

## EDITORIAL COMMENTS

### THE TALIBAN, AL QAEDA, AND THE DETERMINATION OF ILLEGAL COMBATANTS

The *Agora* on military commissions in the April 2002 issue of the *Journal*<sup>1</sup> made several references to the decisions of the United States regarding the status and treatment it accords captured military personnel of the Taliban and Al Qaeda, including those detained at the Guantánamo naval base in Cuba. The principal focus of that *Agora*, however, was the choice of forum for the possible trial of those detainees and President George W. Bush's military order of November 13, 2001, providing for the creation of military commissions.<sup>2</sup> The related decisions concerning the applicability of the Geneva Convention Relative to the Treatment of Prisoners of War<sup>3</sup> (Convention) and the status of Qaeda and Taliban combatants deserve more extensive consideration and comment.<sup>4</sup> The relevant facts may be briefly summarized.

On September 11, 2001, a small number of men who belonged to 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 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 the 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 that country and were consequently its effective government, 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. Since these persons were captured in the course of an international armed conflict, questions immediately arose as to their legal status and the protections to which they might be entitled pursuant to international humanitarian law, particularly as at least some of them were clearly bound to face criminal proceedings for terrorist acts and other crimes.

In February of this year, President Bush determined the position of the United States on 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 on 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;

<sup>1</sup> *Agora: Military Commissions*, 96 AJIL 320 (2002).

<sup>2</sup> Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

<sup>3</sup> Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 [hereinafter Geneva Convention No. III].

<sup>4</sup> This comment is an expansion of remarks by the author at a symposium in The Hague on June 7, 2002, that was sponsored by the Netherlands Red Cross and the Leiden University Chair of International Humanitarian Law.

- (2) that 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 Qaeda personnel are entitled to be prisoners of war (POWs) under that Convention; and
- (4) nevertheless, all captured Taliban and Qaeda personnel are to be treated humanely, consistently with the general principles of the Convention, and delegates of the International Committee of the Red Cross may privately visit each detainee.<sup>5</sup>

Somewhat surprisingly, in the months since this announcement, the United States has not published any legal defense of these decisions. One might have expected such a defense from the legal adviser of the Department of State, the general counsel to the secretary of defense, or the attorney general, but none has been issued. Perhaps there has not been enough public or congressional criticism of the president's decisions to make a defense necessary as a matter of public or congressional relations, but those of us in the international legal community would certainly appreciate an analytical justification by the government. I know from my experience many years ago in two of those three offices<sup>6</sup> that such analyses were certainly prepared, hopefully in time to assist the president in making his decisions, but, in any event, to defend those decisions. Perhaps the explanation for their nonappearance is that those three departments are not in full agreement. Perhaps also, the probability that pleadings by the government may be required at some point in litigation related to certain detainees may make those officials reluctant to publish justifications in advance of those pleadings.

In the absence of such official justification, what may one conclude? First, I would point out that, while the White House press secretary focused on qualification for POW status and treatment under the Geneva Convention, an equally important, and perhaps more important, issue is whether the captives had been 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 murder and other crimes under national law simply for their participation in an armed conflict?<sup>7</sup> Legal combatants are entitled upon capture to the status of prisoners of war. Illegal combatants are not so entitled. I would also point out that, while the press secretary made no reference to the other three Geneva Conventions of 1949, all four Conventions are clearly applicable whenever one of them is applicable.<sup>8</sup>

<sup>5</sup> Ari Fleischer, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002), available in LEXIS, Legis Library, Fednew File; see also White House Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), at <<http://www.whitehouse.gov/news/releases/2002/02/>>.

<sup>6</sup> I was a member of the Office of the General Counsel to the Secretary of Defense from 1960 to 1965 and of the Office of the Legal Adviser to the Secretary of State from 1965 to 1977.

<sup>7</sup> 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, annex to Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Geneva Convention No. III, *supra* note 3, Art. 4; 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 4 A(6) of Geneva Convention No. III, *supra*.

