

The Taliban, al Qaeda, and the Determination of Illegal Combatants

George H. Aldrich*

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Last September 11, a small number of men who were members of a fanatical group known as "al Qaeda" carried out a suicidal armed attack upon the United States that resulted in very substantial material damage and the loss of life by some three thousand persons, the great majority of whom were civilians. In response, the United States and a number of allies have taken action to find, capture or kill as many members of that al Qaeda organization as possible and deprive it of funds, support and sanctuary.

As the leaders of al Qaeda and a large part of its membership and facilities were located within the territory of Afghanistan, the Taliban, who controlled all but a small part of Afghanistan and were, consequently, the effective government of Afghanistan, were requested to assist in this effort. The Taliban refused to do so and made clear that they would continue to give sanctuary to al Qaeda. As a result, the United States and its allies attacked the armed forces of the

Taliban, as well as those of al Qaeda, in the process killing and capturing a considerable number of soldiers belonging to both entities. As these persons were captured in the course of an international armed conflict, questions immediately arose as to their legal status and as to the protections to which they might be entitled pursuant to international humanitarian law, particularly as it was clear that at least some of them were bound to face criminal proceedings for terrorist acts and other crimes.

While these questions were most often phrased in terms of entitlement to the status of, or protection as, prisoners of war (POWs), the real issue was whether they were legal or illegal combatants. In other words, were they persons who had a legal right to take part in hostilities, or, to the contrary, were they persons who could be prosecuted and punished for

* Judge at the Iran-US Claims Tribunal.

murder and other crimes under national law simply for their participation in an armed conflict?¹

In February of this year, President Bush determined the position of the United States concerning at least some of these questions. In essence, as announced by the White House Press Secretary on February 7, 2002, he decided that:

- (1) The 1949 Geneva Convention concerning the treatment of prisoners of war, to which both Afghanistan and the United States are Parties, applies to the armed conflict in Afghanistan between the Taliban and the United States;
- (2) That same Convention does not apply to the armed conflict in Afghanistan and elsewhere between al Qaeda and the United States;
- (3) Neither captured Taliban personnel nor captured al Qaeda personnel are entitled to be POWs under that Convention; and
- (4) Nevertheless, all captured Taliban and al Qaeda personnel are to be treated humanely, consistent with the general principles of the Convention, and delegates of the International Committee of the Red Cross may visit privately each detainee.²

Let us examine these decisions in light of applicable international humanitarian law. In that connection, I must begin by noting the curious fact that I have not seen any public legal defense of those decisions by the United States other than by the Presidential Press Spokesman. If the State Department Legal Adviser, the Defense General Counsel, or the Attorney General has published any analytical justification of them, I am not aware of it. Perhaps there has not been enough public or Congressional criticism of the President's decisions to make such an analytical defense necessary as a matter of public relations, but those of us in the international legal community would certainly appreciate it. I know from my experience years ago as a lawyer for the United States that such analyses most certainly have been prepared, hopefully in time to assist the President in making his decisions, but, in any event, to defend those decisions.

Turning to the applicable law and the choices the President faced, I suggest that the decision to consider that there are two separate armed conflicts is correct. One is the conflict with al Qaeda that is not limited to the territory of Afghanistan. Al Qaeda is evidently a clandestine organization with elements in many countries and composed apparently of people of various nationalities, which has the purpose of advancing certain political and religious objectives by means of terrorist acts directed against the United States and other, largely Western, nations. As such, al Qaeda is not in any respect like a State and lacks international legal personality. It is not a Party to the Geneva Conventions, and it could not be a Party to them or to any international agreement. Its methods brand it as a criminal organization under national laws and as an international outlaw. Its members are properly subject to trial and punishment under national criminal laws for any crimes that they commit.

The armed attack against the Taliban in Afghanistan analytically is a separate armed attack that was rendered necessary

because the Taliban, as the effective government of Afghanistan, refused all requests to expel al Qaeda and instead gave sanctuary to it. While the United States, like almost all other countries, refused to extend diplomatic recognition to the Taliban, both Afghanistan and the United States are Parties to the Geneva Conventions of 1949, and the armed attacks by the United States and other nations against the armed forces of the Taliban in Afghanistan clearly constitute an international armed conflict to which those Conventions, as well as customary international humanitarian law, apply.

