US Detention of Taliban Fighters:
Some Legal Considerations

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During the last seven years detention activities by US forces involved in the Afghanistan conflict¹ have raised numerous questions from the perspective of international law, in particular international humanitarian law (IHL);² this article addresses some of them. The focus will be on identifying the applicable law throughout the various stages of the hostilities (Part I) and issues related to the deprivation of liberty of Taliban fighters that entails its practical application (Part II).³

No issues pertaining to *ius ad bellum*, i.e., related to the lawfulness of the use of force, are discussed in this article. Given that there is often some confusion as to the relationship between the *ius ad bellum* and IHL (*ius in bello*), it must be stressed that IHL applies equally to all parties to an armed conflict, and that this is independent of whether the use of force has been lawful or not under the *ius ad bellum.*⁴

IHL only applies in situations of armed conflict. Treaty law has traditionally distinguished between international armed conflicts and non-international armed conflicts, the former being regulated in far more detail than the latter as can be seen in the core IHL treaties, the 1949 Geneva Conventions⁵ and their two 1977 Additional Protocols.⁶ The last years have, however, seen a growing tendency to regulate

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international and non-international armed conflicts in the same way in treaty law, and customary international law has developed in a way as to largely apply the same rules in both types of conflicts. However, there are still important differences between the two situations concerning the applicable law. To give two examples, the concept of combatant status, which entails, *inter alia*, the privilege of exclusion from criminal prosecution for lawful acts of war, and prisoner of war (POW) status only exist in international armed conflicts.

Following the terrorist acts of September 11, 2001 (9/11), President Bush declared that the United States was at "war against terrorism." On October 7, the United States led a military campaign against the de facto government of Afghanistan—the Taliban—accused of harboring the al-Qaeda group, which was held responsible for 9/11. Since the commencement of this military campaign, the United States has detained thousands of people. Some suspected Taliban and al-Qaeda members, as well as other individuals suspected of supporting them or of being associated with them, were transferred beginning in January 2002 to the US internment facilities at Guantanamo Bay, Cuba. Between 2002 and 2005, the United States brought about eight hundred individuals to Guantanamo. For various reasons those transfers almost completely ceased by the end of 2004. Since that time, the great majority of persons captured have been held in Afghanistan, mainly in the Bagram Theatre Internment Facility; the United States has brought only about twenty individuals to Guantanamo.

At the time this is written, about 240 persons are held at Guantanamo Bay and about 600 at Bagram. The closure of Guantanamo is due to take place no later than January 22, 2010, while the building of a new Bagram facility in Afghanistan with a greater detention capacity has been reported in the media.

I. The Law Applicable to the Situation in Afghanistan

In order to determine the applicable law and standards governing any military activity, such as deprivation of liberty, a legal determination of the situation existing at the time the persons were captured is necessary. From October 7, 2001 to date, two phases in the Afghanistan situation can clearly be identified: a first phase in which the US-led coalition forces fought against the Afghan authorities and non-State armed groups, followed by a phase in which the US and other foreign forces assisted the Afghan authorities in fighting non-State armed groups.

A. The Situation from October 7, 2001 to June 18, 2002

Even though only recognized by a few States as the legitimate authorities of Afghanistan, the Taliban were controlling and ruling over about 95 percent of the
Afghan territory in October 2001. Afghanistan clearly had a functioning Taliban government and its armed wing was the country’s regular armed forces. The airstrikes by the US-led coalition that started on October 7, 2001 thus clearly constituted an international armed conflict between the coalition States and Afghanistan.

An international armed conflict is generally defined as “any difference arising between two States and leading to intervention of members of the armed forces,”15 or, as the International Criminal Tribunal for the former Yugoslavia has put it, as a situation where “there is a resort to armed force between States.”16

The four Geneva Conventions of 1949 were thus applicable, but not Additional Protocol I (AP I) to which neither the United States nor Afghanistan was a State party. While the Geneva Conventions focus almost entirely on the protection of persons in the hands of the enemy, AP I contains detailed rules on the conduct of hostilities, including air-to-ground operations. Consequently, the airstrikes, which were the predominant feature at the beginning of the military operations, were essentially subject to the rules of customary international law. However, these rules of customary international law now correspond largely to those of AP I. These include the principle of distinction and the fundamental rules derived from it, such as

- the prohibition of direct attacks on civilians or civilian objects;
- the prohibition of indiscriminate attacks, including those that may be expected to cause excessive incidental civilian casualties or damages (principle of proportionality);
- the prohibition on attacking objects indispensable for the survival of the civilian population;
- the prohibition on attacking cultural property;
- the obligation to take precautions in attacks;
- the obligation to take precautions against attacks; and
- the prohibition on the use of human shields.17

In addition, the rules contained in the 1907 Hague Regulations,18 which are considered as reflecting customary international law,19 have also been of primary importance to the international armed conflict in Afghanistan.