<sup>8</sup> All four Geneva Conventions include a common Article 2, which provides:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Turning to the applicable law and the choices the president faced, I suggest that the decision to consider that two separate armed conflicts are being waged is correct. The first, the conflict with Al Qaeda, is not limited to the territory of Afghanistan. Al Qaeda is evidently a clandestine organization consisting of elements in many countries and apparently composed of people of various nationalities; it is dedicated to 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 does not in any respect resemble a state, is not a subject of international law, 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.<sup>9</sup> 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.

Analytically, the armed attack against the Taliban in Afghanistan 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 it sanctuary. 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,<sup>10</sup> 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.

Despite the analytical clarity of this distinction, one must recognize that practical problems are likely to arise in some circumstances, for example, when Qaeda personnel are captured while accompanying Taliban armed forces, to whom the Geneva Conventions are applicable; but, once the Qaeda personnel are identified, they would clearly not be entitled to POW status.<sup>11</sup> As persons who were 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 Additional Protocol I to those Conventions of 1977; but they may be lawfully 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.<sup>12</sup> They were illegal combatants, or, as the late Professor and Judge Richard Baxter once described such persons, they were “unprivileged belligerents,”<sup>13</sup> that is, belligerent persons who lack the privilege enjoyed by the armed forces of a state to engage in warfare with immunity

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 2, 6 UST 3217, 75 UNTS 85; Geneva Convention No. III, *supra* note 3, Art. 2; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 2, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva Convention No. IV].

<sup>9</sup> Accord Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AJIL 345, 348 (2002). *But see id.* at 353 (stating that some Qaeda combatants “may also be entitled to presumptive POW status”).

<sup>10</sup> U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1998, at 437, available at <<http://www.state.gov/s/1/>> (last modified Jan. 1, 2000). A list of state parties to the Conventions is also available online at <<http://www.icrc.org/eng>>.

<sup>11</sup> I know of no evidence suggesting that Qaeda personnel were incorporated in Taliban military units as part of the Taliban armed forces.

<sup>12</sup> 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* Geneva Convention No. IV, *supra* note 8, pt. III; U.S. DEP’T OF THE ARMY, THE LAW OF LAND WARFARE, para. 73 (Field Manual 27-10, 1956), available at <<http://www.adtdl.army.mil/atdls.htm>> (1976 ed.). Qaeda personnel would not qualify as “protected persons,” because the Geneva Conventions do not apply to the conflict with them. Moreover, 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.

<sup>13</sup> R. R. Baxter, *So-called “Unprivileged Belligerency”: Spies, Guerrillas and Saboteurs*, 1952 BRIT. Y.B. INT’L L. 323, reprinted in MIL. L. REV. BICENTENNIAL ISSUE 487, 501 (1975).

from any liability under national or 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.

Turning to the Taliban, 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, . . . 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.<sup>14</sup>

Clearly, the press secretary was summarizing the provisions of paragraph A(2) of that article, a paragraph that deals only with members of militias or other volunteer corps that are not part of the armed forces of a party to the armed conflict.<sup>15</sup>

Members of the press attending a press conference probably do not carry with them copies of the Geneva Convention. If they did, they might well have asked the press secretary what happened to the first provision of Article 4, which 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:

- (1) 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.<sup>16</sup>

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 solely to militias and volunteer corps that do not form part of the armed forces of a party to the conflict. 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? On the basis of the public record to date, we cannot know the answer of the United States 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 subparagraph 1 but, rather, only armies of competing warlords; but that, I suggest, would not be fully convincing given the general perception that, when the attacks began, the Taliban government was in effective control of most of Afghanistan.

<sup>14</sup> Fleischer, *supra* note 5.

<sup>15</sup> Article 4A(2) of Convention No. III, *supra* note 3, includes the following category of persons captured by the enemy who are entitled to POW status:

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

<sup>16</sup> *Id.*, Art. 4A(1).

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 the armed forces of a government in effective control of a state’s territory need not be accorded those protections by another state that declines to recognize that government’s legitimacy.

In view of the reasons given by the press secretary, it seems most likely that the United States is relying upon a different argument, i.e., that the conditions specified for POW status by Article 4A(2) for militias and volunteer corps that are not part of the armed forces somehow apply to all armed forces of a state, and that two of those four categories—wearing uniforms or other distinctive signs visible at a distance and conducting their operations in accordance with the laws and customs of war—are not complied with by the armed forces of the Taliban. Apparently, the United States does not question the Taliban’s compliance with the other two conditions—being commanded by a person responsible for his subordinates and carrying their arms openly.