This analysis must recognize that practical problems are likely to arise in some circumstances, for example, when al Qaeda personnel are captured while accompanying Taliban armed forces; but, once the al Qaeda personnel are identified, they clearly would not be entitled to POW status.³ As persons who have been combatants in hostilities and are not entitled to POW status, they are entitled, under customary international law to humane treatment of the same nature as that prescribed by Article 3 common to the four Geneva Conventions of 1949 and, in more detail, by Article 75 of Geneva Protocol I of 1977; but they may lawfully be prosecuted and punished under national laws for taking part in the hostilities and for any other crimes, such as murder and assault, that they may have committed.⁴ They have been illegal combatants, or, as my friend the late Professor and Judge Richard Baxter once described such persons, they are "unprivileged belligerents",⁵ that is, belligerent persons who lack the privilege

¹ While members of the Armed forces of Parties to the Geneva Conventions who are not combatants, such as medical personnel and chaplains, as well as certain categories of persons who accompany the armed forces are entitled to POW status if captured, other persons who are not members of the armed forces are civilians and, as such, are not privileged by law to take part legally in hostilities. See Regulations Respecting the Laws and Customs of War on Land, Art. 1, annexed to Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 4, 6 UST 3316, 74 UNTS 135 [hereinafter Geneva Convention No. III]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, Arts. 43 & 44, 1125 UNTS 3 [hereinafter Protocol I]. From this analysis I exclude the archaic "levée en masse" provided for in Article 2 of the Hague Regulations, supra, and retained in Article 4A(6) of Geneva Convention No. III, supra.

² See Press Release, Status of Detainees at Guantanamo, Fact Sheet and Statement (7 February 2002) (on file with author).

³ I know of no evidence that would suggest that al Qaeda personnel were incorporated in Taliban military units as part of Taliban armed forces.

⁴ With respect to illegal combatants to whom the Geneva Conventions apply, it may be argued that such persons enjoy some additional protections as "protected persons" under the Geneva Convention Relative to the Protection of Civilian Persons of 1949, but such status would not preclude their prosecution and punishment under national laws. See Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Part III, 6 UST 3516, 75 UNTS 287; US Department of the Army, The Law of Land Warfare: United States Army field manual, FM 27-10, para. 73 (1956). However, the negotiating history of the Convention is unclear on that question. In any event, the question seems academic in the context of al Qaeda personnel, as the Conventions do not apply to them and as virtually all of them appear to be nationals of States with which the United States has normal diplomatic relations, and such nationals are excluded from the definition of protected persons by Article 4 of the Convention.

⁵ Baxter, R., "So-called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs", (1951) 28 British Yearbook of International Law 323, reprinted in (1975) Military Law Review Bicentennial Issue 501.

enjoyed by the armed forces of a State to engage in warfare with immunity from any liability under national law or under international law, except as prescribed by the international laws of war. This vulnerability to prosecution for simply taking part in an armed conflict and for injuries that may have been caused in that connection is the sanction prescribed by the law to deter illegal combatants.

I find it quite difficult to understand the reasons for President Bush's decision that all Taliban soldiers lack entitlement to POW status. The White House Press Secretary gave the following, cryptic explanation of that decision:

"Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: they would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war. The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda."⁶

Members of the press attending a press conference probably do not carry with them copies of the Geneva Convention. If they had, they might well have asked the Press Secretary what happened to the first provision of Article 4. As many of you know, it provides as follows:

"A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."⁷

Are the Taliban soldiers not members of the armed forces of a Party to the conflict? Or, at least, are they not members of militias or volunteer corps forming part of those armed forces? It is only with respect to the second category of POWs that we come to the four conditions referred to by the Press Secretary as justifying the President's decision, and that category relates only to militias and volunteer corps that do not, repeat not, form part of the armed forces of a Party to the conflict. On the basis of the public record to date, we cannot know the answer of the President to those questions. We are forced to speculate. Perhaps the United States might argue that Afghanistan has no armed forces within the meaning of that sub-paragraph 1, but rather only armies of competing warlords; but that would, I suggest, not be fully convincing given the general perception that, when the attacks began, the Taliban was the government in effective control of most of Afghanistan.

Perhaps the same argument could be phrased differently, for example, that no armed forces in Afghanistan "belong to" Afghanistan, which is the "Party to the conflict" and that only armed forces belonging to a Party to the conflict are

entitled to POW status; but the different language would give me no greater confidence in the force of the argument. Certainly the protections of the Convention would be eroded if it were accepted that they need not be accorded to the armed forces of a government in effective control of the territory of a State by another State that declines to recognize the legitimacy of that government.

