

Defining the War on Terror and the Status of Detainees: Comments on the Presentation of Judge George Aldrich

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In his presentation, Judge Aldrich raises two legal questions of considerable interest: the status of detainees held by the US in connection with its 'war on terror', and the characterisation of the conflict.

1. The character of the 'conflicts' involving the Taleban and Al Qaeda

Judge Aldrich agrees with the White House that there are two separate armed conflicts:

One, between the US and its allies against the Taleban, the *de facto* government of Afghanistan, which took place on the territory of Afghanistan. This is an international armed conflict

Two, between the US and its allies against Al Qaeda, which is not confined to the territory of Afghanistan. Its status as 'international' or 'non-international' is not defined.

1.1. The conflict against Afghanistan

There is no doubt that there has been an armed conflict between the US and its allies against Afghanistan as understood by the 1949 Geneva Conventions and their 1977 Addi-

tional Protocols. Since it involves at least two States, clearly it is an international armed conflict, within the meaning of common Article 2 of the Geneva Conventions. Although the use of force in apparent self-defence by the US was a response to a terrorist attack on the United States by Al Qaeda, rather than to any act attributable to Afghanistan or for which Afghanistan was considered responsible, Afghanistan was attacked because it was considered to be harbouring and assisting Al Qaeda members and for its refusal to hand them over.

The international armed conflict began with the American strikes against Afghanistan. Even if, as the US President said, the attacks by Al Qaeda were a 'declaration of war', it seems to have been rhetorical rather than actual. One could accept that an international armed conflict began at that point only if one could show that Al Qaeda were acting on behalf of a State, which they were not generally considered

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to be, even if they were being supported by certain States. The US War Crimes Ambassador Pierre Prosper said that: "These aggressors initiated a war that under international law they have no legal right to wage." He added, "And their conduct, in intentionally targeting and killing civilians in a time of international armed conflict, constitute war crimes".¹ As a non-State, Al Qaeda is not legally competent to declare war on a State, so the attacks of September 11 could not have initiated an international armed conflict. Since their crimes in attacking the world trade centre and pentagon were not committed in the context of an armed conflict, they are not war crimes within the meaning of the Geneva Conventions. In fact, the acts can be legally characterised in several ways, as crimes against humanity, or as breaches of conventional law concerning terrorism. They could also be considered as acts of piracy.

Clearly, the attacks cannot be considered as committed in the context of an internal armed conflict. Whatever the attacks on the US on 11 September 2001 initiated, until the US used force against Afghanistan, it was neither an international nor an internal armed conflict. If it was a declaration of war, it is not a war contemplated by humanitarian law.

1.2. The conflict against Al Qaeda/the War on Terror

The 'conflict' between the US and Al Qaeda units in countries other than Afghanistan, that is, the so-called 'war on terror' is not *per se* an armed conflict within the meaning of the Geneva Conventions and their Additional Protocols. Most fundamentally, it is not a conflict between two or more States. On the one side there is the US and its allies and on the other side there is Al Qaeda, which Aldrich describes as "a clandestine organization with elements in many countries and composed apparently of people of various nationalities". Given that Al Qaeda seems to have no international legal status, and is simply composed of terrorists, criminals *hosti humanis*, who could be prosecuted by any State, but certainly by a State with a personal interest in the matter, such as the US; that for the most part they are not combatants, but simply civilian criminals; that they are mainly based in countries where there is no armed conflict, including the US itself; that they are not parties to the Geneva Conventions and Protocols, nor are they capable of becoming a party, it is impossible that any 'conflict' between that organisation, acting on its own behalf, and a State or coalition of States could be considered as an international armed conflict within the meaning of common Article 2 of the Geneva Conventions.

It is theoretically possible that some members of Al Qaeda could be considered as fighting for Afghanistan or as agents of the Taleban, and should then be considered as affiliated to Afghanistan's armed forces and as involved in an international armed conflict, although Aldrich states that no evidence of such involvement has been shown. More facts need to be made available regarding the relationship between the Taleban and Al Qaeda and whether Al Qaeda could be considered to be working as agents of the Taleban. Did they receive financial aid from the Taleban? To what extent were

their operations known to and directed by Kabul, etc.? Did the Taleban have overall or effective control of Al Qaeda operations?

Nor can the campaign against Al Qaeda *per se* be considered as an internal armed conflict, within the meaning of common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II. There might however be cases where the US and its allies become involved in what might be an internal armed conflict on the territory of another State, where, by invitation, it helps States fight armed rebels with suspected links to Al Qaeda.

In fact, the 'war on terror' is clearly not an armed conflict at all. It consists of a multi-faceted counter-terrorism campaign, some aspects of which involve the use of military force, most of it carried out in States where there is no armed conflict, although aspects of the counter-terrorism campaign assume the characteristics of armed conflict where the US attacks a State considered to be harbouring or assisting Al Qaeda, as it did in Afghanistan. In this case, it would be an international armed conflict against the attacked State, rather than Al Qaeda, since Al Qaeda is not a State. Otherwise, the so-called 'war on terror' which the US is waging against Al Qaeda does not satisfy the conditions of the Geneva Conventions to be considered as an armed conflict.

