

Bush War: Military Necessity or War Crimes?

By Jennifer Van Bergen & Charles B. Gittings Jr.¹

GITMO

A reporter visits Guantanamo Bay and asks a guard about the sign at the front gate of the prison camp. The sign says: "Honor bound – to defend freedom."

The reporter asks "Isn't that a little strange, a slogan about freedom on the gate of a prison camp?"

The guard replies "Doesn't seem strange to me – does it seem strange to you?"²

This exchange appeared in a New York Times Magazine story. One can't help but wonder if either of these persons are aware that over the front gate at the Auschwitz concentration camp the Nazis had a sign that said "Work makes one free."

An Air Force Colonel who has been given the job of chief defense counsel for military commissions at Guantanamo talks to Reuters and says that some of the rules formulated for these commissions would be different if he was making the rules. As reported by Reuters:

"If I were the person who had designed this system, I would have designed it differently," [USAF Col. Will] Gunn said.

Gunn singled out language permitting the Defense Department to monitor any conversations or communications between defense lawyers and defendants, which some critics have called a breach of customary attorney-client privilege.

"For instance, I would make it clear that no conversation between the defense counsel and a client can be monitored unless the government had a particularized reason for doing so ... a reason that can be clearly articulated," Gunn said.

Gunn said the appeals process would be different if he had designed it. The rules do not allow for an independent judicial review of convictions or sentences. Appeals go to a military panel appointed by the Pentagon, and final review of convictions or sentences is made by Bush himself.

Gunn said the traditional U.S. military justice system allows for some appeals to be heard by a civilian court.

"The most serious cases with the most severe sanctions can be reviewed by civilians," Gunn said.³

As it stands, the President has claimed the authority to invade any country he pleases, determine who is an enemy combatant, whether or not they can be detained indefinitely, whether they are to be tried before a commission (or not at all), what the rules for such commissions should be, and whether or not the results of such a trial are fair and just – solely at his own discretion.

One wonders if any of these people have ever read the Federalist, where Madison says:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."⁴

And whenever anyone dares to question the Bush Administration's actions – many of which these authors believe are violations of the Geneva Conventions and other treaties, and some of which are war crimes subject to capital punishment under U.S. law – the Administration always insists that it is following Geneva, except to the extent that "military necessity" requires otherwise.

The President has claimed that the invasion of Iraq was a military necessity and we now know it was founded on forged documents.⁵ The President has claimed that the detention of persons at Guantanamo is "appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949." He has declared that the establishment of Military Tribunals in this country, even while the civil courts are open and fully functioning, is "necessary to meet the emergency."⁶

The authors thus ask the question: is Bush complying with international law, and specifically with the Geneva Conventions? Or is he violating them? If government officials, including Bush and Rumsfeld, are violating Geneva, are they thereby committing war crimes? Or does military necessity dictate – and justify – their course? What do the Geneva Conventions require of the Administration? What is military necessity and what determines it?

GENEVA

The United States Constitution expressly incorporates international treaties as "the supreme law of the land." Article 6 of the United States Constitution states: The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

All executive and judicial officers and members of Congress are bound by oath to support the Constitution, including Article 6. The term "treaties" includes those signed by the President and ratified by the Senate, as well as those not ratified or simply part of "customary international law" – meaning those principles which are recognized by most nations.⁷ The Geneva and Hague Conventions were signed and ratified by the United States in 1956. They have a long history. They were developed through many wars, starting in 1864. The present version arose out of the depredations of World War II. As the Geneva Convention requires, the United States codified their enforcement in the U.S. Code.⁸

Geneva forbids "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." It is

forbidden under the Hague Convention "to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party."⁹ Think about what Bush has done by detaining combatants at Guantanamo for over a year without trial " or by taking persons out of civil courts and throwing them in military brigades for eventual trial before military tribunals " tribunals that do not have judicial guarantees that meet basic Constitutional or international human rights standards. Think about the lack of judicial guarantees, the lack of access to a jury of peers, of basic rules of evidence (that disallow hearsay, for example), the right to confidential communications with and zealous representation by an attorney, and the right to appeal to an independent judicial body. The Bush Military Tribunals fail to guarantee any of these protections.

