have their detention reviewed annually by an Administrative Review Board (ARB).[25] This ARB determines whether the detainee can be released or transferred without posing a serious threat to the United States or its allies. We are aware of concerns about determining who should be detained and for how long in this new class of conflict, and CSRTs and ARBs attempt to address these concerns through robust administrative procedures. To date, more than 170 detainees have left Guantanamo through these processes.

Although I disagree with Dr. Voneky about whether Common Article 3 requires a state to give a detainee the right to habeas corpus, it is indisputable that Common Article 3 prohibits, "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."[26] In response to the *Hamdan* decision, the Military Commissions Act established rules for a new system of military commissions in which to prosecute alien unlawful enemy combatants; these rules are fully consistent with Common Article 3. These commissions provide the accused a full range of procedural protections, including the right of the accused to be present for the entire trial, the presumption of innocence, the right to cross examine witnesses, right to counsel, and a ban on all evidence obtained through torture.[27] The accused may appeal a final military commission conviction to the U.S. Court of Appeals for the D.C. Circuit, and then to the U.S. Supreme Court.[28] These tribunals are on hold for the moment while the United States resolves certain technical issues, but I hope that in the near future we will see the tribunals try those who we believe have committed serious war crimes.

Second, the article suggests that the term "unlawful enemy combatant" is misleading, and that all people fall either into the category of prisoner of war or

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[24] Boumediene v. Bush, 127 S.Ct. 3078 (2007) (order granting cert.).

[25] Detainee Treatment Act § 1005(a)(1)(A).

[26] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135..

[27] Military Commissions Act §§ 948k, 948r(b), 949a(b)(1)(A), 949a(b)(1)(B), 949l(c)(1).

[28] *Id*. § 950g.

civilian.[29] In fact, the distinction between lawful and unlawful enemy combatants (also referred to as "unprivileged belligerents") has deep roots in international humanitarian law, preceding even the 1949 Geneva Conventions. The Hague Regulations of 1899 and 1907 contemplated distinctions between lawful and unlawful combatants, and this distinction remains to this day. As Professor Adam Roberts told the Brookings Speakers Forum in March 2002, "There is a long record of certain people coming into the category of unlawful combatants— pirates, spies, saboteurs, and so on. It has been absurd that there should have been a debate about whether or not that category exists."[30] Comments from those negotiating the 1949 Geneva Conventions indicate that States did not believe that unlawful combatants would be entitled to protections under the Fourth Convention. For example, the Dutch representative at the 1949 Diplomatic Conference explained, "The Civilians Convention certainly does not protect civilians who are in the battlefield taking up arms against the adverse party."[31] The ICRC representative at the same conference confirmed this understanding, stating, "Although the two conventions might appear to cover all the categories concerned, irregular belligerents were not actually protected."[32] For more on the historical and policy rooting of the term unlawful enemy combatant, I would refer you to my blog entries on www.opiniojuris.org.

Putting this point aside, what are the differences between Dr. Voneky's approach, which acknowledges that terrorists are "offensive civilians" who may lawfully be targeted in military actions, and our approach, which categorizes these individuals as "unlawful enemy combatants"? Under both models, a State can use military force to respond to the threat posed by dangerous terrorists, can detain for the duration of the conflict those individuals who continue to pose a threat, and must treat individuals involved in a non-international armed conflict consistently with Common Article 3. While there may indeed be substantive differences between our approaches, I would suggest that it would be more productive to confront directly the question of how and when terrorists may be targeted and how they should be treated as detainees, rather than engage in theoretical arguments about legal categories. For example, Dr. Voneky's article argues that only terrorists who have a combat mission can be lawfully targeted by military force.[33] But who has a

[29] Vöneky, *supra* note 1, at 753.

[30] Adam Roberts, *Counterterrorism and the Laws of War: A Critique of the U.S. Approach* (Mar. 11, 2002) (transcript available at http://www.brookings.edu/comm/transcripts/20020311.htm).

[31] Commentaries concerning the Draft Convention, 2B Final Record of the Diplomatic Conference of Geneva of 1949, at 271 *et seq.* (1949).

