

Background Paper on Geneva Conventions and Persons Held by U.S. Forces

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Introduction

This background paper highlights the international law issues surrounding the status and treatment of Taliban and al-Qaeda fighters from Afghanistan in U.S. custody. It cites the need for a formal and individualized determination of prisoner of war status where that status is in doubt. This paper also sets out international law requirements governing prisoners of war and so-called “unlawful combatants,” including humane treatment, interrogation and prosecution.

Since the commencement of U.S. military operations in Afghanistan in October 2001, thousands of persons have been detained by anti-Taliban Afghan forces and by U.S. armed forces. Those held include both Taliban and al-Qaeda fighters. In addition to Afghan nationals, many Pakistani nationals are reportedly among the detainees, as well as smaller numbers of Saudis, Yemenis and others from Arab states, Uzbeks, Chechens from Russia, Chinese, Europeans, and others.

Most of the captured combatants are in the custody of the new post-Taliban Afghan authorities. The largest group, numbering several thousand, is being held in Afghan custody at the large prison complex in Shiburghan, west of Mazar-i-Sharif in northern Afghanistan. There are dozens of smaller Afghan-controlled prison facilities and ad-hoc detention facilities scattered around Afghanistan, some relatively formal prisons inherited by the new Afghan administration from the Taliban regime, while others are basically lock-up facilities under the control of local warlords.

The U.S. military has been screening and interrogating detainees in Afghan custody in order to identify persons whom the U.S. wants to prosecute or detain, or who may have useful intelligence information (such as the whereabouts of Taliban or al-Qaeda leaders, or knowledge about the inner workings of the al-Qaeda network). The U.S. has taken custody of several hundred detainees held by Afghan forces, and has transferred them to its own detention facilities: a U.S. military detention facility located outside Kandahar and detention facilities in off-shore Navy ships such as the *USS Peleliu*. In addition, U.S.

military forces have also directly taken custody of persons while carrying out military operations inside Afghanistan. In January the U.S. government began transferring these persons from the detention facilities in the immediate theater of conflict to a more permanent detention facility at the U.S. military base in Guantanamo Bay, Cuba. According to the Defense Department on January 28, 482 prisoners are being held by U.S. forces in Afghanistan and at Guantanamo Bay, about one-fifth of whom are Saudi nationals.

1. International Law and the Treatment of Prisoners in an Armed Conflict

The treatment of detainees in an armed conflict is governed by international humanitarian law, also known as the laws of war. Most relevant are the four Geneva Conventions of 1949, to which most states, including the United States and Afghanistan, are party. (Two Additional Protocols to the Geneva Conventions, adopted in 1977, have not been ratified by the United States, but many of their provisions are considered to be indicative of customary international law.) The Geneva Conventions set out a comprehensive legal framework aimed at protecting captured combatants and civilians during armed conflict.

The protection and treatment of captured combatants during an international armed conflict is detailed in the Third Geneva Convention relative to the Treatment of Prisoners of War, which defines prisoners of war (POWs) and enumerates the protections of POW status. Persons not entitled to POW status, including so-called “unlawful combatants,” are entitled to the protections provided under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. All detainees fall somewhere within the protections of these two Conventions; according to the authoritative Commentary to the Geneva Conventions of the International Committee of the Red Cross (ICRC): “nobody in enemy hands can fall outside the law.”

There are other international legal instruments outside the Geneva Conventions that also affect the treatment of persons during armed conflict -- and after the conflict. While some human rights standards can be derogated or limited during times of war or national emergency, other human rights standards continue to apply in full force at all times. Instruments relevant to the treatment of persons deprived of their liberty include the International Covenant on Civil and Political Rights, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

2. Types of Prisoners under International Humanitarian Law

Under international humanitarian law, combatants captured during an international armed conflict should be presumed to be POWs until determined otherwise. Specified categories of combatants who "have fallen into the power of the enemy" are entitled to POW status. These categories include members of the armed forces of a party to the conflict, members of militia forces forming part of those armed forces, and inhabitants of a non-occupied territory who take up arms openly to resist the invading forces. POW status also applies to captured members of irregular forces who are under responsible command; have a fixed distinctive sign (such as an insignia, uniform or other marking)

recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war.

