

From: John Cerone [jplc100@yahoo.com]
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To: ILDG@yahoogroups.com
Subject: [ILDG] Status of detainees; text

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Hi again -

Apparently the attachment won't go through. So here is the text. (Please e-mail me if you would like the full analysis with endnotes, which are, unfortunately, rather extensive.)

John

Status of detainees in international armed conflict, and their protection in the course of criminal proceedings

By John Ceronefx

Introduction

In light of the recent detentions of members of the Taleban and Al-Qaeda, questions have been raised as to what protections they are afforded under international law. At the same time, attempting to apply existing international law to the novel circumstances presented by their cases yields substantial controversy and reveals possible gaps in the law.

Analysis of those circumstances requires resolution of questions for which international law does not provide definitive answers or about which there is no general agreement. Simply to determine the applicable law, it is necessary to consider: which law applies to an armed conflict between a state and a non-state armed group based within another state or states; the extent to which Protocol I to the Geneva Conventions of 1949 (Protocol I) represents customary law; whether human rights law continues to apply in full alongside humanitarian law; and whether the law of international armed conflict applies between a state and a de facto government that has not attracted international recognition, while the supposed de jure government has retained its seat at the United Nations. If it is determined that the law of international armed conflict applies, one must then attempt to resolve a variety of issues arising from the application of that law, such as whether diversity of nationality is required for a combatant to be entitled to Prisoner of War (POW) status; whether individuals detained in the US by the Immigration and Naturalization Service could be deemed internees under the relevant provisions of humanitarian law; whether US forces are occupying any part of Afghanistan for the purposes of the Fourth Geneva Convention; and whether Taleban fighters may be deemed "armed forces of a Party to the conflict;" under the Third Geneva Convention.

The purpose of this ASIL Insight is to provide the basic legal framework surrounding some of the controversial issues arising in the determination of the applicable law, the status of detainees, the

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UNITED STATES DEPARTMENT OF STATE
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I. Applicable Law

Whether or not international humanitarian law, or the law of armed conflict, applied as from September 11, it clearly began to apply once the US started bombing Afghanistan. Further, the conflict between the United States and the Taleban, as de facto government of Afghanistan, is international in nature. This author takes the view that the law of international armed conflict should also govern relations between the United States and Al-Qaeda. Thus, the remainder of this analysis proceeds on the assumption that the law of international armed conflict applied as between the United States and the Taleban and Al Qaeda from October 7, 2001, if not before.

The primary sources of law relevant for this analysis are the Geneva Conventions of 1949. The Conventions provide standards for the treatment of persons not, or no longer, taking active part in hostilities during a state of armed conflict or occupation. The trial rights of detainees in the present conflict are provided in the Third and Fourth Geneva Conventions, dealing respectively with POWs and civilians.

II. Status of detainees

The Geneva Conventions provide different regimes of protection depending upon the status of a particular individual under the Conventions. Special rights in judicial proceedings are expressly provided for those having the status of POW under the Third Convention and, in certain circumstances, for "protected persons;" under the Fourth Convention.

POWs

Article 4 of the Third Convention sets forth the requirements for POW status. In order to qualify, captured individuals must fall into one of the enumerated categories, the first two of which are particularly relevant here. The first category is members of the armed forces of a party to the conflict. While this may cover Taleban fighters, it would probably not include members of Al Qaeda. The second category includes members of other militias or volunteer corps "belonging to a party to the conflict;" so long as they fulfill certain additional conditions, including having a distinct sign, carrying arms openly, and complying with the law of war. Given the types of activities for which Al Qaeda has been alleged to be responsible, it is unlikely that it fulfills these conditions. However, Article 5 of the Third Convention provides that in the event of "any doubt;" as to whether an individual is entitled to POW status, that individual shall be treated as a POW "until such time as their status has been determined by a competent tribunal."