B. The Situation from June 19, 2002 to Date

The fall of the Taliban did not necessarily mean the cessation of active armed hostilities. There are certainly still active armed hostilities in Afghanistan; however, the nature of the armed conflict has changed.
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Following the convening of the Loya Jirga in Kabul in June 2002, an Afghan transitional government was established on June 19, 2002. It received unanimous recognition by the international community of States and could also claim broad-based recognition within Afghanistan through the Loya Jirga process. This new government of Afghanistan has been leading an armed struggle against an insurgency (i.e., the remnants of the Taliban and other non-State armed groups), which can be qualified as a non-international armed conflict. Indeed, the criteria usually used in IHL to define non-international armed conflicts seem to be met: the hostilities have reached a minimum level of intensity, and non-governmental groups involved in the conflict can be considered as “parties to the conflict” since they possess organized armed forces, operate under a certain command structure and have the capacity to sustain military operations.\(^20\)

This non-international armed conflict is “internationalized” by the participation of foreign forces, including those of the United States, but because those foreign forces are assisting the Afghan government, it still cannot be characterized as an international armed conflict since it does not involve opposing States.

Recent developments in the conduct of the hostilities, in particular the US cross-border operations into Pakistan, might raise further questions about the legal qualification of the nature of the situation, i.e., is there an international armed conflict between the United States and Pakistan? According to the information available at the time of writing, it is the author’s opinion that those operations represent a “spill-over” of the armed hostilities in the Afghan non-international armed conflict into Pakistan and do not represent a separate armed conflict.

Common Article 3 (CA3) of the four Geneva Conventions of 1949 and customary IHL rules are thus applicable to this situation,\(^21\) but not Additional Protocol II (AP II) to which neither the United States nor Afghanistan are State parties.

**II. Deprivation of Liberty of Taliban Fighters**

The two phases in the Afghanistan conflict have direct consequences on the status given to the Taliban deprived of liberty and the legal standards governing their deprivation of liberty.

**A. Taliban Captured before June 19, 2002**

In an international armed conflict governed by the Geneva Conventions, such as the one in Afghanistan between October 2001 and June 2002, there are two main categories of persons deprived of liberty: either they are captured combatants entitled to POW status and protected by the Third Geneva Convention (GC III),\(^22\) or
they are civilians interned or detained and protected by the Fourth Geneva Convention (GC IV).\textsuperscript{23}

Article 4, GC III identifies several groups of persons that, having fallen into the power of the enemy, are to be considered POWs. The first group of persons includes members of the armed forces of a party to the conflict. As stated earlier, given that the Taliban government was not recognized by a large part of the international community, including the United States, members of the Taliban regular armed forces fell into the category of persons described in Article 4(A)(3) of GC III, i.e., “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.” These “members of regular armed forces” differ from those referred to in Article 4(A)(1) (“members of the armed forces of a Party to the conflict”) in one respect only: the authority to which they profess allegiance is not recognized by the adversary as a party to the conflict.

As pointed out in the International Committee of the Red Cross (ICRC) Commentary, the “regular armed forces”—be they of recognized or unrecognized governments—are assumed to have all the material characteristics and all the attributes of the armed forces falling within Article 4(A)(1), GC III: they wear uniforms, they have an organized hierarchy, and they know and respect the laws and customs of war.\textsuperscript{24} Therefore, the delegates to the 1949 Diplomatic Conference thought that it was not necessary to expressly specify that such armed forces had to satisfy the requirements laid down in Article 4(A)(2)(a), (b), (c) and (d): that of being commanded by a person responsible for his subordinates, that of having a fixed distinctive sign recognizable at a distance, that of carrying arms openly and that of conducting operations in compliance with IHL.\textsuperscript{25} It was presumed that States’ regular armed forces complied with these requirements.\textsuperscript{26}

