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Panel II

Commentary—Jus in Bello

Leslie Green¹

The first issue to be considered when examining the impact of the law of armed conflict on the war against terrorism is the nature of that war. Immediately after the September 11th attacks, President George W. Bush declared that we were now involved in a “war against terrorism—the first war of the twenty-first century.”² Moreover, President Bush subsequently declared that those “who are not with us are against us,” thus negating any possibility that those failing to see eye to eye with him could claim to be neutrals as would be the case if this were a traditional war.³ Prima facie, the President’s statement

1. Leslie Green is Professor Emeritus of International Law at the University of Alberta, Canada.

2. President George W. Bush, Remarks by The President Upon Returning to the White House (Sep. 16, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html>, (Sep. 23, 2002).

3. President George W. Bush, Remarks by the President to the Employees of the Department of Labor (Oct. 4, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/10/20011004-8.html> (Sep. 23, 2002). Note that the concept of neutrality is markedly changed when dealing with a UN Security Council Resolution calling upon all member nations to use force to achieve a certain objective. In this instance, the traditional concept of neutrality does not apply.

implied that any state not supporting the United States would be considered an “enemy” of the United States.

A major difficulty with the President’s approach is that the attacks of September 11th, organized by non-state actors, were not the acts of a state triggering the traditional notion of self-defense against an act of aggression or a breach of the peace as outlined in Article 51 of the UN Charter.⁴ Traditionally, and in accordance with the normally understood rules of international law, war is an armed conflict conducted by the organized armed forces of two or more contesting states. After the events of September 11th, there was no opposing “state” upon which to declare “war.” In other words, the President’s statement that “we are at war” seemed more to be political rhetoric, possessing certain similarities to the language used in the past in relation to the “war against poverty” or the “war against drugs.”

The fundamental difference in this case from these other “wars” though is the determination of the United States to resort to armed force and to pursue and destroy or bring to justice the offenders identified as members of the al Qaeda terrorist group led by Osama bin Laden. This group had its headquarters in Afghanistan, a state governed by a de facto administration known as the Taliban. The Taliban was not the actual government of Afghanistan but instead was a group in possession of much of the territory of Afghanistan. The only government of Afghanistan legitimately recognized by the UN was the Northern Alliance. In fact, the Taliban administration had achieved only minimal recognition as the government of the country, only gaining official recognition of such status by Pakistan and two other Muslim states.⁵ Shortly after the United States began its operations, even those states recognizing the Taliban as the legitimate government of Afghanistan withdrew their recognition.⁶

When the Taliban authorities rejected a demand that they capture Osama bin Laden and his leading henchmen and hand them over to the United States for trial and punishment, the American authorities decided to engage

4. U.N. CHARTER art. 51.

5. The two other states recognizing the Taliban as the legitimate government of Afghanistan on September 11th were Saudi Arabia and the United Arab Emirates. Both Saudi Arabia and the United Arab Emirates severed ties with the Taliban very quickly after September 11th. Pakistan did not do so until November 22, 2001. See *Pakistan Shuts Down Taliban Embassy*, USA TODAY, Nov. 22, 2001, available at <http://www.usatoday.com/news/attack/2001/11/22/taliban-embassy.htm#more> (Sep. 23, 2002).

6. *Id.*

7. President George W. Bush, Presidential Address to the Nation (Oct. 7, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>) (Sep. 23, 2002).

in self-help, invading Afghanistan.⁷ This action was undertaken without resort to the Security Council but did receive general international support from a variety of states, particularly after al Qaeda made it clear that their terror campaign was not necessarily restricted to American targets. Given that the United States decided to use force against not only al Qaeda but also the Taliban administration, it might have been presumed that the law of armed conflict regarding prisoners of war and the application of the principles of distinction and proportionality would come into play.