In fact, the Geneva Convention not only requires due process by regularly constituted courts, but requires that every captured person "whose status is in doubt" have his status determined by a competent tribunal. The official Geneva Commentary states that "[t]his amendment was based on the view that decisions which might have the gravest consequences should not be left to a single person " The matter should be taken to court." Because combatants might be subject to capital punishment, a further amendment was made, "stipulating that a decision regarding persons whose status was in doubt would be taken by a "competent tribunal," and not specifically a military tribunal."¹⁰ A unilateral determination by the President that captives are "unlawful enemy combatants" does NOT meet the requirements of the Geneva Convention. It is rumored that some detainees have already been deported to other countries. (Some rumors have it that these persons were deported to countries that use harsher interrogation methods than we do.) The 1945 Charter of the International Military Tribunal forbids the deportation (not to mention the ill-treatment or murder) of "civilian population of or in occupied territory" for "any " purpose."¹¹ Geneva forbids the "unlawful deportation or transfer or unlawful confinement of a protected person " or willfully depriving a protected person of the rights of fair and regular trial."¹² Geneva defines protected persons as those "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."¹³ While Geneva makes rules for how combatants and civilians are to be treated, it also makes rules that apply to the nation who captures them " and to those that violate the treaty. The Geneva Conventions "were the first treaties to require States to prosecute violators, regardless of their nationality or the place where the offence is committed." Furthermore, under Geneva, "States must not only respect but "ensure respect" for [international humanitarian] law."¹⁴ The 1929 Geneva Convention abolished the provision that the Convention is binding only if all the belligerents are bound by it. In other words, Geneva is binding on all.

Finally, Geneva is applicable in all circumstances. This means that "no Power bound by the Convention can offer any valid pretext, legal or other, for not respecting the Convention in all its parts." Whether the war is just or unjust, a war of aggression or of resistance to aggression, all parties are bound, not merely to take the necessary legislative action to prevent or repress violations, but to search for, and prosecute, guilty parties. No signatory can evade this responsibility.¹⁵ The Bush Administration is denying terrorist suspects hearings by a competent tribunal on their status, and is disobeying the intent of the conventions that combatants should be classified as POW's until such a hearing finds otherwise. The legal processes that will be used in the military tribunals violate both the Conventions and any rational concept of justice; they presume guilt, lack independent counsel, and lack appeal to

independent competent authority. These are all deeply troubling flaws that cannot be ignored. Any one of those things by itself would be a war crime. Taken together, they are an outrage against humanity.

The United States enacted section 2441 of Title 18 of the United States Code to enforce Geneva. Section 2441 states that "Whoever, whether inside or outside the United States, commits a war crime " shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death." ¹⁶ In its pertinent part, subsection (c) defines a war crime as:

- (1) a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
- (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party." ¹⁷ Clearly, the Bush Administration is flagrantly violating Geneva, and in doing so, it is violating the United States Constitution, international humanitarian law, and domestic federal law.

How can Bush get away with this? Military necessity.

MILITARY NECESSITY

As we have shown, the Bush Administration is violating Geneva, and in doing so, it is violating the United States Constitution, international law, and federal domestic law. The President and his officials get away with this by claiming "military necessity." The determination of military necessity shifts the balance on most prohibitions. The Third Geneva Convention forbids:

Wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.¹⁸

The Hague Convention prohibits destruction or seizure of "the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."¹⁹

"Military necessity" is a term that has been thrown around quite a bit by this Administration. What is it?

According to one scholar:

Military necessity was first stated as a legal principle in General Orders No. 100, a codification of the law of war drafted by Francis Lieber and issued by President Lincoln in 1863. Controversial from the beginning, the principle was nevertheless intended as a new restraint on military discretion, as Lincoln's application of it during the Civil War demonstrates. Military necessity remains an important restraint on military operations in new situations for which specific rules have yet to be established.²⁰

Lieber wrote that "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."²¹

Lieber's language is reflected in the Commentary to the 1977 Protocol Additional to the Geneva Conventions, which states that military necessity "means the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war."²²

The concept of military necessity comes from the idea of "just war," which is based on the idea of a human society with norms and morals that transcend national boundaries and apply to all humanity. According to the 16th century Dutch jurist, Hugo Grotius, war is just if:

- (1) the danger faced by the nation is immediate,
- (2) the force used is necessary to adequately defend the nation's interests, and
- (3) the use of force is proportionate to the threatened danger.²³

According to one commentator, there are three constraints on the free exercise of military necessity:

First, any attack must be intended and tend toward the military defeat of the enemy; attacks not so intended cannot be justified by military necessity because they would have no military purpose. Second, even an attack aimed at the military weakening of the enemy must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated. Third, military necessity cannot justify violation of the other rules of IHL [International Humanitarian law].²⁴

"[T]he principle of necessity specifies that a military operation is forbidden if there is some alternative operation that causes less destruction but has the same probability of producing a successful military result."²⁵

THE TRUTH ABOUT BUSH'S WARS

The question must be asked, then: is the Bush Administration following Geneva, except to the extent that "military necessity" requires otherwise?

Clearly not. Military necessity cannot justify violations of international humanitarian law, which include those provisions in the Geneva and Hague Conventions relating to

status determination of captives, the right to a fair hearing, legal representation, and full due process. Military necessity does not justify indefinite detention of suspects without charge. It does not justify violation of the United States Constitution. Nor can military necessity sanction the violation of federal criminal law.

