

SUMMARY BRIEF:

PROJECT TO ENFORCE THE GENEVA CONVENTIONS AND 18 USC 2441

INTRODUCTION

This is a summary of a legal project I've been working on since 11/13/2001. The effort was motivated by the belief that the Bush administration is engaged in war crimes in violation of the Geneva Conventions and US code. My goal is to bring a civil action in the US District Court for the District of Columbia in order to prompt the enforcement of those laws.

The only purpose of this effort is to uphold the laws of the United States. The summary is intended to present an informal overview of the issues in order to invite pro bono legal representation or assistance.

There are two parts: a draft criminal complaint, and a plan for civil action to initiate prosecution. I am currently in the process of documenting the first section, which is more or less complete in its details. The second section is a working model.

THE CRIMINAL CASE

This project seeks the appointment of a special prosecutor to enforce the Geneva conventions and 18 USC 2441 (war crimes) in regard to the Bush administration's current policies and actions regarding captured enemy combatants and civilians.

I will omit the full details of Geneva here: suffice it to say that Geneva is binding on the US, and is in effect for the duration of the conflict. All parties are bound to obey and enforce it in all circumstances.

No party may absolve itself from responsibility for a violation. All parties are required to give Geneva full force in their national laws.

No prisoner may be tried under any law or procedure not in effect at the commencement of hostilities; POWs may only be held accountable by the same procedures and laws (at the minimum) which apply to the forces of the detaining authority; collective guilt or guilt by association are prohibited.

18 USC 2441 is the War Crimes Act of 1996, which was enacted by congress against the backdrop of events in Rwanda and Kosovo. It makes it a federal offense for any US citizen to commit a war crime, and defines the acts which constitute a war crime. Two of the definitions take point here:

- 1) Any grave breach of Geneva (1949).
- 2) Any violation of Hague IV Annex (1907), Articles 23, 25, 27, or 28. One provision of Article 23 has particular importance:

"[I]t is especially forbidden – ... To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party".

It's abundantly clear in the present circumstances that captured combatants have been denied virtually every legal right they have, unless we believe they have absolutely no rights at all.

Grave breaches are narrowly defined in Geneva, and the Bush administration has committed at least two:

- The Bush administration has failed to properly classify the prisoners as POWs, and denied them a fair hearing on their status before a competent tribunal. (Geneva 3, Article 130, specifies: "... or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.")
- DoD Military Commission Order No. 1 will be a grave breach when and if they put a prisoner on trial before such a commission. Meanwhile, it's a violation of 18 USC 371 (conspiracy).

But the bottom line is Hague IV Annex article 23 – every failure to grant the prisoners any legal right whatever is an offense, and the total number of counts is huge.

NB: The aim here is fundamentally different than in the habeas cases for Hamdi and Padilla. Habeas aims to assert an individual's rights, the aim here is to enforce criminal law. For example, one issue in the habeas cases is: can the government treat a citizen as a POW? The government says yes, and they have a precedent from WW2 that the defense is challenging. My view is that they may hold anyone who actually is an enemy combatant for the duration, but ONLY by actually designating them as a POW under Geneva, which the government has explicitly refused to do in any case.

The offenses are quite obvious. It doesn't matter what the prisoners actual classification is: POW, civilian, or Little Green Man from Mars— their legal rights are being comprehensively violated whatever their true status is. The Bush administration's arguments about "illegal combatants" are fraudulent: under Geneva one is either a POW or a civilian, period. In reality, most of the prisoners are clearly entitled to POW status.

An indictment requires only probable cause, and here there is certain proof available from the administration's own statements. Culpability extends to everyone involved in planning or carrying out the crimes: White House, DoD, DOJ, and State, plus the military and the law enforcement agencies. There is no statute of limitations or pardon for war crimes.

So the administration position rests entirely on false claims of authority:

- The express authorization of congress in the 9/14 war powers resolution granting the president the authority to use whatever means necessary to the war.
- The constitutional authority of the president as commander-in-chief of the armed forces.
- Legal and historical precedent, in particular, Ex Parte Quirin (1942).

All of this fails.