While it recognized the application of GC III in the conduct of armed hostilities against the Taliban, the US administration reached the conclusion, as set forth in a 2002 White House memorandum, that the Taliban collectively were not entitled to POW status because they were not fulfilling the necessary criteria under Article 4 of GC III.\textsuperscript{27} This collective denial of POW status for the adversary armed forces is highly problematic. The main reasons invoked were that the Taliban did not distinguish themselves from the general population and did not obey the laws and customs of war.\textsuperscript{28}

It is highly unlikely that none of the Taliban fighters complied with these requirements. This is particularly evident with regard to the obligation to distinguish oneself during an attack. Indeed, it has been argued that the Taliban fighters were clearly distinguishable from the civilian population because they wore black turbans and had scarves indicating to which force they belonged.\textsuperscript{29} Thus, the requirement to distinguish oneself could not be assessed in a generalized manner, but had
to be decided for each captured person. According to Article 5, GC III, a “competent tribunal” is to decide in each individual case whether a person was indeed distinguishing her/himself. An individualized factual assessment was also necessary for the other requirements. Given that there was debate about whether these conditions were fulfilled, there was reason for doubt and thus a competent tribunal—and not the executive authorities in Washington—should have made a finding on the facts and ruled on whether the person in question was or was not a POW. This competent tribunal could have been either civilian or military. Until the tribunal has given its ruling, the person deprived of his or her liberty must be treated as a POW.

Because of the position enunciated in the 2002 White House memorandum, competent tribunals were never established in Afghanistan. But in response to a US Supreme Court decision in June 2004, according to which US courts have jurisdiction to hear legal challenges on behalf of persons detained at Guantanamo, the US Department of Defense (DoD) established administrative hearings, called Combatant Status Review Tribunals (CSRTs). The purpose of the CSRTs is to review whether each person meets the criteria to be designated as an enemy combatant and to allow those persons to contest such designation. US authorities have stated that CSRT procedures provide a process similar to that of a competent tribunal under Article 5, GC III. In this regard, it must be argued that the CSRT and Article 5 hearings serve different purposes and operate under different circumstances. Article 5 hearings are meant to take place on or near the zone of combat, immediately after capture, thereby maximizing availability of witnesses and evidence. They are designed to swiftly determine a detainee’s legal status, i.e., if he or she is entitled to POW status. In contrast, CSRTs started to operate in July 2004, two and a half years after the arrival of the first detainees at Guantanamo from Afghanistan and thousands of miles from the combat zone. Moreover, CSRTs may only confirm the enemy combatant designation or conclude it was an error; they do not have the authority or the option of declaring a detainee a lawful combatant, i.e., a POW.

What would be the main consequences if a Taliban fighter had received POW status after an Article 5 hearing? In those circumstances, he could lawfully be deprived of liberty until the end of active hostilities of the international armed conflict. He could not be prosecuted for his mere participation in hostilities, unless he had committed a war crime. If prosecuted for war crimes, the concerned POW should be sentenced by the same courts and according to the same procedures as in the case of members of the armed forces of the detaining power, i.e., by “court martial” if prosecuted by the United States.
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An Article 5 tribunal could also have decided that an individual was not entitled to POW status. In that scenario, the concerned Taliban fighter would then be protected by GC IV as a detainee or internee\(^{38}\) (if he fulfilled the criteria of nationality found in Article 4, GC IV).\(^{39}\) A person protected by GC IV may be detained until the end of active hostilities unless released earlier because this person is deemed to no longer pose a security threat. He may be deprived of certain rights and privileges while in detention (but must be humanely treated), and may be prosecuted for the mere fact of having taken up arms under the domestic law of the United States.

For the individuals who did not fulfill the criteria of GC III or GC IV to benefit from their respective protections, they would still benefit from the rules of existing customary IHL as reflected in CA\(^{40}\) and Article 75, AP I,\(^{41}\) which lay down fundamental guarantees. Thus, there is no category of persons affected by or involved in international armed conflict that fall outside the scope of IHL protection.

B. Taliban Captured before June 19, 2002 and Still Held by the United States
Taliban captured during the period of the international armed conflict in Afghanistan and still in the power of the United States are not held in Afghanistan but in Guantanamo. With the end of the international armed conflict, GC III and IV no longer provide a valid legal basis for continuing to hold, without charge, persons captured before June 19, 2002. Because armed hostilities are ongoing in Afghanistan, it would not be realistic to require that every person held by the United States in Guantanamo who is not facing a criminal proceeding be released; such a person might still constitute a security threat to the United States in the context of the ongoing non-international armed conflict in Afghanistan. The United States could, therefore, continue to hold these persons for the same reason(s) that it currently interns persons in connection with the non-international armed conflict in Afghanistan (see Part C below). As GC III and IV no longer provide a legal basis for continuing to hold them, these persons should be placed within another legal framework to regulate their internment, including, in particular, a regular, independent and impartial review of the reasons for their continued deprivation of liberty.\(^{42}\) In its June 2008 decision concerning those held at Guantanamo, the US Supreme Court granted internees access to US civilian courts.\(^{43}\) This access would allow the concerned individuals to benefit from judicial supervision of the lawfulness of their continued deprivation of liberty. Such judicial supervision seems to be the most adequate means of ensuring a genuine independent and impartial review process.