POWs receive the full protection of the Third Geneva Convention relative to the Treatment of Prisoners of War. POWs may not be tried for the mere act of being combatants, that is, for taking up arms against other combatants. However, they may be prosecuted for the same offenses for which the forces of the detaining power could be tried, including common crimes unrelated to the conflict, war crimes, and crimes against humanity.

Captured combatants who are not entitled to POW status have been described as “unlawful combatants” or “non-privileged combatants,” although neither term is found in the Geneva Conventions. Such persons are still protected under the Geneva Conventions, but under the provisions of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. This Convention also applies to civilian non-combatants who are affected by the conflict and due special protections as “protected persons.”

3. Status Determination of Prisoners

Article 5 of the Third Geneva Convention states: “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 for POWs, “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

No detainee can be without a legal status under the Conventions. According to the ICRC Commentary:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status; nobody in enemy hands can fall outside the law.*¹

U.S. officials have endorsed the government’s adherence to this principle. In 1987, then-Deputy Legal Advisor to the U.S. State Department, Michael Matheson, stated that:

¹ International Committee of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: 1958), p. 51 (emphasis in original). The International Criminal Tribunal for the Former Yugoslavia, charged with prosecuting war crimes and crimes against humanity committed during the recent conflicts in the Balkans, has explicitly affirmed this principle in a 1998 judgment, stating that “there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war ... he or she necessarily falls within the ambit of [the Fourth Convention], provided that its article 4 requirements [defining a protected person] are satisfied.” *Celbici Judgment*, para. 271 (1998).

We [the United States] do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement before a judicial tribunal and to have that question adjudicated.³

According to the U.S. military Judge Advocate General Handbook, the U.S. armed forces used such tribunals in conflicts from Vietnam to the Gulf War:

“When doubt exists as to whether captured enemy personnel warrant POW status, Art. 5 [Third Geneva] Tribunals must be convened. It is important that judge advocates be prepared for such tribunals. During the Vietnam conflict, a Directive established procedures for the conduct of Art. 5 Tribunal...[The accompanying footnote states:] No Article 5 Tribunals were conducted in Grenada or Panama, as all captured enemy personnel were repatriated as soon as possible. In the Gulf War, Operation Desert Storm netted a large number of persons thought to be [Enemy Prisoners of War], who were actually displaced civilians....Tribunals were conducted to verify the status of the detainees. Upon determination that they were civilians who had taken no part in hostilities, they were transferred to refugee camps. Whether the tribunals were necessary as a matter of law is open to debate – the civilians had not “committed a belligerent act,” nor was their status “in doubt.”⁴

Regulations issued by the four branches of the U.S. military in 1997 set out detailed procedures for tribunals consisting of three commissioned officers to make determinations of status where doubts arise in accordance with the Third Geneva Convention. Under the 1997 U.S. military regulations, persons whose status is to be determined shall: be advised of their rights at the beginning of their hearings; be allowed to attend all open sessions and will be provided with an interpreter if necessary; be allowed to call witnesses if reasonably available, and to question those witnesses called by the tribunal; have a right to testify or otherwise address the Tribunal; and not be compelled to testify before the Tribunal. According to the regulations, following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination, and a written report of the tribunal decision is to be completed in each case.

³ Remarks of Michael J. Matheson, *American University Journal of International Law and Policy*, Vol. 2, No. 2 (1987), pp. 425-26.

⁴ U.S. military Judge Advocate General Operational Law Handbook (2000). Eds. M. Lacey & B. Bill. International Law and Operational Law Department, Judge Advocate General's School, Charlottesville, Ch 5, p. 7.