Article 4 is silent on the issue of nationality. While certain provisions of the Third Convention seem

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to imply that a POW will necessarily have a different nationality than that of his or her captors, there is no express requirement of a diversity of citizenship. In addition, there is precedent in US case-law for holding that US nationals fighting with the enemy are not deprived of POW status by virtue of their US citizenship. There is however a line of cases from other jurisdictions holding that nationals fighting for the enemy are not entitled to POW status. A third possibility would be that such individuals could be tried for treason, but otherwise retain the protections of the Third Convention.

The rights of POWs may not be renounced, and the protection of the Third Convention continues to apply to them until final release or repatriation.

;"Protected Persons;" Under the Fourth Convention

While the Fourth Geneva Convention provides a minimum of protection to all individuals throughout the territories of all parties to the conflict, the bulk of its protections are applicable only to "protected persons;" as defined in Article 4 of that Convention. Article 4 defines protected person as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

Paragraph 2 of Article 4 excludes from this definition nationals of a co-belligerent state, as well as nationals of neutral states in the home territory of a party to the conflict, so long as such states have normal diplomatic representation in the state in whose hands they are. Note that this exclusion does not apply to nationals of neutral states who find themselves in occupied territory. Such individuals qualify as protected persons irrespective of the status of diplomatic relations between their state of nationality and the state in whose hands they are.

Generally, individuals not qualifying for POW status under the Third Convention will qualify as "protected persons;" so long as they meet the nationality requirement. Thus, those persons taking part in hostilities who do not qualify as lawful combatants will qualify for the protection of the Fourth Convention if they fall within Article 4.

Further, notwithstanding the diversity of nationality requirement, the International Criminal Tribunal for the former Yugoslavia has developed a doctrine whereby individuals who do not technically meet the nationality requirement of Article 4, may in some cases be assimilated to the enemy state such that they could benefit essentially as de facto enemy nationals.

This doctrine is particularly important in light of the number of foreigners alleged to be fighting with the Taliban or Al Qaeda. If such individuals are determined to be ineligible for POW status or do not meet the nationality test for protected persons, there would be an argument for assimilating them to enemy nationality for the purpose of protection under the Fourth Convention.

Finally, the rights afforded to protected persons will

...ly depending upon their circumstances. While some rights are afforded generally to protected persons in the home territory of a party to the conflict, a more extensive catalog of rights is provided to such individuals if they have been interned.

Extensive protection is also afforded to protected persons in occupied territory. In this regard, it is important to note the low threshold for application of the provisions of the Fourth Convention concerning occupied territory. The ICRC Commentary appears to take the position that these provisions apply to the extent a party to the conflict exercises control over protected persons in the territory of the other party.

According to this interpretation, any protected persons taken into custody by US forces in Afghanistan would be covered by these provisions, and this analysis proceeds on that assumption.

Others

Individuals ineligible for POW status who also fail to qualify as protected persons benefit from the protection of Article 75 of Protocol I to the extent that it may be regarded as customary law. Article 75 is intended to be a residual provision applying to all persons who do not receive greater protection under other provisions of international law.

III. Trial Rights Afforded

Crimes under domestic as well as international law were clearly committed on September 11. Criminal proceedings based upon those attacks have already commenced. In the event a detainee is prosecuted, the accused is afforded trial rights under both human rights and humanitarian law.

Human Rights Law

For the United States, the relevant provisions of human rights law would include, inter alia, Article 14 of the International Covenant on Civil and Political Rights. That article provides comprehensive protection, guaranteeing such rights as: equality before courts and tribunals; the right to a fair hearing by an independent and impartial tribunal established by law; the presumption of innocence; the right to counsel of the accused; his choice; the right to appeal to a higher tribunal; the right to call and examine witnesses; the free assistance of an interpreter; and freedom from compelled self-incrimination.

As human rights law is subject to derogation, it is imperative to consider also the rights provided under humanitarian law, which is not generally subject to derogation.