The attacks against the Pentagon and the World Trade Center were clear threats to the sovereignty and security of the United States. While it may be argued that the attack on the World Trade Center was primarily directed against private, non-governmental interests and thus not *prima facie* aimed at the state, this cannot be the case as regards the Pentagon. The attack on the Pentagon was clearly aimed at the very heart of American governmental processes, thus constituting a threat to the very existence of the state. Such an attack clearly entitled the United States to expect authorities of states in which the perpetrators or their supporters reside to cooperate in seeking them out. The failure of the Taliban administration to do so opened the way for the United States to engage in self-help. Such self-help, though, would be limited solely against al Qaeda bases and any Afghan organization clearly associated with al Qaeda or supporting al Qaeda. The authority to target the Taliban administration itself would require proof of a close relationship between the Taliban itself and al Qaeda.

At the same time that the United States was beginning its attacks, it was building a coalition of nations. Propaganda by al Qaeda and previous terrorist acts directed against US embassies as well as a US warship made it clear that the events of September 11th were part of a continuum. Intelligence reports suggested that similar attacks were likely to follow, making it easier for other states to support the US efforts. Such states based their efforts upon the principle of collective self-defense, including the right of preventive and even anticipatory self-defense. Within this coalition, however, some issues developed as to the application of the law of armed conflict to certain personnel.

While the United States never declared “war” as such, the bombing and subsequent land offensive by it and allies such as Canada and the United Kingdom amounted to an armed conflict within the terms of the Geneva

8. See Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter GC III] *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts and Richard Guelff eds., 3rd ed., 2000) at 243 [hereinafter DOCUMENTS ON THE LAWS OF WAR].

Conventions of 1949.⁸ This seems particularly to be the case regarding Taliban members and installations under the control of the Taliban. Once operations evolved to the point that they were directed at al Qaeda and at the replacement of the Taliban with the Northern Alliance, the Geneva Conventions became relevant. Despite the absence of a declaration of war, the actual fact of conflict was enough to invoke the fundamental principles of the law of armed conflict, particularly those of proportionality and distinction.

By Article 2, common to all four Conventions:

*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 Conventions shall also apply to all cases of total or partial occupation of the territory of a High Contracting Party, even if the said occupation meets with no 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.*⁹

In accordance with the normal law concerning treaties, the Taliban administration would be bound in the same way as the Northern Alliance, against which it would be considered a rebel authority, with its forces entitled to the same rights and subject to the same duties as the forces of the legitimate Afghan government, the Northern Alliance. It might have been expected that allies of the legally recognized authority capturing Taliban personnel would hand such captives over to the Northern Alliance for trial or detention, as was the customary practice of the United States in its participation in hostilities on behalf of the Republic of Vietnam. In this case, however, the United States treated all captives, whether supporters of the Taliban or al Qaeda, as potential terrorists.

This ignored the fact that while the Taliban authorities might, due to their failure to cooperate in seeking out al Qaeda personnel, constitute a legitimate target, it does not follow that every member of the Taliban forces falls within the same category. Ample evidence exists to indicate that many of the rank and file Taliban were orthodox, if not fundamentalist, followers of Islam who had taken up arms only against the Northern Alliance.

As a consequence of this policy, the United States announced that it was not going to treat any captive or detainee as a prisoner of war, nor apply to

9. *Id.* (italics added).

10. Ari Fleisher, Press Briefing, Office of the Press Secretary (Jan. 31, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020128-11.html#prisoners%20down%20in%20Guantanamo%20Bay> (Sep. 24, 2002).

them the protection of Geneva Convention III relating to the treatment of prisoners of war.¹⁰ Not all coalition members of the US campaign favored this policy, as the United Kingdom, Australia, and Germany registered concerns about the lack of adherence to the Geneva Convention on Prisoners of War (GC III).¹¹ Despite these protests, the United States refused to consider any detainees as potential prisoners of war.

Article 4 of the Convention provides in part that:

[p]risoners of war . . . 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.