4. Determining the Status of Prisoners in the Afghanistan conflict

To date the United States has released little information on the persons captured in Afghanistan, except to say they come from 25 countries. The United States has labeled all persons in its custody captured in Afghanistan as “unlawful combatants,” “battlefield detainees,” or “illegal combatants,” and has indicated that while they may be treated in accordance with the Geneva Conventions, there is no obligation that the United States so treat them. For instance, U.S. Secretary of Defense Donald Rumsfeld stated on January 11, 2001 that those held were “unlawful combatants” and that “unlawful combatants do not have any rights under the Geneva Convention. We have indicated that we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate.”

The U.S. position is inconsistent with the Geneva Conventions on several counts. First, the U.S. may not classify as a group all detainees from the Afghan conflict as not being entitled to POW status; such a determination must be made on an individual basis by a competent tribunal. Second, there is a presumption that a captured combatant is a POW unless determined otherwise. Third, it is incorrect to assert that only POWs are protected by the Geneva Conventions—all persons apprehended in the context of an international armed conflict, including the types of prisoners the U.S. has labeled as “unlawful combatants,” receive some level of protection under the Geneva Conventions.

In a press conference on January 22, Defense Secretary Rumsfeld seemed to backtrack in part from his earlier statements. He stated that “whatever one may conclude as to how the Geneva Convention may or may not apply,” the United States is treating the detainees humanely. He continued: “Lawyers must sort through the legal issues with respect to unlawful combatants and whether or not the Taliban should be considered what the documents apparently refer to as a, quote, ‘high contracting party,’ unquote, or, in plain English, I think, a government. The Department of Defense will leave those issues to them.”

More recently, the Bush Administration has suggested that the Geneva Conventions do not apply to a war against terrorism, that the government can decide that captured combatants are not POWs with a determination before a competent tribunal, and that treating the detainees as POWs would prevent them from being questioned for alleged criminal offenses.

Such statements from the U.S. government suggest that it will apply its own standards to the detainees, picking and choosing those provisions of the Geneva Conventions it wishes to apply. The United States is ignoring important and relevant international standards, and is instead determining its own standard of protection outside the Geneva system. This also undermines long-time efforts by the U.S. military to incorporate the Geneva Conventions into the operations of the armed forces through its training programs and institutions.

Members of the Taliban armed forces or militia groups that formed part of the Taliban armed forces are likely to be entitled to POW status. It does not matter for determining POW status whether these soldiers were Afghans or foreigners. The U.S. government has asserted that members of the Taliban armed forces are not entitled to POW status because the Taliban was not the recognized government of Afghanistan. This is contrary to both international law and long-standing U.S. practice. The Geneva Conventions do not require a formal state of war between two state parties to be applicable; rather, it is only necessary that there be “armed conflict,” which does not require formal recognition of one state by another. The Geneva Conventions would have minimal legal effect if states could simply escape their obligations by declaring that an adversary state was not the legitimate government of the country. During the Korean War, the United States considered prisoners from the People’s Republic of China (PRC) to be POWs under the Geneva Conventions, although neither the United Nations nor the United States recognized the PRC government at the time.

Al-Qaeda fighters, unless they can show that they were part of the Taliban armed forces, must meet the specific standards for POW status for members of irregular forces. First, they must be members of “militias [or] other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory.” Second, they have to fulfill some minimum conditions: they must be under responsible command; have a fixed distinctive sign recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war.

The members of al-Qaeda may not be entitled to POW status because they may not meet all of these criteria; in particular they have made clear that they do not conduct their operations in accordance with the laws and customs of war. While such persons may more appropriately be called “unlawful” or “non-privileged” combatants, it does not follow that they can be denied all protections of the Geneva Conventions, such as humane treatment.

5. Rights of Prisoners under International Humanitarian Law

The status of individual prisoners determines what rights they are due under the Geneva Conventions. The rights of POWs vary significantly from those of so-called unlawful or nonprivileged combatants. However, all detainees may be prosecuted for war crimes, crimes against humanity, and criminal acts unrelated to the armed conflict. Likewise, all persons in custody, regardless of their status, must be treated humanely. An important measure to ensure humane treatment, provided under the Geneva Conventions, is to permit visits by the International Committee of the Red Cross and for the detaining government to follow their recommendations.