It is thus not clear on what legal basis either the White House or Judge Aldrich can claim that there is an armed conflict involving Al Qaeda.

2. Status of captured Taleban/Al Qaeda

According to the US, neither captured Taleban nor Al Qaeda are entitled to POW Status. While the Third Geneva Convention applies to the former, as the US recognises that there was an armed conflict involving two parties: it and Afghanistan, they have forfeited their protection by violating humanitarian law and associating themselves with Al Qaeda, and further, through their failure to comply with the conditions of combatancy set out in Article 4 of the Third Convention.² They are thus 'unlawful combatants'. The Third Geneva Convention does not apply to Al Qaeda, who are also considered 'unlawful combatants'. This executive decision to consider all detainees as unlawful combatants, with no legal rights but who will be treated humanely, is supposed to settle the matter. There has been no review of the status of individual detainees by competent tribunals of a kind contemplated by the Third Convention.

¹ Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Status and Treatment of Taliban and al-Qaida Detainees, Remarks at Chatham House, London, United Kingdom, 20 February 2002, <<http://www.state.gov/s/wci/rls/rm/2002/8491.htm>>, 23 October 2002.

² See White House Fact Sheet on Status of Detainees at Guatanamo Bay, 7 February 2002. Online at <<http://whitehouse.gov/news/releases/2002/02/20020207-13.html>>, 23 October 2002; US Department of Defense News Transcript, Secretary Rumsfeld Media Availability en Route to Camp X-Ray, 27 January 2002, <http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html>, 23 October 2002.

2.1. Status of Taleban detainees

The US position regarding the status of Taleban detainees is legally flawed and at variance with its own law.³ It has been contested by numerous international lawyers and the International Committee of the Red Cross.⁴ The Taleban are entitled to be considered as POWs. As Aldrich correctly asserts, as members of the armed forces, under Article 4(1) of the Third Convention they are entitled to presumptive POW status, as the four conditions of belligerency mentioned in Article 4(2) only applies to militias and volunteer corps that do not form part of the armed forces. No other reading of Article 4 is possible as it plainly states: "Prisoners of war, in the sense of the present Convention, are persons belonging to *one* of the following categories [...]". Even if Taleban soldiers allied or associated themselves with members of Al Qaeda, this would not suffice to deny them the status of prisoner of war.

The lack of recognition by the US of the Taleban as the legitimate government of Afghanistan cannot justify a refusal to consider the captured Taleban as members of the armed forces of Afghanistan. It would be ridiculous to assert that a State's armed forces do not exist or have no legitimacy because a government is not recognised. Clearly, the Taleban were the *de facto* government, and in fact, the US tacitly recognised this by directing its dialogue and requests at the Taleban government. Legally, the war involved the US and the State of Afghanistan, and the US engaged with that State's armed forces. If the State of Afghanistan did not have any official armed forces recognised as such by the US, it is hard to see how the US could then have engaged in an international armed conflict involving the State of Afghanistan. In fact, the US has recognised that it was involved in an international armed conflict against Afghanistan. Otherwise, one would have to characterise US involvement in the conflict in Afghanistan as interference in an internal armed conflict with the aim of shifting the balance of power to the Northern Alliance.⁵ If one were to regard Afghanistan as a failed State with no legitimate government and no army, one could imagine that the US involvement could be plausibly construed in this way, and the war as being some sort of 'internationalised' internal armed conflict. But this requires a wilful misreading of the actual situation.

In any event, the benefit of the doubt remains with the detainee who is entitled to POW status under Article 5 of the Third Convention until such time as his status is determined by a competent tribunal. The US is in clear breach of the Third Convention by presumptively denying POW status to captured Taleban and yet refusing to convene an impartial and independent Tribunal which can authoritatively determine their status. The burden is on the US to show that Taliban are not members of the lawful armed forces and not entitled to POW status, and to do so on a case-by-case basis.

As Judge Aldich observes, it is not entirely clear why the American are refusing to recognise the Taleban as POWs.⁶ One reason may be that, under Article 102 of the Third Convention, captured combatants have to be treated to the same

conditions of trial and sentencing as a State's own forces and this would make it illegal to try them before military commissions set up exclusively to try non-nationals. Moreover, under Article 103, prisoners of war should be tried as soon as possible. Once the conflict ends, POWs should be released unless they are being tried for a war crime or for other crimes committed in custody. The mere fact of having fought is not a triable crime. One can argue that the international armed conflict between the US and Afghanistan is now over. It seems that, while not wanting to consider the Taleban POWs, which it might have to release, US does not necessarily want to try them either. The government may try some of them before the military commissions it has established,⁷ but since the detainees are really being held as suspected terrorists or persons who might have useful intelligence information, it might not be easy to try them for war crimes. On the other hand, the government has indicated that even if persons were tried and acquitted, they would still not be released, but will be held indefinitely for interrogation purposes.

