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Tuesday, February 17, 2009

Obama Administration must define 'enemy combatant' consistent with traditional laws of war

5:32 PM ET

Gabor Rona [International Legal Director, [Human Rights First](#)]: "For some rule-of-law fans the toasting is over and it's already the morning after. The new administration's **recent decision** to continue the Bush line that torture victims' claims should be dismissed in order to preserve unspecified "state secrets" was a shocker. But that's small change compared to what's on the horizon.

President Obama has issued executive orders establishing task forces to study how to close the Guantanamo detention camp and to reassess the legal frameworks for the future detention of unspecified classes of persons (terrorists? fighters? security risks?) at home and abroad. These orders create a 180-day window for deciding what kind of a country we want to be. Will we respect the limits of wartime detention authority contained in the Geneva Conventions and only imprison people under a constitutional rubric of criminal responsibility? Or will we falsely convince ourselves that we can detain a broad spectrum of individuals by simply maintaining an elastic definition of "**enemy combatant**" or by legislating a domestic administrative detention scheme for those whom it might seem inconvenient to prosecute?

But that 180-day clock is an illusion. In the meantime, litigation deadlines loom in Guantanamo habeas cases, in a challenge to detention in Afghanistan of individuals brought there from other countries, and in a U.S. Supreme Court case dealing with the power of the president to imprison a lawful U.S. resident as an "enemy combatant." All these cases require the Obama administration to lay its visions of detention authority on the line tout de suite. At the heart of the debate is the fate of the "enemy combatant" - not merely the persons designated as such, but the concept, which perverts fundamental principles of the laws of war.

"Enemy combatant" as a trigger for detention authority must be retired. It was born of a misguided, reverse-logic assumption that anyone with potential intelligence value should be detainable, and therefore, should be designated a "combatant" in order to justify the detention. (Thus, the


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Bush administration's now famous response to a hypothetical put to it back in 2004 by Judge Green in the "In Re: Guantanamo" cases: Yes, it's permissible to lock up a little old lady in Switzerland who innocently writes a check to a charity that, unbeknownst to her, turns out to be a front for al Qaeda). A related problem is the false assumption that any "terrorist" is an enemy combatant and that any non-state participant in hostilities against the United States is a terrorist.

The question of who may be detained should not be tied in domestic law to the term "combatant." In the laws of war, a combatant is an individual who is privileged to participate in hostilities and is therefore, always targetable and always detainable without criminal charge. Civilians who directly participate in hostilities without a legal privilege to do so may also be targeted and may also be detained without charge under applicable domestic law, but they do not thereby become "combatants." They remain civilians. This much is clear from the distinction between who is a POW, protected by the **Third Geneva Convention** (members of the armed forces and associated militia) and who is a civilian protected by the **Fourth Geneva Convention** (pretty much any enemy national who is not a POW). Indeed, the Fourth Geneva Convention is clear that it covers individuals who engage in hostilities by: a) not excluding them from the definition of protected persons, and b) permitting the detaining authorities to withhold certain rights of the Fourth Convention to detainees who "engage in activities hostile to the security of the state." In short, a combatant is a combatant and a civilian is a civilian and never the twain shall meet. To expand the class of persons designated by domestic law and practice as "combatants" beyond this long-understood limitation in international law is a recipe for confusion, at least, and disaster, at most. Conflating the distinction between civilians and combatants - the most fundamental principle in the laws of war - places both civilians and combatants at unwarranted risk and thus, undermines the single most significant purpose served by laws of war: the protection of the civilian population.

The laws-of-war concept of "combatancy" as a talisman for detention authority is also underinclusive. It unduly constrains the scope of who may be detained. Under the international laws of war applicable to international armed conflict (wars between states), namely, the Third and Fourth Geneva Conventions and **Additional Protocol I to the Geneva Conventions**, civilians who pose a serious security threat, as well as combatants, are detainable. Since international law provides stand-alone detention authority in wars between states, there is no need in such cases for domestic law to authorize detention, let alone to pervert the definition of combatant in order to include civilians.

Some experts have proposed limiting detention authority to persons deemed to be "directly participating in hostilities," which is the criteria for targeting in armed conflict. In international armed conflict, this would constrain the detention authority that the Fourth Geneva Convention provides, since "direct participation in hostilities" is narrower than "serious threat to security." I guess a state could do that but why would it want to? Indeed, the proponents of a "direct participation in hostilities" standard for detention are probably not even thinking of wars between

states. They are thinking of non-international armed conflict, that is, wars between states and non-state armed groups. In these conflicts, unlike the case of international law applicable to international armed conflicts, detention authority does not exist in the applicable instruments of the international laws of war, namely, **Common Article 3 of the Geneva Conventions** and **Additional Protocol II to the Geneva Conventions**. The drafters of the Geneva Conventions assumed that detention authority in such conflicts would be supplied by domestic law. This is no accident of omission. Since non-state actors in non-international armed conflict possess no privilege of belligerency, their hostile conduct is per se criminal, and so, it is correctly assumed that domestic law is the proper legal framework for their detention, and if warranted, their prosecution.

As concerns potential detention within the United States, the substance and the territorial reach of criminal law has robustly responded to 9/11, making the need for additional detention authority questionable. As concerns future U.S. detention operations abroad, they may fall within the ambit of the Third or Fourth Geneva Conventions provisions applicable in international armed conflict, including in situations of occupation. In such cases, no extraneous detention authority is needed.

In other situations, be they non-international armed conflict or non-armed conflict, U.S. detention operations abroad must be seen as proxy detentions on behalf of the host state, whose domestic law must provide the basis for detention. This domestic law might be no more than a Memorandum of Understanding between the U.S. and the host state, if such a procedure satisfies domestic legal requirements. For example, the U.S. and Iraq are now moving toward compliance with this requirement per the terms of a new Status of Forces Agreement, by which the U.S. is to gradually turn its many thousands of detainees over to Iraqi authorities, operating under Iraqi law. The remaining caveat in such situations is that the law defining the scope of detention authority and the process due the detainee must comport with international human rights rules that guard against arbitrary detention. In non-international armed conflict battlefield situations, domestic authorities might wish to detain non-fighters as well as fighters. They may wish to do so pursuant to criminal prosecution or an administrative detention scheme. But in any case, the concept of "combatant" has no place in such detentions.

In short, any definition of enemy combatant that is broader than the meaning of that term under the laws of war is confusing and dangerous. Further, any definition that is broader than the combination of combatant and detainable civilian in the context of international armed conflict is an overreaction to a threat that is containable through application of traditional law-of-war, human rights and domestic legal frameworks. It is inconsistent with the understanding and application by all western democracies of long-standing principles and rules of international human rights and humanitarian law. It represents acquiescence in the proposition that, henceforth, the United States is always and everywhere at war and heralds a seismic shift in the meaning of liberty in America.

It is true that the Geneva Conventions did not foresee al Qaeda. But it

does not follow that they, along with other complementary international legal frameworks, are inadequate to the task of dealing with 21st century conflicts and terrorist groups. For these reasons, detention authority should be tied not to a purpose-built definition of enemy combatant that is at odds with the meaning of that term in the laws of war, but rather, should be determined by application of traditional international laws-of-war and human rights constructs."

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