Humanitarian Law

Trial rights afforded under humanitarian law depend upon the status of the accused and the nature of the crime for which he or she is being tried.

a. POWs

benefit from the customary law of combatant immunity. As combatants have been authorized to use force, they may not be prosecuted for common crimes committed in the context of hostilities. Thus, they may be prosecuted only for violations of the law of armed conflict or for crimes that are unrelated to the hostilities.

In any prosecution, they are guaranteed the protections outlined in Articles 82 to 108 of the Third Convention. These provisions require, inter alia, that POWs be tried by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power; that they only be sentenced to the same penalties that would apply to members of the Detaining Power's armed forces for the same acts; that capital punishment not be carried out prior to the expiry of a waiting period of at least six months; and that accused persons be granted the same right of appeal as that open to members of the armed forces of the Detaining Power. Article 105 provides for the rights of defense including: the right to counsel of the accused's choice, the right to confer privately with counsel, the right to call witnesses, and the right to an interpreter.

b. "Protected Persons;" Under the Fourth Convention

In the course of judicial proceedings, protected persons who have been interned or are in occupied territory are entitled to the protection of Articles 71 to 76 of the Fourth Convention. These rights include: the right to a regular trial; the right to counsel of the accused's choice, who must be able to visit the accused freely and be provided with the necessary facilities for preparing the defense; the right to call witnesses; the right to an interpreter and to request replacement of an interpreter; the right of appeal "provided for by the laws applied by the court"; the right to be visited by the delegates of the Protecting Power and the ICRC; and the right to be detained and serve sentences in the occupied territory.

Protected persons in occupied territory may not be prosecuted for acts committed prior to occupation, with the exception of war crimes. Protected persons in the home territory of a party to the conflict who are not interned are not provided any specific judicial guarantees.

c. Others

All those who do not benefit from greater protection under the Third or Fourth Conventions are entitled to the protection of Article 75 of Protocol I to the extent its provisions embody customary law. The trial rights contained therein apply to any penal proceedings arising out of offenses related to the armed conflict. Article 75(4) requires that proceedings be conducted before an "impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure." Those principles are deemed to include a range of procedural rights, such as provision of "all necessary rights and means of defence"; the right to be presumed innocent; freedom from compelled

remedies. Article 75(4) also prohibits ex post facto application of criminal law and requires respect for the principle of non bis in idem.

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The inclusion of the presumption of innocence in Article 75 is particularly significant, as it is absent from the Third and Fourth Conventions. While POWs and protected persons receive greater protection generally under the Third and Fourth Conventions, they are not precluded from availing themselves of this or any other additional protection provided by Article 75.

d. Anyone prosecuted for violations of the Geneva Conventions

Any person prosecuted for violations of the Geneva Conventions, irrespective of his or her status under humanitarian law, must be provided with "safeguards of proper trial and defence, which shall not be less favorable than" those outlined in Articles 105 and following of the Third Convention. These include the same rights of defense and appeal as those afforded to POWs. The relevance here of whether the law of international armed conflict applied as of September 11 is clear. Any individuals prosecuted for violations of the Geneva Conventions arising from the September 11 attacks must be provided these rights.

IV. Implications for the Operation of the Proposed Military Commissions

Notwithstanding the fact that the proposed military commissions will be specifically authorized to prosecute violations of the laws of war, very few of the procedural safeguards guaranteed under humanitarian law are expressly provided for in the Military Order authorizing their establishment. While further elaboration of the rights of the accused may be expected in the rules of procedure issued by the Secretary of Defense, certain provisions of the Military Order may already be problematic if they are construed to limit the capacity of the Secretary to enact rules conforming to the requirements of human rights and humanitarian law.

The failure to guarantee the rights enumerated above may itself constitute a war crime. Indeed, if this failure amounts to willfully depriving a POW or a protected person of the rights of a fair and regular trial "prescribed in the present Convention," the person(s) responsible for such failure will have committed a grave breach of the Geneva Conventions.

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