Geneva is absolutely binding on both the president and the congress. Treaties are akin to contracts, and the treaty power is a constitutional exercise of national sovereignty by the president as head-of-state, acting with the advice and consent of the senate. By the authority and acts of their predecessors, both the congress and president are bound to enforce and obey Geneva; neither has any power to suspend or violate it, and it's obvious that all treaties entail the government voluntarily limiting discretionary powers they would otherwise be at liberty to exercise freely.

The presidential war powers as commander-in-chief also fall short here. As above, the president's authority as C-i-C is subordinate to his authority as head-of-state— he's bound by a prior contract. Further, Geneva is no ordinary law: it's one of the most fundamental laws of war.

There is strong precedent for granting the president very broad latitude in war; both by the discretion to act as the situation warrants, and the extraordinary deference which the courts have historically granted to the executive branch in time of war. It's generally accepted that war often requires bending or breaking laws that would be considered inviolable in peacetime, and the courts have historically taken that line in such cases.

That's such strong precedent that it's commonly taken for granted, but here it's moot. Geneva has no peacetime function: it applies only in war. It's written in terms that go to exceptional lengths to be absolutely binding on all parties under all circumstances. The administration's arguments could only be true if we assume that the treaty was adopted as a pretence which was never intended to be enforced.

In truth, Geneva has been the focus of over 100 years of international diplomacy. It has been adopted and strongly supported by the US through successive versions going back to 1899. The US has enforced Geneva on both our enemies and our own forces.

This is the critical issue in the case.

Going further, there are constitutional issues concerning treaties vs laws. I think the government will have a hard time getting traction there: Geneva is about as sound and self-executing as a treaty could be. But there's a worse problem here that reinforces the preceding points.

Any argument the Bush administration makes here will raise a constitutional question. The arguments based on presidential power as C-i-C fall in that category.

But this is a unique case; things have changed since Quirin was decided. The usual attitude of the US regarding treaties with requirements touching on domestic law is something like: "we don't need to pass any special enabling laws, our laws are fully adequate to carry out our treaty obligations as is". That has the effect of putting any such treaty at the mercy of the Supreme Court in the event the government decides to violate the treaty— there's an instant constitutional question.

But 18 USC 2441 is the exception, and if you read the house report on the bill, this is discussed. The statute was intended to explicitly implement the Geneva treaty by law in order to close any loop holes, and it was revised to make it even stronger the following year,

by including the four articles from Hague IV among other things. Like any other act of congress, it was enacted by congress and signed into law by the president, both exercising their fundamental powers under the constitution. And here's the kicker: Geneva is explicitly intended to govern the conduct of government officials and military personnel in exactly the circumstances of a war or armed conflict.

This is why I think the case can be won: there simply are no constitutional questions here—none. Geneva is US law both by adoption as a treaty, AND by statute duly enacted under the constitution. To deny that, the government must first deny its own authority to make and enforce laws.

As for the historical and legal precedents, well, I believe they all just got refuted en passant—see above. But there is much more to use if needed, and in fact, I've spent a lot of time on this area. Briefly: they are mostly obsolete, Quirin certainly. The laws since 1942 have been completely revised. Articles of War replaced by UCMJ. Geneva 4 was added to Geneva 3 in 1949, and that's important, because when Quirin was handed down, there was no Geneva protection for civilians (just Geneva 3 POWs, 1929), and now Geneva is comprehensive with respect to all persons. Then there is the case itself, which is entirely different from this situation: the issue was did they get due process, not could they be held without trial indefinitely. Beyond that there was a paradigm shift in international affairs after WW2: "NEVER AGAIN". The UN charter, Geneva 1949, and a whole host of treaties were negotiated after WW2 with the idea that the world had to make progress far beyond our best efforts in the past. There's plenty more to be said in this area, but this will do for now. The pragmatic arguments the administration makes are really quite vacuous.

I also plan to include some other possible offenses: specifically, two air attacks in Afghanistan. One was a conventional air-strike near Shikin, the other was a Predator attack near Zhawar Kili. Both attacks were on vehicles which were not involved in combat when they were struck. The attack at Shikin killed 8 men, 3 women, 3 children, and critically injured a fourth child. The attack at Zhawar Kili killed an unknown number of presumed enemy forces. I'm not sure if DoD has released any subsequent details.