Those who are suspected of having committed war crimes or other criminal offenses can and should be prosecuted. Some have argued that the US federal criminal justice system has proven itself highly adequate and adaptable to the challenges
of prosecuting complex terrorism cases, while the possible use of "new" military commissions on US soil has been reported in the media. But whatever system is eventually used, those prosecuted must be afforded essential judicial guarantees such as the presumption of innocence, the right to be tried by an impartial and independent tribunal, the right to effective legal counsel and the exclusion of any evidence obtained as a result of torture or other cruel, inhumane or degrading treatment.

An appropriate approach would be to consider that these persons are now protected by CA3, customary rules applicable to non-international armed conflict and relevant rules of human rights law since their deprivation of liberty is no longer linked to the former international armed conflict but rather to the current non-international one. From an analytical perspective, these persons would be viewed as though they had been released at the end of the international armed conflict and simultaneously re-arrested at the beginning of the non-international conflict, with the legitimacy and conditions of their continued detention reevaluated in accordance with this approach.

C. Taliban Captured after June 19, 2002 and Still Held by the United States

Combatant status, which entails the right to participate directly in hostilities, and POW status do not exist in non-international armed conflict, such as the one that began on June 19, 2002 and is ongoing. Therefore, upon capture the Taliban do not, as a matter of law, enjoy POW status and may be prosecuted by US authorities under domestic law for any acts of violence committed during the conflict, including, of course, war crimes. In terms of IHL, their rights and treatment during detention are governed by CA3 and customary rules applicable to non-international armed conflicts.

Following the June 2006 Hamdan decision, the DoD issued a memorandum requiring all DoD personnel to adhere to the standards of CA3 with regard to the treatment of detainees and that all relevant directives, regulations, policies, practices and procedures be reviewed "no later than three weeks from the date of this memorandum" in order to comply with the CA3 standards. In January 2009 the Secretary of Defense was tasked with undertaking a review of the conditions of confinement of those held at Guantanamo to ensure they meet humane standards, notably those required by CA3.

The vast majority of the Taliban captured after June 2002 are held in Afghanistan, but almost none of them have been charged with any crime. Therefore, they must be considered as internees. As for those interned in Guantanamo (see Part II B above), a wide range of procedural principles and safeguards should be implemented by the US detaining authorities, including a regular independent and impartial review of the reasons for their continued deprivation of liberty.
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One particular issue that needs to be tackled and clarified by US authorities is the legal basis for their internment activities at Bagram for individuals detained by US forces operating as part of Operation Enduring Freedom. Indeed, there is no UN Security Council resolution (unlike in Iraq until December 31, 2008), no agreement with the Afghan authorities and no US domestic legislation or executive order governing this type of deprivation of liberty.48

While internment is clearly a measure that can be taken in a non-international armed conflict, as evidenced by the language of AP II, which mentions internment in Articles 5 and 6,49 CA3 contains no provisions regulating internment apart from the requirement of humane treatment. Therefore, reliance on international human rights law as a complementary source of law in situations of non-international armed conflict is necessary. Moreover, even though not applicable per se, the principles and rules of GC IV might serve as guidance.50

It can be argued that the basis for the detention/internment activities of US forces assigned to the International Security Assistance Force (ISAF) can be found in UN Security Council Resolution 1386 of December 20, 2001 and subsequent resolutions. Those resolutions authorize the ISAF to assist Afghan authorities in the maintenance of security and ISAF-participating States to take “all necessary measures to fulfil its mandate.”51 The wording “necessary measures” could be interpreted as encompassing deprivation of liberty activities. However, this wording remains vague and definitely needs more details regarding the grounds and process governing the use of internment as a form of deprivation of liberty.

