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Tuesday, September 25, 2007

Military commissions review court misconstruing 'unlawful combatant'

8:50 PM ET

Gabor Rona [International Legal Director, [Human Rights First](#)]: "The U.S. Court of Military Commission Review (CMCR) has issued a **decision** overturning the dismissal of **prosecution against Omar Khadr** by a military commission. The case was dismissed because although Khadr was found by a Combatant Status Review Tribunal to be an "enemy combatant," there was no finding, as is required for military commission jurisdiction, that he was an "unlawful enemy combatant." The CMCR decided that 1) the distinction between "enemy combatant" and "unlawful enemy combatant" is significant for purposes of establishing military commission jurisdiction under the Military Commissions Act of 2006 (MCA), and 2) the military commission, itself, has the power to determine that someone is an "unlawful enemy combatant." But these conclusions are insignificant in comparison to the consequence of assumptions made by the Court about the concept of "unlawful combatant."

The Decision begins by addressing the distinction between what it calls "lawful" and "unlawful" combatants, terms that do not exist in the laws of war. What the Court is, in fact, addressing is the distinction between privileged and unprivileged belligerents. There's a big difference between these concepts. The Court correctly notes that unprivileged belligerents are denied prisoner of war (PoW) status in international armed conflict. The Court is on less solid ground when it says that acts of unprivileged belligerency are violations of the laws of war. The Decision wrongly asserts that the Third Geneva Convention "sought carefully to define 'lawful combatant' for all signatory nations." The Third and Fourth Conventions merely establish that privileged belligerents are entitled to PoW status and treatment, whereas others (such as unprivileged belligerents and civilians who take no part in hostilities) are not. Nowhere in the Geneva Conventions is there mention of the illegality, let alone criminality, of unprivileged belligerency.

This does not mean that unprivileged belligerents can never be prosecuted for acts which render their belligerency unprivileged. It does

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mean that the crime of unprivileged belligerency must first be established in the domestic law. To hold otherwise is to violate the principle of legality (i.e., that people should only be prosecuted for conduct that is established as prohibited by law).

In the case of Omar Khadr, a charge of "murder in violation of the law of war" would, of course, require proof that the killing was in violation of the law of war. Thus, while unprivileged belligerents (known in 'MCA-speak' as unlawful enemy combatants) may fall within the jurisdiction of a military commission, they are not, ipso facto, criminally liable there under for acts of unprivileged belligerency, unless those acts also constitute violations of the laws of war enumerated as crimes in the MCA. Killing of a combatant by an unprivileged belligerent is not a listed crime in the MCA and is not "murder in violation of the law of war."

Even assuming that the MCA establishes that killing by an unprivileged belligerent is murder in violation of the law of war (which it does not), it is a violation of the prohibition against ex post facto prosecution to try Omar Khadr on such a charge, since the MCA post-dates his acts that are alleged to be criminal under the MCA.

Those who hold opposing views will bring up the *Quirin* case (as did the CMCR) for the proposition that "unlawful combatants . . . are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. 1, 31. But *Quirin* does not involve "mere" acts of unprivileged belligerency. It involves acts of belligerency that were unlawful not because the accused were unprivileged – in fact they were members of the opposing armed forces in an international armed conflict. You can't get more privileged than that. The very next sentence after the one cited above is this: "The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." (Citations omitted) 317 U.S. 1, 31. The propriety of criminal charges in *Quirin*, unlike in *Khadr*, is based on the nature of the act, not on the status of the accused. In other respects, the *Quirin* case was not about the criminality of the accused's conduct. Rather, it was about the scope of executive authority to establish military commissions.

News reports rightly proclaim a victory for the government. But there may be a long way to go before *Khadr's* and other MC cases are final, even if this CMCR decision is not appealable to the D.C. Circuit (as provided by the MCA for convictions by military commissions) and even if the Supreme Court does buy the government's argument that it should not take cognizance of claims involving military commissions in the context of habeas claims, at least until after a trial and conviction."

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Regardless of whether Quirin should be considered a "good" interpretation of the law of war, the fact remains that the Court was reviewing the propriety of three distinct charges. Espionage was one, but so was a "general" violation of the law of war. When this is considered in connection with the language cited by Mr. Gabor in his comment - indicating that the Court concluded that "coming through the lines" without uniform FOR THE PURPOSE of waging war was a violation of the law of war, it seems to contradict Mr. Gabor's conclusion. The Court upheld the legitimacy of the charge alleging "violation of the law of war", and noted that merely acting with the purpose to operate as a warrior while not wearing a uniform was considered a violation of the law of war.

In my opinion, the much more troubling aspect of the charge at issue is that the United States and the reviewing court have both relied on an offense derived from the law applicable to international armed conflict (where it is at least possible to be a "lawful" enemy combatant) and grafted onto what has been treated by the U.S. as a non-international armed conflict (where it is never possible to be a "lawful" enemy combatant). Such an extension of the Quirin precedent is both illogical and invalid as a violation of the nulle crimen principle Mr. Gabor cites.

September 27, 2007

It is not a complete falsehood to say that the term "unlawful combatant" is unknown to international law. However, international law does indeed have a term for such a person, "*franc-tireur*" Also, it is indeed a war crime to fight without being a combatant. A tribunal at Nuremberg confirmed a rule under the laws and customs of war to the effect that it is unlawful for someone without the combatant's privilege to engage in combat. "We think the rule is established," wrote U.S. Military Tribunal V "that a civilian who aids, abets, or participates in fighting is liable to punishment as a war criminal under the laws of war." U.S. v. List (reprinted in 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10; 1230, 1246 (U.S. Military Tribunal V, 1948)). The Tribunal recites the Hague Regs on who, in effect, can lawfully fight (id.), and eventually finds, "[i]t is clear from the record . . . that the guerrillas participating in the incidents shown by the evidence were not entitled to be classed as lawful belligerents within the rule hereinbefore announced. We agree, therefore, with the contention of the defendant List that the guerrilla fighters with which he contended were not lawful belligerents entitling them to prisoner of war status upon capture. We are obliged to hold that such guerrillas were *francs-tireurs* who, upon capture, could be subjected to the death penalty." (Id. at 1269.) The tribunal found no criminal responsibility on his part for execution of partisans in southeast Europe.

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