Whether the four conditions applicable under Article 4 A(2) to members of militias and other volunteer corps that are not part of the armed forces of a state are also inherent requirements of any of a state’s armed forces is a debatable question. While contrary to textual logic, that assertion has occasionally been made.<sup>17</sup> Certainly, I would not deny that, to qualify for POW status under the Convention, all armed forces must belong to the state in the sense of being subject to a command responsible to that state for that group’s conduct and for its compliance with the rules of international law applicable in international armed conflict. On the other hand, each state is normally free to determine the nature of the clothing to be worn by its armed forces. While I certainly do not know whether or not some or all of the members of the Taliban’s armed forces were distinguishable from civilians, either by wearing black turbans or by some other visible sign, it seems insufficient for the United States merely to assert an absence of distinction without adducing evidence, and it appears most unlikely in any event that all units of the Taliban’s armed forces were indistinguishable from civilians.

With respect to the requirement that armed forces conduct their operations in compliance with the applicable laws of war, I note that the only allegation by the press secretary is that the Taliban “have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.”<sup>18</sup> Providing sanctuary to Al Qaeda and sympathizing with it are wrongs, but they are not the same as failing to conduct their own military operations in accordance with the laws of war.<sup>19</sup> A nation that assists an aggressor thereby commits a wrong, but its armed forces should not, as a consequence, lose their entitlement, if captured, to POW status. Moreover, asserted noncompliance with this fourth requirement is a dangerous argument to make in defense of denial of POW status, because it can so easily be abused, as it was by North Korea and North Vietnam, to deny POW treatment to all members of a state’s armed forces on the ground that their state was an aggressor or that some of the members of its

<sup>17</sup> See, e.g., ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR 328 (1976); W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT’LL. 39, 44, 48 (1977). Ruth Wedgwood, in the *Agora*, *supra* note 1, agrees, see Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AJIL 328, 335 (2002), but Michael J. Matheson, in the *Agora*, implies that the four conditions do not apply to the armed forces of a state, see Michael J. Matheson, *U.S. Military Commissions: One of Several Options*, 96 AJIL 354, 355 (2002).

<sup>18</sup> Fleischer, *supra* note 5.

<sup>19</sup> *Contra* Wedgwood, *supra* note 17, at 335.

armed forces allegedly committed war crimes.<sup>20</sup> Even in a conflict where substantial war crimes were committed by a state's armed forces, this argument 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.

I believe 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. This is what we did in Vietnam, where we found it desirable to give virtually all enemy prisoners POW status. The different treatment of the Taliban causes me to suspect that some unexplained reason may lie 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. Probably, POW status might be thought to inhibit interrogation, as it would prohibit confinement except for penal or disciplinary sanctions.<sup>21</sup> Such confinement may well facilitate successful interrogation. The detainees in Cuba are evidently confined in separate pens.<sup>22</sup>

I would suggest that a necessary first step would be for the United States to make public both the basis and the reason for denying POW status to all Taliban prisoners, not simply by asserting that the Taliban armed forces neither distinguished themselves adequately from the civilian population nor conducted their military operations in accordance with the laws of war, but by documenting such assertions and accompanying this evidence with a convincing explanation of the gravity of these matters and some elaboration of the evidently felt need to deprive them of POW status.

When I prepared the first draft of these comments, I assumed that the rejection of POW status for Taliban soldiers must have resulted from some unexplained central purpose, probably one related to the intention ultimately to prosecute some of them. The longer I ponder the reasons that might have inspired this decision by the president, the more I am inclined to suspect that there may well have been no such unexplained purpose. Might it not be the case that the present administration in Washington believes precisely what the White House press secretary 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 objectives of Al Qaeda suffice to justify, or even require, denial of POW status to all members of the Taliban armed forces? While such a determination seems baseless, one can imagine its being urged by those who, in the Reagan administration, grotesquely described Geneva Protocol I as law in the service of terrorism.<sup>23</sup>

<sup>20</sup> All of the then-Communist states made a reservation to Article 85 of Geneva Convention No. III to the effect that they refused to accept continued POW status for prisoners of war who were tried and convicted of war crimes or crimes against humanity. North Korea and North Vietnam, however, denied POW status to all American prisoners solely on the basis of the allegation that they were all war criminals. George H. Aldrich, *The Laws of War on Land*, 94 AJIL 42, 62 n.100 (2000).