[Since this was written there has been another CIA Predator attack by a in Yemen. If that was lawful, then by the same logic, al Qaeda's attack on the Pentagon was lawful. We don't have to agree with them waging war on the United States to admit that they have their own motives. Given that they have those motives and consider themselves to be at war with us, the Pentagon is, by the administration's logic, a legitimate target— and it should be noted that al Qaeda actually declared war on the United States long before 9/11.

We can draw a distinction between states and revolutionaries, but if we do, what is the status of our own revolution in 1776? There are no really convincing distinctions to be drawn here. Violence is violence, and the notion that the US is acting strictly in self-defense will not withstand scrutiny given the long history of US interference in the affairs of the Middle East since WW2, including Israel, Iraq, Saudi Arabia, Iran, Pakistan, and Afghanistan.]

The issue here is an important one: military necessity. That will come up in the main case also. Necessity means you absolutely have no choice. The D-Day invasion involved laying down a massive naval bombardment on a section of the French coast that was known to have significant numbers of French civilians living right in the line of fire, but surprise was absolutely essential. That is a clear example of military necessity.

Both of these attacks were made on people who were not positively IDed, when no battle was in progress. They were in an area believed to be al-Qaeda, and they might have even been tracked from a known base, but they had no real idea of who exactly was on board.

Where's the necessity? Killing them isn't necessarily good--- tailing them or sending in troops to nab them might be better. And what about the risk to civilians? Are two year-olds disposable if daddy happens to be a terrorist? This is military convenience, not necessity, and the convenience is merely arguable, not demonstrable. The administrations arguments are such that one might argue the attacks on the WTC and Pentagon were legitimate.

We've heard the administration go on and on about "illegal combatants". Is a CIA civilian sitting at a video console "carrying arms openly and wearing a fixed sign visible at a distance"? Is remote control assassination on suspicion a valid military tactic?

We don't have enough evidence to draw hard conclusions here: the field reports, mission logs, rules of engagement, etc, will have to be investigated. The issues are inherently fuzzy, but I'll ask for the special prosecutor look into the matter. I think this issue is very important, because there are some other implications that extend to the administration's new national security policy.

If just the probability of killing an enemy warrants making an attack with a certainty of killing civilians, where do we draw the line? If eliminating the terrorists justifies killing civilians as an unfortunate necessity, then obviously, the logical strategy is to exterminate the entire population so we can be absolutely certain we get all the bad guys. Underneath all the rhetoric, it's the exact logic of the final solution, but with a chilling difference.

The original targeted something real: the Jews. Cunning brutality, pure and simple.

What's the Bush administration targeting? Terror. Anyone who threatens us. In short— anything we fear. That's not sound reasoning, it's paranoid dementia.

They're justifying the treatment of the prisoners by arguing they have to take extraordinary measures. Do they suppose that the president has the authority to order the that the families of al-Qaeda fugitives be roasted alive and served for dinner in order to persuade al-Qaeda give it up? Surely not, but that might have a plausible chance to work— and what exactly is their criteria anyway?

Whatever it is, it's difficult to believe it's objective.

PLAN OF CIVIL ACTION

So that's the case. The next problem is how to bring it.

This is basically a criminal case, but in US law only public officials can file a complaint. A citizen can only report a crime, or if the situation requires, make a citizen's arrest.

However, a civil suit is very flexible: the only real requirements are that there must be some actual dispute between two parties, and the dispute has to be something subject to relief within the courts jurisdiction.

But there's a problem here: there is well established precedent that makes it almost impossible for a citizen to seek relief for some complaint against the government that affects all citizens equally. You can sue if the government does something like busting down your door because they lost the warrant and couldn't remember the right address, but you can't sue because you think attacking Iraq endangers world peace.

Your own interests have to be at stake, not the interests of all citizens, which are viewed as a political matter. It's a complicated area, but there are some types of cases that have been allowed as exceptions, notably some environmental ones.

Yet this situation is extremely exceptional. Grave crimes are being committed by the highest officials of the government. Unlike Watergate, where a few felons acted on behalf of a few officials who then staged a cover-up, here we have the entire military and law enforcement apparatus of the US government being used to commit the crimes as a matter of official US policy. The administration isn't exercising discretion within the limits of their authority here, they're flaunting the law.