Conclusions

In the aftermath of 9/11, the armed conflict in Afghanistan has raised many questions concerning the application of IHL, in particular with regard to deprivation of liberty. Nothing in existing IHL prevents US authorities from capturing, detaining or interning persons in the fight against terrorism, or from prosecuting persons suspected of having committed criminal offenses when appropriate. Thus, it is the author’s opinion that, if properly implemented, the existing conventional and customary rules of IHL adequately address most, if not all, of these questions. Seven years after the beginning of the conflict, and on the verge of the closure of Guantanamo, it is time to think on how better compliance can be achieved. The January 2009 White House executive order establishing a special task force to identify “lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations”52 seems to be a significant step in the right direction.
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Notes

1. US forces have been deployed in Afghanistan under the banner of Operation Enduring Freedom since 2001 and under the NATO-led International Security Assistance Force (ISAF) operation since 2002.

2. The term “IHL” is used as synonymous with the “law of armed conflict” and the “laws and customs of war.”

3. It is not the aim of the author to identify and attribute specific violations that may have been committed by the parties to the conflict.


9. Bagram is a place of detention located on the US military base in the ancient city of Bagram, north of Kabul. The US base was originally built and used by the Soviet Union during its war in Afghanistan in 1979–89. The detention center was set up at the end of 2001 and was used by the US military as a temporary screening facility until the end of 2004. Detainees were either released, or sent to US places of detention at Kandahar, Afghanistan or at Guantanamo Bay, Cuba.

10. For a list of US detainee transfers to and from Guantanamo, see http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm (last visited Feb. 24, 2009).


13. While not of direct interest for this article, at the time of the launching of the coalition military campaign, years of armed hostilities in Afghanistan between the Northern Alliance armed group and the Taliban constituted a non-international armed conflict, thus were subject to the rules of IHL.


16. Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995). This definition has been adopted by other international bodies since then.

17. See AP I, supra note 6, arts. 48, 51, 53, 54, 57 & 58.


19. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 89 (July 9); 1 Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg, 14 November 1945–1 October 1946, at 253–54 (1947).


21. For more information on customary law and for a complete description of the rules of IHL applicable in non-international armed conflict as a matter of customary law, see the ICRC study on customary international humanitarian law. JEAN-MARIE HENCKAERTS & LOUISE DOWSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) (2 volumes: Volume I, Rules; Volume II, Practice (2 Parts)).

22. There are some exceptions such as Article 46 of AP I, which is of customary nature. It provides that combatants who engage in espionage do not have the right to POW status.

23. There are some categories of persons who are not combatants but who are granted POW status (e.g., war correspondents as provided in Article 4, GC III).

24. COMMENTARY III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 63 (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY III].

25. Id. at 59–61.

26. Whether these criteria must also be met by a State’s regular armed forces has generated some controversy in literature with arguments based on textual logic, i.e., the conditions are only mentioned in Article 4(A)(2) and not in Article 4(A)(1) and (3) of GC III. See, e.g., George H. Aldrich, The Taliban, Al Qaeda, and the Determination of Illegal Combatants, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 895 (2002); Yoram Dinstein, Unlawful Combatancy, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 255 (2002).


30. Article 5(2) of GC III states that

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.

31. ICRC COMMENTARY III, supra note 24, at 77.
36. See GC III, supra note 5, art. 118.
37. See id., art. 102.
38. Internment is defined as the deprivation of liberty of a person that has been initiated/ordered by the executive branch, not the judiciary, without criminal charges being brought against the internee.
40. The International Court of Justice recognized the customary nature of CA3 not only in non-international armed conflict but also in the event of international armed conflict. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
47. See White House Executive Order, supra note 11, § 6. See the outcome of this review in Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement (2009), available at http://www.defenselink.mil/pubs/pdfs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENT.pdf.
48. It is arguable whether the Authorization for the Use of Military Force (Pub. L. No. 107-40, (codified at 50 U.S.C. § 1514), which authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with 9/11, provides an adequate basis for US detention abroad. In this regard, see Hamdi v. Rumsfeld, 542 U.S. 507 (2004). See also the Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, in Re: Guantanamo Bay Detainee Litigation, filed by the US Department of Justice on March 13, 2009. At the time this is written, it is unclear whether the US administration would rely on the Authorization for the Use of Military Force authority with regard to detention in Afghanistan.

49. AP II, supra note 6, art. 5(1) ("the following provisions shall be respected as a minimum with regards to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"); id., art. 6(5) ("At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of liberty for reasons related to the armed conflict, whether they are interned or detained").

50. For more details, see ICRC Report, supra note 42.