Another possible argument might be that the conditions specified for POW status by Article 4A(2) for militias and volunteer corps that are not part of the armed forces are somehow also applicable to all armed forces. While contrary to textual logic, the assertion has occasionally been made that those four requirements are inherent in the nature of armed forces of States.⁸ I consider that to be a dangerous argument, however, one that States should be reluctant to put forward, because the fourth condition – that the militia or corps conducts its operations in accordance with the laws of war – can easily be abused, as it was by North Korea and by North Vietnam, to deny POW treatment to all members of a State's armed forces on the ground that some of its members allegedly committed war crimes. Even in a conflict where substantial war crimes were committed by the armed forces of a State, this would be a bad idea. Those who commit war crimes should be punished, but their crimes should not be used as an excuse to deprive others of the protections due POWs.

It seems clear to me that it would be much easier and more convincing for the United States to conclude that the members of the armed forces of the effective government of most of Afghanistan should, upon capture, be treated as POWs. That causes me to suspect that there may have been some unexplained reason behind the decision. I am forced to ask why the United States would wish to deprive all Taliban soldiers of POW status when they have been defending the government whose armed forces they are? Does it intend to prosecute them simply for participating in the conflict? I must doubt that. Does it intend to prosecute them for crimes under United States law? For crimes under some Afghan law? If a few of them are guilty of war crimes or crimes against humanity, they could be prosecuted while remaining POWs. I have questions, but no answers. I would suggest that a necessary first step would be for the United States to explain publicly what is the basis and the reason for denial of POW status to all Taliban prisoners, not simply by asserting that the Taliban armed forces did not distinguish themselves adequately from the civilian population and did not conduct their military operations in accordance with the laws of war, but by evidence documenting such assertions accompanied by a convincing explanation of the gravity of these matters and by some explanation of the evidently felt need to deprive them of POW status.

⁶ See Press Release, *supra* note 2.

⁷ Geneva Convention No. III, *supra* note 1, at Art. 4.

⁸ See, e.g., Rosas, A., *The Legal Status of Prisoners of War*, Suomalainen Tiedeakatemia, Helsinki, 1976, p. 328; Mallison, W. T. & Mallison, S. V., "The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict", (1977) 9 *Case Western Reserve Journal of International Law* 44–48.

When I prepared the first draft of these remarks, I assumed that the rejection of POW status for Taliban soldiers must have been the result of some unexplained central purpose, probably one related to the ultimate prosecution of some of them. The longer I ponder the question of the reasons that might have inspired this decision by the President, the more I am inclined to suspect that there may well not have been any such unexplained purpose. Might it not be the case that the present administration in Washington believes precisely what the White House Press Spokesman said, that is, that the failure of the Taliban soldiers to wear uniforms of the sort worn by the members of modern armies and the support by the Taliban government of the unlawful terrorist objective of al Qaeda suffice to justify, or even require, denial of POW status to all members of the Taliban armed forces? Certainly, one can imagine such a determination being urged by those who, in the Reagan Administration, grotesquely described Geneva Protocol No. I as law in the service of terrorism.⁹

Without a doubt the most difficult element to defend of the decisions made by President Bush in February with respect to the status of prisoners taken in Afghanistan is the blanket, all-encompassing nature of the decision to deny POW status to the Taliban prisoners. By one, sweeping determination, President Bush determined that not a single Taliban soldier, presumably not even the army commander, could qualify for POW status under the Geneva Convention. While decisions by armed forces in the past doubtless included some decisions about army units or other groups as a whole, one cannot help but question the all-encompassing nature of this one. Can it possibly exclude any doubt? Moreover, can it legitimately preclude any contest by an individual prisoner?

Article 5 of the Convention states the following cautionary rule:

“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”¹⁰

Given that provision, either the United States must maintain that no doubt could arise with respect to any Taliban prisoner, or it must preserve the option of a determination by a tribunal in the event that any doubt does arise concerning a group or an individual prisoner. I have been informed that the Press Spokesman of the Department of State indicated in his press briefing on February 8 of this year that the United States would be prepared to review its determination about the applicability of Article 4 of the Convention should any genuine doubt about status arise in individual cases. I do not know whether such “review” would be made by a tribunal, as required by the Convention, or by the President. Review in individual cases is helpful and meaningful. Only if reviews occur in practice can that be determined. Given the broad and definitive nature of the President’s determination, there would appear to be a risk that any review might well have to be limited to resolving doubts as to whether a

prisoner was, in fact, a member of the Taliban armed forces, not whether those armed forces meet the standards of Article 4. If so limited, a right to individual review would fall far short of a right to determination of POW entitlement by an Article 5 tribunal.