Further, the political situation of the Congress is so balanced and polarized that they're not really paying attention, especially as we're at war, when everyone tends to jump on the band wagon for the sake of national unity— exactly the case here. Further, there's a well known tendency in our society to view foreign treaties with a certain degree of contempt; both as a cultural prejudice, and as an expedient view when it suits some political purpose.

The crimes in view here are crimes against humanity which jeopardize the integrity of a treaty that serves to protect our own armed forces. Under the principles of the Nuremberg Charter, these crimes also compromise US sovereignty.

One does not wage war on prisoners. A prison camp is not a battlefield, and neither is the world: a battlefield is a specific locale where a military engagement is in progress.

Most importantly, the issue here is the government willfully and systematically violating laws they are sworn to enforce, and using our military and law enforcement agencies as the means to commit war crimes, which is a direct attack on the integrity of the law and the constitution. As citizens, we have a right to expect that the administration will execute the laws faithfully. When they abuse that trust by committing crimes on the scale seen here, the fundamental constitutional duties of the courts warrants the fullest deference to any and all reasonable actions for whatever relief is required to defend the rule of law.

Government properly has wide latitude with respect to criminal prosecutions. They have discretion as to what specific charges to bring, and they also have discretion not to prosecute a crime at all. The guiding principle is that they should act in the best interests of justice.

In this case, there's a clear conflict of interest— they're exercising prosecutorial discretion over their own criminal acts. The laws in view here apply only in time of war, and they are explicitly intended to regulate the actions of the military and the government.

So here I am: a citizen with a sincere and certain belief that grave crimes are being committed by the government of the United States. The crimes are obvious, and on the plain facts there's enough evidence to move for a directed verdict. The crimes are being committed in plain sight as official policy, and there is good reason to believe that no valid constitutional mandate exists.

I assert that the laws of the United States are enforceable in the courts of the United States, and that in circumstances where they are being violated by the very officials whose duty it is to enforce them, the most exceptional measures are warranted to insure the integrity of justice.

No deference is due to an overtly criminal act which is explicitly covered in all its elements by statute. In virtually every historical case the administration cites, the results show that there was no tangible need for the exception, and very often what prompted the exception was some type of malfeasance or panic: in Quirin, the government presented false evidence and tampered with the court.

So I'll present the case, noting that both the courts and the administration have a duty to enforce the law impartially, and, intending no disrespect, to obey their oaths. I will then call on the government to appoint a special prosecutor and convene a special grand jury. This is the relief I seek.

Since the special prosecutor statute has expired, the authority to appoint a special prosecutor falls to the Attorney General under DOJ policy. Since he is one of the principal accused, he will have to recuse himself; and under the circumstances, I will argue that any negative decision from any other DOJ official must be presumed tainted. Hence, I'll ask the court to either order the government to appoint a prosecutor, or appoint one on the court's own authority to appoint officers to serve the interests of justice.

If that doesn't work, my last resort is to ask them to deputize me for the purpose of filing a criminal complaint myself.

I'll make it clear I have no intent to cause disruption, and that I am prepared to believe the government may actually cooperate with a prosecution voluntarily and let justice take its course. I will also point out that any US judge or law enforcement official who reads my case and finds it credible has a positive duty to act in accordance with their oath and enforce the law.

That point is a possible road to victory all by itself: tell them the truth, and they might just do their job. I won't be holding my breath, but Judge Doumar (presiding in Hamdi) has demonstrated that there's some hope here. We have some really outstanding people on the federal bench, and I think most of them try to live up to the office, despite being a very mixed bag as to legal competence and politics.

That's the gist of it. The worst case is that I get dismissed without a hearing: then the only way to proceed will be an appeal, and I'll need help to have any real chance.

If I do get a hearing, then I figure I can call on the human rights organizations to join the case, but even if they turn me down, it's possible that I could argue the merits on my own and win, simply because the case is so strong. If that happens, the government will appeal, but I have to believe the rights organizations would step up at that point, and if not, maybe somebody else will.

Charles Gittings
Oakland, California

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