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Washington, D.C. 20530

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MEMORANDUM FOR DICK THORNBURGH
Attorney General

Extension of Prisoner of War Treatment to Defendants Noriega and Del Cid Under the Geneva Convention

In the pending criminal proceedings in the Southern District of Florida, defendants Noriega and Del Cid have each filed motions to dismiss contending, inter alia, that the court lacks jurisdiction to try them because they are "prisoners of war" under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, TIAS No. 3364 ("Geneva Convention"), to which both the United States and Panama are parties. Defendants' motions raise two principal issues: (1) whether defendants are, as a matter of law, entitled to prisoner of war status under the Geneva Convention; and (2) whether the Geneva Convention precludes their prosecution in federal district court for crimes allegedly committed prior to the initiation of hostilities in Panama on December 20, 1989.[1]

Both the Department of State and the Department of Defense believe that the United States should, as a matter of policy, extend the basic protections of the Geneva Convention to Noriega and Del Cid, because our failure to do so could have adverse repercussions in the international community, and could undermine the United States' traditional position that the protections of the Geneva Convention should be liberally applied to all members of a nation's regular armed forces (including our own military personnel) taken by an enemy in the course of armed hostilities.[2] We believe that this is also the better view of

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[1] Defendant Del Cid also argues that his arrest was illegal because the Posse Comitatus Act, 18 U.S.C. 1385, bars the military from making arrests. This argument is without merit because, inter alia, the Posse Comitatus Act does not apply overseas. In any event, even assuming that the Posse Comitatus Act was violated, this would not deprive the court of jurisdiction to try Del Cid.

[2] At the commencement of Operation Just Cause, the Department of State, the Department of Defense, and the Joint

(continued...)

the Geneva Convention as a matter of construction. Although arguments could be made that defendants Noriega and Del Cid are technically not entitled to prisoner of war status under the Geneva Convention as a matter of law, these arguments are problematic given the sweeping language of the Convention. Moreover, commentaries on the Geneva Convention confirm that it was intended to be liberally applied.

We have attached for your reference a letter from the State Department Legal Adviser confirming that Department's position that the Convention should, as a policy matter, be fully applied to all members of the Panamanian Defense Forces captured during Operation Just Cause. This letter is included as an exhibit to the Government's brief responding to the motions to dismiss filed by Noriega and Del Cid.

In the Government's brief, we argue that (1) it is unnecessary for the court to decide the legal applicability vel non of the Geneva Convention to defendants, because the United States has already decided to extend the basic protections of the Convention to them as a matter of policy; and (2) in any event, the Geneva Convention does not affect the court's jurisdiction to try them, or impair the court's ability to detain them in the United States pending trial.

It is clear that the Geneva Convention does not defeat the court's jurisdiction over the defendants, nor does it affect the court's power to detain defendants in the United States throughout the trial and the completion of any sentence that defendants might receive. One of the basic principles that animates the Geneva Convention is the principle of equivalency: that is, a detaining power must not treat prisoners of war charged with criminal offenses differently than it would treat members of its own armed forces charged with similar offenses. Since federal district courts exercise concurrent jurisdiction with military courts over offenses against the laws of the United States committed by U.S. military personnel, and it is clear that a U.S. military officer could be tried for offenses similar to those with which Noriega and Del Cid have been charged, the

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[2](...continued)
Chiefs of Staff determined, as a matter of policy, that all individuals captured during the hostilities would be provided the protections normally accorded to prisoners of war until their precise status could be determined. Subsequently, the same Departments determined that these protections should be provided to any members of the Panamanian Defense Forces who fell into U.S. hands until their final release and repatriation, even if they might not be entitled to these protections under the terms of the Geneva Convention.

Geneva Convention poses no barrier to the criminal proceedings in Florida.

In addition, consistent with the Geneva Convention, and in order to defuse any arguments that defendants are in being detained in violation of its provisions, we are currently taking steps to establish an administrative structure that satisfies the Convention's requirements. In accordance with Article 39, which requires that "each prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer," the Department of Defense is designating a liaison officer to oversee defendants' detention in coordination with representatives of the Bureau of Prisons. The International Committee of the Red Cross ("ICRC"), which frequently acts as a "protecting power" under the Geneva Convention, has already expressed an interest in visiting defendants and monitoring the conditions under which they are being held. If we accept the ICRC's overture (and all indications are that we will), the State Department believes that we will quell any legitimate concerns that may be voiced by members of the international community. From this point forward, if defendants raise any objections concerning their treatment or the conditions of their detention in federal district court, we will take the position that their complaints should properly be directed to the liaison officer. This should effectively permit the court to concentrate on moving the case to trial.

Although we do not anticipate any difficulties in this regard, it should be noted that, in addition to sundry provisions relating to food, clothing, and similar amenities, there are principally four articles in the Convention that defendants may raise in the near term in an effort to provoke controversy.

First, although Article 119 of the Geneva Convention expressly recognizes that "[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings and, if necessary, until the completion of the punishment," Article 103 provides that "confine[ment] while awaiting trial" shall "[i]n no circumstances . . . exceed three months." After three months of pretrial detention have elapsed, defendants may invoke Article 103 and contend that they must be released, or transferred to more comfortable quarters. State and Defense have indicated that there is support for the view that the three-month limitation on "confinement" in Article 103 only refers to the detention of a prisoner of war in disciplinary confinement before formal charges are brought. In any event, it is our view that defendants are not being "confined" as that term is used in Article 103, but are merely being "detained" consistent with Article 119, which clearly recognizes the authority of a detaining power to hold a prisoner of war pending the conclusion of criminal proceedings and the completion of any sentence that may be levied upon him.