And, where is the necessity in committing an act that is explicitly prohibited by law? (Remember 18 U.S.C. 2441 explicitly prohibits violation of Geneva and Hague and requires the United States to prosecute violators. This means that not only is every official who violates 2441 guilty of a war crime, but every federal prosecutor in this country who does not prosecute them is failing his or her duty.)

What about protecting our freedoms could possibly justify preventing our laws from being enforced? And since when does "necessity" entail doing anything that someone happens to think is a good idea without the least regard for any civilized standard of conduct?

A real necessity is obvious. When we launched the D-Day invasion we knew that there were French civilians living in the beachhead area who would very likely be injured or killed, but we also knew that warning them of the invasion would seriously jeopardize the chance of it's success. That is an example of a real military necessity: a specific instance where the specific circumstances require a specific method.

It is not necessity to simply do whatever you think might possibly give you some tactical advantage or leverage. If we were to capture some of Osama Bin Laden's children, we might be able to exert some pressure on him by roasting them one by one over an open fire, but there wouldn't be anything necessary about it – it would simply be another atrocity committed by an administration that has not the least understanding of necessity because they are lost in hysteria, greed, and the self-serving conviction of their own infallibility.

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² Ted Conover, "In the Land of Guantanamo," New York Times, 6/29/03

³ Will Dunham, "Key Lawyer Differs on U.S. Terrorism Trial Rules," Reuters, 6/28/03

⁴ James Madison, The Federalist Papers, #47

⁵ See: http://www.statesman.com/news/content/coxnet/iraq/ap_story.html/Intl/AP.V42

⁶ See the Military Tribunal Order, and the White House Fact Sheet on the Status of Detainees at Guantanamo.

⁷ See Paquete Habana, 175 U.S. 677 (1900) and U.S. v. Belmont, 301 U.S. 324 (1934).

⁸ 18 U.S. Code, section 2441.

⁹ Geneva Common Article 3(1)(d); Hague IV Annex (HR) Article 23.

- ¹⁰ International Committee of the Red Cross (ICRC) (Jean S. Pictet, ed.), *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977 (hereafter "Geneva Commentary"), vol. 3, pp. 75-76.
- ¹¹ IMT Charter (London 1945).
- ¹² Hague IV Annex (HR) Art. 23-28.
- ¹³ Fourth Geneva Convention (Civilians) Article 4. Other definitions specifically include POW's. See Pietro Verri, *Dictionary of the International Law of Armed Conflict*, (ICRC, 1992).
- ¹⁴ Both quotes from: ICRC, *Punishing Violations of International Humanitarian Law at the National Level: A Guide for Common Law States* (2001), pp. 9-10 (emphasis in the original).
- ¹⁵ All information in this paragraph is from: ICRC, *Geneva Commentary*, vol. 3, p. 27.
- ¹⁶ See footnote 12 for link. This statute applies only to violations against U.S. citizens. See footnote 7 for the link to the Hague Convention articles.
- ¹⁷ <http://www4.law.cornell.edu/uscode/18/2441.html>. The clause ends with "and which deals with non-international armed conflict." Thus, clause (1) and (2) apply to international conflicts, and clause (3) applies to non-international ones. The meaning of this is that there is no "sovereign immunity" for officials who commit war crimes against domestic rebels, criminals, or untermenschen. (Sub clause (4) relates to any person who willfully kills or causes serious injury to civilians under the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.)
- ¹⁸ Third Geneva Convention Article 130. The spelling is so in the original.
- ¹⁹ Hague IV Annex (HR) Article 23.
- ²⁰ Burrus M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity," 92 *American Journal of Int'l Law*, Vol. 92 (No. 2), p. 213 (April 1998).
- ²¹ www.commonlaw.com/Lieber.html.
- ²² ICRC, *Geneva Commentary*, pp. 681-82.
- ²³ See Rebecca Grant, "In Search of Lawful Targets," *Air Force Magazine* (February 2003).
- ²⁴ Françoise Hampson, "Military Necessity," (From *Crimes of War Project - The Book*).
- ²⁵ Douglas P. Lackey, *The Ethics of War and Peace* (1989) p. 59, quoted in, Colonel J.G. Fleury, "Jus In Bello and Military Necessity," Department of National Defence (Canada), Advanced Military Studies Course ("This paper was written by a student attending the Canadian Forces College in fulfillment of one of the communication skills requirements of the Course of Studies. The paper is a scholastic document, and thus contains facts and opinions which the author alone considered appropriate and correct for the subject. It does not necessarily reflect the policy or the opinion of any agency, including the Government of Canada and the Canadian Department of National Defence.").

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