If the Taleban detainees have no legal rights and status under the Third Convention, neither do they, in its view, have any status or rights under US national law. In fact, the government seems to take the view that they are persons without any legal status and rights whatsoever.

In fact, if they are POWs they must be released at the end of the conflict or tried for a particular crime they are suspected of committing. If they are not POWs and have committed a crime under national or international law, they can be tried for it before US or other courts, or before an international court. Otherwise, they should be released. But legally, one way or the other, they cannot be detained indefinitely without trial. Human rights law applies to them, and in particular, they can invoke Articles 9 and 14 of the ICCPR and Article 7 and 8 of the American Convention.

It is worth noting the February 2002 decision of the district court of California in the United States, in which a petition for *habeas corpus* filed on behalf of prisoners in Guantanamo bay, was rejected on three grounds. The court found that the petitioners, lacking a sufficiently close relationship with the detainees, did not have standing to seek the remedy; the court found that it had no jurisdiction over the detainees as they

³ Including the US Army's Operational Law Handbook (2002) p. 22 and Department of Defense's Directive 5100.77 on the Law of War Program. See Murphy, S. D., "Contemporary Practice of the United States Relating to International Law", (1999) 93 American Journal of International Law 476.

⁴ ICRC Press Release on Geneva Convention on Prisoners of War, 9 February 2002.

⁵ This reading has been proposed by Fitzpatrick, J., "Jurisdiction of Military Commissions and the Ambiguous War on Terrorism", (2002) 96 American Journal of International Law 350.

⁶ See also Murphy, S.D., *Supra* note 3, 477.

⁷ By Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism of 13 November 2001, 66 Fed. Reg. 57, 833, 15 November 2001. The question of the legality of these commissions is outside the scope of this brief comment but has recently been the subject of an Agora in the American Journal of International Law. "Agora: Military Commissions", (2002) 96 American Journal of International Law 320-358.

were not present on US sovereign territory; no other court had jurisdiction, therefore the case could not be remitted.⁸

Relying on the earlier decision in *Johnson*,⁹ the court found that Guantanamo Bay is part of Cuba and not part of US sovereign territory. It is interesting to note, however, that the court, not distinguish between Al Qaeda and the Taliban, did not say that these detainees have not no status or no rights at all – simply not under US law – but in fact have rights under the third Geneva Convention to which the United States is a party. According to the Court, these people are combatants and should be given protection under the third Geneva Convention.

b. Status of Al Qaeda detainees

According to Aldrich, detained Al Qaeda members are clearly not entitled to POW status. They are illegal combatants and may therefore be prosecuted for their participation in any armed conflict and for any crime they committed in the process.

It may be the case that member of Al Qaeda are not entitled to POW status. However, the almost meaningless status of ‘illegal combatant’ should not be applied across the board to detainees who are members of Al Qaeda, if indeed it should be applied to any detainees. Instead, it is necessary to distinguish between members of Al Qaeda depending on the context in which they are captured.

Members of Al Qaeda who have been captured in Afghanistan and who were engaged in combat against US and allied forces may indeed be considered as ‘unlawful combatants’, or better, as civilians illegally engaged in an

armed conflict. Theoretically, some of them could be considered as belonging to the armed forces. It is also possible that members of Al Qaeda were members of militias or volunteer forces, and providing that they could prove that they had satisfied the four conditions of combatancy, in principle, could be entitled to POW status.

On the other hand, there might be members of Al Qaeda captured in Afghanistan who did not participate in the armed conflict and who were captured because of their membership of an illegal organisation. These persons should not be considered as unlawful combatants but should be regarded as terrorist suspects. If they are committed a common or an international crime, they may be prosecuted, but they cannot be held indefinitely without charge.

Likewise, members of Al Qaeda who have been captured outside the territory of Afghanistan, and with no connection to that armed conflict, should not be considered as ‘unlawful combatants’. Since they are not involved in armed conflict, as that is normally understood, they cannot be considered as combatants, unlawful or otherwise, and international humanitarian law does not apply. They are persons suspected of crimes under national and international law. Members of Al Qaeda captured outside of Afghanistan and with no connection to that conflict cannot therefore be charged with a war crime by a Military Commission or any court, since, as indicated, their campaign against the US and the West cannot be characterised as an armed conflict, and neither can America’s ‘war on terror’.

⁸ *Coalition of Clergy v. Bush*, No. CV 02-570 AHM (JTLX), 2002 WL 272428 at pp. 3-7 (C.D. Cal. Feb. 21, 2002).

⁹ *Johnson v. Eisentrager*, 339 US 763 (1950).