The United States probably believes that its screening of Taliban captives prior to their transfer to the camp in Cuba is thorough and as fully adequate as a tribunal to ensure that they are legitimately detained for purposes of further criminal investigation. That may well be true, but, in view of the President’s determination, such screening could have no effect on their entitlement to POW status.

There are, in my view, all too few places where international humanitarian law provides for the rights of individuals to challenge State action, but one of those few is the right of access to a tribunal granted by Article 5. It would be regrettable if in practice it proves to have been effectively negated for Taliban prisoners.

In this connection, I note that the United States Army Field Manual on the Law of Land Warfare makes the following interpretation of Article 5 of the Convention:

“*b. Interpretation.* The foregoing provision applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or who has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.”¹¹

This interpretation clearly indicates that doubt arises and a tribunal is required whenever a captive who has participated in hostilities asserts a right to be a POW. That is a point that we were careful to state in Article 45, paragraph 1 of Protocol No. I when we negotiated it in the seventies, and, in my view, it is now part of customary international law. In that connection, I should point out that, when the armed forces of countries that are Parties to the Geneva Protocol capture Taliban soldiers, they will obviously be required by Article 45, paragraph 1 to give them POW status unless and until a tri-

⁹ See, e.g., Feith, D. J., “Law in the Service of Terror – The Strange Case of the Additional Protocol”, *National Interest*, No. 1, Fall 1985, at 36; Sofaer, A. D., “Terrorism and the Law”, (1986) 64 *Foreign Affairs* 901; Roberts, G. B., “The New Rules for Waging War: The Case Against Ratification of Additional Protocol I”, (1985) 26 *Virginia Journal of International Law* 109; Safire, W., “Rights for Terrorists? A 1977 Treaty Would Grant Them”, *New York Times*, 15 November 1984, at A31, col. 5.

For responses to these comments, see Aldrich, G. H., “Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I”, (1986) 26 *Virginia Journal of International Law* 693; Solf, W. A., “A Response to Feith’s Law in the Service of Terror – The Strange Case of the Additional Protocol”, (1986) 20 *Akron Law Review* 261; Gasser, H.-P., “An Appeal for Ratification by the United States”, (1987) 81 *American Journal of International Law* 912 and Aldrich, G. H., “Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions”, (1991) 85 *American Journal of International Law* 1.

¹⁰ Geneva Convention No. III, *supra* note 1, at Art. 4.

¹¹ United States Army Field Manual, *supra* note 4, at para. 71(b).

bunal decides otherwise. This obligation might also prevent transfer of such prisoners to the United States.¹²

Also relevant to prisoners facing criminal prosecution is paragraph 2 of Article 45 of Protocol I which establishes a separate right of any person who has fallen into the power of an adverse Party and is to be tried by that Party for an offense arising out of the hostilities to have his entitlement to POW status determined by a judicial tribunal. When that text was negotiated, the United States Government was painfully aware of the experiences in Korea and Vietnam where many American military personnel were mistreated by their captors and were denied POW status by mere allegations that they were all criminals. Time evidently dulls memory.

In conclusion, I should stress that the legal difficulties I have indicated with the actions taken by the United States concerning prisoners captured in Afghanistan exist only with respect to persons who served in the armed forces of the Taliban, not with respect to those who were members of the al Qaeda terrorist group. The latter are, in my view, international outlaws who are entitled to humanitarian treatment, but nothing more.

This conclusion flows from the fact – that there are two armed conflicts involved in Afghanistan – one with the

Taliban, to which the Geneva Conventions and, for Parties to it, Protocol No. I, apply, and another with al Qaeda, to which those treaties do not apply. Al Qaeda and its personnel do not belong to any Party to the Geneva Conventions and al Qaeda is not itself capable of being a Party to a conflict to which those Conventions and Protocol No. 1 apply. Members of al Qaeda are not entitled to be combatants under international law and are subject to trial and punishment under national laws for their crimes. ■

¹² Article 45, para. 1 provides: “A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.” Protocol I, supra note 1, at Art. 45.

Article 12 of Geneva Convention No. III includes the following restriction: “Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in custody.” Geneva Convention No. III, supra note 1, at Art. 12.