The rights and protections granted to POWs are enumerated in detail in the Third Geneva Convention. “Nonprivileged” or “unlawful” combatants are protected under the Fourth Geneva Convention, customary international law and, where applicable, Protocol I to the

Geneva Conventions. Although the United States is not a party to Protocol I, the U.S. government accepts many of its provisions as part of customary international law; especially relevant is article 75 on “fundamental guarantees,” which sets out basic standards of humane treatment and due process that is required for all persons affected by the conflict, regardless of their status.

Humane Treatment: POWs must be humanely treated at all times. They must be protected against acts of violence or intimidation and against insults or public curiosity. POWs must be kept in facilities “under conditions as favorable as those for the forces of the Detaining Power in the same area.” In particular, “the premises provided for the use of prisoners of war...shall be entirely protected from dampness and adequately heated and lighted.” (Third Geneva, Arts. 13, 25, 34).

Nonprivileged combatants are entitled to humane treatment. While the detainees can be denied certain rights that would endanger security—such limitations should be absolutely necessary, and should never amount to inhumane or degrading treatment.

Interrogation: While the detaining power may interrogate them, POWs are only required to provide their name, rank, birth date, and serial number. POWs cannot be punished if they do not provide additional information. “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” (Third Geneva, Art. 17).

While nonprivileged or unlawful combatants cannot claim the same protections under interrogation as POWs, they are, like all detainees, protected from torture and other cruel, inhuman or degrading treatment as set out under international human rights law and customary international law. Relevant international instruments include Article 75 of Protocol I, the International Covenant on Civil and Political Rights, and the Convention against Torture. For instance, Article 2 of the Convention against Torture, which the U.S. has ratified, states: “No exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Violation of Article 2 is a criminal offense of universal jurisdiction.

Prosecution: While POWs cannot be tried or punished simply for their participation in the armed conflict, they may be prosecuted for war crimes and crimes against humanity and for common crimes under the laws of the detaining power or international law. POWs are entitled to substantial legal protections during the trial: POWs have the right to be tried before the same courts and facing the same procedures that the detaining power’s military personnel would face, offering “the essential guarantees of independence and impartiality.” In the case of Afghanistan POWs, that would mean trial before U.S. court martial or U.S. civilian courts. POWs are entitled to competent counsel to represent them at the trial, and must be

informed of the charges against them. POWs are also entitled to have an appeal of their conviction and sentence.

POW status provides protection only for the act of taking up arms against opposing military forces, and if that is all a POW has done, then repatriation at the end of the conflict would be required. But as Article 82 of Third Geneva explains, POW status does not protect detainees from criminal offenses that are applicable to the detaining powers' soldiers as well. That is, if appropriate evidence can be collected, the United States would be perfectly entitled to charge the Guantanamo detainees with war crimes, crimes against humanity, or other violations of U.S. criminal law, whether or not they have POW status. As Article 115 of the Third Geneva Convention explains, POWs detained in connection with criminal prosecutions are entitled to be repatriated only "if the Detaining Power [that is, the United States] consents."

Nonprivileged or unlawful combatants may be charged with criminal offenses arising out of their participation in the armed conflict. Like POWs, they can also be charged with committing war crimes, crimes against humanity, and common crimes. While nonprivileged combatants are not entitled to the extensive trial rights of POWs under the Third Geneva Convention, they are entitled to a "fair and regular trial" and the trial protections provided by the Fourth Geneva Convention. It is a fundamental provision of the Geneva Conventions that all detainees are entitled to "all the judicial guarantees recognized as indispensable by civilized peoples." Nonprivileged combatants are entitled to trial before a "properly constituted, non-political military court," to be informed of the charges against them, to present their defense and call witnesses, to be assisted by qualified counsel of their own choice, to have an interpreter, and to mount an appeal against the conviction and sentence. As an exceptional measure, trials may be held *in camera* if the security of the state so requires.