<sup>21</sup> Geneva Convention No. III, *supra* note 3, Arts. 21, 95, 97, 98.

<sup>22</sup> Note that Article 17 of Convention No. III provides, *inter alia*:

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 unpleasant or disadvantageous treatment of any kind.

<sup>23</sup> See, e.g., Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109 (1985); Douglas J. Feith, *Law in the Service of Terror—The Strange Case of the Additional Protocol*, NAT'L INTEREST, Fall 1985, at 36; William Safire, *Rights for Terrorists? A 1977 Treaty Would Grant Them*, N.Y. TIMES, Nov. 15, 1984, at A31; Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901 (1986).

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 nature of the decision to deny POW status to the Taliban prisoners. By one sweeping determination, the president ruled that not a single Taliban soldier, presumably not even the army commander, could qualify for POW status under the Geneva Convention. While armed forces in the past doubtless made some decisions related to 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.<sup>24</sup>

Given that provision and the fact that the president is not a tribunal and cannot substitute for a tribunal under Article 5, 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.<sup>25</sup> The 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.<sup>26</sup> I do not know whether such a “review” would be made by a tribunal, as required by the Convention, or by the president. Review by a competent tribunal in individual cases would certainly be helpful if it could be meaningful. Only if reviews occur in practice can that be determined. The broad and definitive nature of the president’s determination would appear to entail the risk that any review by a tribunal 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 the unit in which he served, or those armed forces in general, met 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 scrutiny by 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.

In my view, international humanitarian law provides all too few opportunities for individuals to challenge state action,<sup>27</sup> but one of those few is the right of access to a tribunal granted by Article 5. It would be regrettable if in practice this right proves to have been effectively negated for Taliban prisoners. In this connection, I note that, since 1956, the United States Army Field Manual *The Law of Land Warfare* has made the following interpretation of Article 5 of the Convention:

For responses to these comments, see George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AJIL 1 (1991); George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT’L L. 693 (1986); Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AJIL 912 (1987); Waldemar A. Solf, *A Response to Douglas J. Feith’s Law in the Service of Terror—The Strange Case of the Additional Protocol*, 20 AKRON L. REV. 261 (1986).

<sup>24</sup> Geneva Convention No. III, *supra* note 3, Art. 5.

<sup>25</sup> Accord Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AJIL 320, 325 (2002).

<sup>26</sup> Richard Boucher, Spokesman, Daily Press Briefing (Feb. 8, 2002), at <<http://www.state.gov/r/pa/prs/dpb/>>.

<sup>27</sup> George H. Aldrich, *Individuals as Subjects of International Humanitarian Law*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 851, 855–56 (Jerzy Makarczyk ed., 1996).

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 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.<sup>28</sup>

This interpretation clearly indicates that doubt arises and a tribunal is required whenever a captive who has participated in hostilities asserts the right to be a POW. That is a point we were careful to state in Article 45, paragraph 1 of Protocol 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 until a tribunal decides otherwise.<sup>29</sup> Given the president's decisions of February 7, 2002, this obligation might also prevent the transfer of such prisoners to the United States.<sup>30</sup>

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 that intends to try him for an offense arising out of the hostilities to have his entitlement to POW status determined by a judicial tribunal.<sup>31</sup> 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 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 pertain only to persons who served in the armed forces of the Taliban, not to those who were members of the Qaeda terrorist group. The latter are, in my view, international outlaws and as such 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 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 I 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.

GEORGE H. ALDRICH

<sup>28</sup> U.S. DEP'T OF THE ARMY, *supra* note 12, para. 71 (b).

<sup>29</sup> Article 45, paragraph 1 of Protocol I, *supra* note 7, 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.

<sup>30</sup> Article 12 of Geneva Convention No. III, *supra* note 3, 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 its custody.

<sup>31</sup> Paragraph 2 of Article 45 of Protocol I, *supra* note 7, reads in full:

If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held *in camera* in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.