(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, fulfill 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.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.¹²

11. See, e.g., *Coalition at Odds over Cuban Camp*, THE SCOTSMAN, 1, Jan. 21, 2002, available at http://news.scotsman.com/archive.cfm?id=75162002&rware=HYRBHPXMUZMV&CQ_CUR_DOCUMENT=4 (Sep. 24, 2002); *Rocks, stones found in cells - War on Terror Letters to a Missing Son*, THE DAILY TELEGRAPH, Jan. 28, 2002, available at LexisNexis, Major World Newspapers (Sep. 24, 2002). The United States changed this initial approach on February 7, 2002 when the Office of the Press Secretary released a fact sheet stating that “[t]he President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees” but that “[u]nder the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs” and “therefore neither the Taliban nor al Qaeda detainees are entitled to POW status.” Office of the Press Secretary, Fact Sheet - Status of Detainees at Guantanamo, February 7, 2002, available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (Sep. 24, 2002).

12. See GC III, *supra* note 8 at art. 4.

Note that this article makes no reference to parties to the Convention, but refers solely to parties to the conflict. Paragraph 3 is significant for those opposing the Taliban or seeking al Qaeda members since it expressly refers to the forces of an authority unrecognized by a captor. As to paragraph 2, it seems that various Taliban units were under a proper command and may have been wearing a distinctive insignia as they wore a black head-covering of a similar type. These Taliban supporters carried their arms openly and it is not known whether they complied with the laws and customs of war as there were no real land operations allowing for this to be studied.

Further coalition problems arose regarding the actions of the United States when studying other articles of this convention. Article 5 provides:

[t]he present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

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.¹³

To date, not a single Article 5 hearing has been undertaken by the United States, nor are such hearing likely to take place in the future. The United States has taken the position that such hearings are not required for Taliban or al Qaeda members as they fall so clearly outside the scope of Article 4 that there can be no question but that they are not entitled to the protection of the Convention.

Additionally, although the United States has announced it is establishing special military commissions for the trial of these “detainees,” trials have yet to take place. In fact, no charges have even been made public. Finally, it is unclear what crimes, if any, the majority of Taliban members detained at Guantanamo Bay have actually committed.

13. See GC III, *supra* note 8 at art. 5.

14. This is particularly true for those allies who have ratified Additional Protocol I which increases the types of people considered to be lawful combatants and imposes additional obligation on holding powers. See, e.g., 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 8 at 419.

This policy of refusing to treat detainees as required by the Third Geneva Convention has caused problems for US allies such as Canada and the United Kingdom.¹⁴ By way of example, though Canada has not declared war, its policy is that its forces will at all times observe the law of armed conflict as recognized by Canada.¹⁵ As debate developed in Canada as to the application of the Third Geneva Convention to detainees, Taliban members captured by Canadian Forces were turned over to the United States.¹⁶ Such transfer was clearly in breach of Canadian obligations in Article 12 of the Third Geneva Convention which provides that:

[p]risoners 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. . . . [I]f that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.¹⁷

Though no Protecting Power existed in this case, the United States had made it clear that it would not apply the protections of GC III to these detainees. Nevertheless, no Canadian request for the return of these prisoners was ever made,¹⁸ causing an apparent breach of GC III by Canada.

A singular lesson exists from these problems. As situations like these develop where a need exists to take combined action outside the umbrella of the UN, great care should be taken as early as possible to agree upon policies that will effectively deal with these types of issues to the satisfaction of all coalition members.

15. See Code of Conduct for CF Personnel, Office of the Judge Advocate General, October 20, 1999, p. 2, available at http://www.dnd.ca/jag/jag_pdf_docs/codeconduct_ch1to3_e.pdf (Sep. 24, 2002).

16. See Tim Naumetz, *Prisoner Furor Dogs Grits*, CALGARY HERALD, p. A1 (Jan. 30, 2002), available at LexisNexis, Major World Newspapers (Sep. 24, 2002).

17. GC III, art. 12, *supra* note 8.

18. Interestingly, the United Kingdom transferred personnel falling into the hands of its forces operating in Afghanistan to the Northern Alliance, as the legitimate government of that country, which was entitled to treat such persons in accordance with its own laws, such as there might be.