[32] Commentaries concerning the Draft Convention, 2A Final Record of the Diplomatic Conference of Geneva of 1949, at 433 (1949).

[33] Vöneky, *supra* note 1, at 752, 53.

"combat mission"? Is it just the terrorist who straps on the suicide vest? What about the vest maker? For years, numerous law of war experts have grappled with these issues at a series of expert meetings co-organized by the ICRC and the TMC Asser Institute that has focused on the meaning of "direct participation in hostilities."[34] Although the experts' work is not finished, I am aware that it delves into these difficult questions, and I look forward to reading it.

Third, the article mischaracterizes the U.S. position on the application of human rights law during times of armed conflict. To be clear, the United States does not argue that human rights treaties cease to apply as a categorical matter during time of armed conflict. There will be circumstances in which the two bodies of law are mutually exclusive – as in peacetime, when the law of war is inapplicable – and circumstances in which they may not be – as in an armed conflict occurring in one's own territory. Thus, whether international human rights law applies to the conduct of a particular state during an armed conflict is a case-by-case inquiry.

But discussion of the boundaries of IHL and human rights law aside, it is the longstanding and clear position of the United States that certain human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR)[35] and the Convention against Torture's non-refoulement provision[36] apply only to activities that take place in the territory of a Party. I would refer the reader to recent reports filed by the United States with the Human Rights Committee and Committee Against Torture that explain the legal basis for these views.[37] We understand the desires of some in the international community to argue for a broader application of the principles encompassed in these treaties as a policy matter. As a matter policy the United States itself has prohibited the transfer persons in U.S. custody worldwide to countries where it is more likely than not that they will be tortured. But the U.S. view of the legal scope of these treaties is based on the text and history of the documents, and has endured across administrations, suggesting that is likely to remain the U.S. position going forward.

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[34] To access reports that have come from these meetings, *see* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?opendocument.

[35] United Nations International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

[36] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

[37] *See, e.g.*, United States Department of State, *Second Periodic Report of the United States of America to the Committee Against Torture* (May 6, 2005), *available at* http://www.state.gov/g/drl/rls/45738.htm.

Ultimately, my hope is that this conversation will result in the recognition that the threat posed by al Qaida does not neatly fit within existing legal frameworks, contrary to Dr. Voneky's conclusion. Common Article 3, while containing important baseline protections, does not provide a comprehensive set of rules to govern detention of combatants in non-international armed conflict. More and more, those in the international community are recognizing the limitations of existing law, as reflected in the growing number of international governmental and academic conferences dedicated to discussing this issue. Some governmental officials forthrightly have expressed their agreement that the law in this area needs further development. OSCE Special Rapporteur for Guantanamo Anne Marie Lizin recognized in her report from last July that "there is incontestably some legal haziness" regarding the legal status of members of international terrorist organizations.[38] Indeed, she recommended the formation of an international commission of legal experts to examine the question. Likewise, at last year's U.S.-E.U. summit, then-Austrian Chancellor Wolfgang Schussel acknowledged that we face legal "gray areas" regarding detention of terrorists.[39] More recently, the Foreign Affairs Committee of the UK House of Commons wrote that the Geneva Conventions dealt inadequately with the problems posed by international terrorism, and called on the UK government, in connection with States Parties to the Geneva Conventions and the International Committee of the Red Cross, to work on updating these Conventions for modern problems.[40] Although we do not – and will not – always see eye to eye with our European allies, I am encouraged that we have reached some degree of common ground, and that there is a growing acknowledgment that international terrorist organizations like al Qaida do not fit neatly into the existing international legal system.

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[38] Anne-Marie Lizin, Special Representative of the President of the Organization for Security and Co-operation in Europe Parliamentary Assembly, *Report on Guantanamo Bay*, at 13 (June 30, 2006), *available at* http://www.oscepa.org/admin/getbinary.asp?fileid=1470.

[39] Wolfgang Schüssel, Chancellor of Austria, Press Conference at U.S.-E.U. Summit (June 21, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/06/20060621-6.html.

[40] HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, SECOND REPORT, 2006–7, *available at* http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/4402.htm.