Accordingly, we are confident that there is no basis in the Geneva Convention for an argument that defendants must or should be released pending trial.

Second, defense counsel may try to mount a collateral attack on the district court proceedings by invoking Article 132 of the Geneva Convention, which provides that the parties to a conflict may resolve disputes concerning alleged violations of the Convention by, inter alia, agreeing to the appointment of an "umpire." Any such contention would be unavailing for several reasons. By its terms, Article 132 does not require the United States to submit to any form of international mediation at the defendants' behest and, as indicated above, we have a strong argument that any complaints that defendants raise can be fully aired before the military liaison officer and the ICRC. Furthermore, in no event could Article 132 have any affect on the district court proceedings, because the only remedy provided for in that provision is that any violation of the Convention be "repress[ed] with the least possible delay."

Third, defendant Noriega has already complained that the public dissemination of his intake photograph and the Southern Command's erroneous report that 50 kilos of cocaine had been found in a house used by Noriega, were in violation of Article 13 of the Geneva Convention, which provides in part that "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." The Southern Command report concerning the cocaine discovery, while unfortunate, could not have constituted a violation of Article 13, because the report was released approximately ten days before Noriega was taken into U.S. custody. Even assuming that either or both of these actions could be construed as violations of Article 13, however, they do not affect the district court's jurisdiction, and the Geneva Convention does not specify a remedy for such violations other than the 'cease and desist' remedy found in Article 132.

Last, Article 60 of the Geneva Convention states that "[t]he Detaining Power shall grant all prisoners of war a monthly advance of pay" in an amount equivalent to between 8 and 75 Swiss francs, depending on rank. We are currently exploring arguments that this benefit does not apply to prisoners of war, such as Noriega, whose military employment has been terminated by their government. If a determination is made that either Noriega or

Del Cid is entitled to compensation under Article 60, however, the Department of Defense has advised us that they have set aside a fund for this purpose.

We have attached talking points addressed to the Geneva Convention issues.

William P. Barr
Assistant Attorney General
Office of Legal Counsel

Attachments

TALKING POINTS: EXTENSION OF PRISONER OF WAR TREATMENT TO DEFENDANTS NORIEGA AND DEL CID

1. The United States is a firm supporter of the Geneva Convention Relative to the Protection of Prisoners of War, as well as other treaties in force for the United States dealing with the laws of armed conflict. Early on in the military operation in Panama, the United States determined to extend the protections of the Geneva Convention to any members of the Panamanian Defense Forces who fell into U.S. hands even if, strictly speaking, they might not be entitled to these protections as a matter of law.

2. Consistent with its traditional position that the protections of the Geneva Convention should be extended to members of the regular armed forces of a foreign nation whenever armed hostilities occur, the Department of State and the Department of Defense have determined that, as a matter of policy, defendants Noriega and Del Cid should be treated as prisoners of war pending trial, and accorded the basic protections of the Convention.

3. In a letter to the Attorney General, the Legal Adviser to the State Department has stated that the Geneva Convention does not pose any barrier to defendants' trial in federal district court for the offenses with which they have been charged. The Convention specifically contemplates that prisoners of war may be tried in the civilian courts of a detaining power for offenses committed prior to capture, provided that members of the armed forces of the detaining power could be tried in civilian courts for such offenses. The Geneva Convention will not interfere with defendants' prosecution in this case, because it is clear that U.S. military officers could be tried in federal district court for offenses similar to the offenses with which Noriega and Del Cid have been charged.

4. It is also clear that the Geneva Convention expressly contemplates that defendants may be detained in the United States pending trial, and may complete any sentence that they might receive for offenses against our laws.

5. Most of the protections provided for in the Geneva Convention are already being afforded defendants by our criminal justice system. Consistent with the requirements of the Convention, we are appointing a liaison officer from the Department of Defense to oversee defendants' detention in conjunction with representatives of the Bureau of Prisons. In addition, we have taken, or will be taking, steps to see that defendants are provided with whatever other basic amenities the Convention affords prisoners of war who are similarly situated.

6. If asked whether, as alleged in Noriega's brief, the dissemination of his intake photograph and the erroneous press release concerning the discovery of cocaine in his house violated the Geneva Convention, respond:

We do not believe that either one of these actions constituted a violation of the Geneva Convention and, even assuming that they did, they clearly would not affect the district court's jurisdiction to try him. Furthermore, in our view, any complaints concerning such violations should properly be directed not to the district court, but to the military liaison officer whom we have appointed to ensure that defendants receive the benefits of the relevant protections of the Convention.

7. If asked about any other alleged violations of the Geneva Convention, respond:

We are unaware of any such violations of the Convention. However, if defendants have any complaints about the conditions of their detention, we would urge them to bring them to the attention of the military liaison officer in charge.

8. If asked why the liaison officer was designated only after defendants argued that they were entitled to be treated as prisoners of war under the Geneva Convention, respond:

Let me emphasize at the outset that the applicability of the Geneva Convention to defendants, from a legal point-of-view, is hardly a foregone conclusion. However, as I indicated earlier, the United States is a firm supporter of the Geneva Convention and, after a careful review of the situation, we have determined to ensure that the basic protections of the Convention are extended to defendants as a matter of policy. That said, it should be remembered that, for purposes of the Geneva Convention, we are not here dealing with ordinary prisoners of war, but individuals that have been charged with grave offenses against the laws of the United States who happen to have been taken into custody incident to armed hostilities.