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Strategic Insight

The Geneva Conventions, POWs, and the War on Terrorism

by Daniel Moran

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The Geneva Conventions are probably the most broadly familiar of all international agreements. Novels and movies about war have long used them as short-hand for international law as a whole, and anyone familiar with such popular treatments will have concluded, correctly, that in some general way the Conventions forbid casual brutality or deliberate abuse of civilians, prisoners, and others who, being caught up in war, are unable to defend themselves. When people speak of the Geneva Conventions today they usually mean the four Conventions concluded in 1949, to which virtually every government on earth, including the United States, has adhered; and perhaps also to the less firmly established Additional Protocols, concluded in 1977, which further elaborated the protections afforded by the 1949 agreements and extended them to a wider range of military conditions, including those that arise from civil war and revolutionary insurgency. But these are merely the most prominent in a long line of treaties extending back to the Brussels Declaration of 1874, the first attempt to spell out the legal rights of non-combatants in war.

In contrast to what is sometimes called "Hague law," which is concerned with the rules of combat, the legality of weapons, and so on, "Geneva law" has focused on protecting the "victims" of war. In recent times, however, this distinction has ceased to count for much, because both bodies of law have expanded to the point where their concerns must overlap —the rights of POWs are a central example—and because of the rising concern with human rights as a subject of international regulation. Two once-distinct threads of legal reasoning—the law of war, which seeks to regulate the treatment of the enemy in wartime, and the law of human rights, which concerns relations between governments and their own people—have lately woven themselves together into a complex tapestry called "international humanitarian law." The comments that follow are intended to address some aspects of the application of this body of law to the U.S. campaign against al Qaeda, and specifically to consider how far international law can or should govern the treatment of prisoners alleged to be complicit in terrorism.

The treatment of prisoners of war is a perennial subject of international law, if for no other reason than because it is one on which agreement has been relatively easy to reach. All governments share a common interest in protecting their soldiers from ill treatment by the enemy. It is also an issue on which civil and military opinion have tended to converge, especially since the advent of mass conscript armies in the latter half of the nineteenth century, which extended the risk of capture throughout society. To this must be added an additional, more strictly tactical incentive. It is much better for beaten enemy soldiers to surrender, rather than fight to the death against insuperable odds. The corrosive effects of last-ditch resistance on the morale of the winner is evident, for instance, in the Pacific Theater of the Second World War. Japanese soldiers, who had been indoctrinated to believe that surrender meant torture and humiliation, were far less likely to become POWs than their German or Italian counterparts. Instead they would engage in lethal forms of suicidal combat, to which their American opponents reacted with fear and hatred of an unusually personal and enduring kind. Their reaction in turn made legitimate surrender attempts by either side less likely.

The development of legal norms respecting the treatment of POWs before 1945 affords an especially clear illustration of the underlying logic of the law of war as traditionally understood. At bottom, that logic

depended upon exactly two forms of sanction: fear of reprisal, and concern for neutral opinion. Belligerents that were not disposed to care about either of these things for cultural or ideological reasons were correspondingly less likely to follow the rules. The Japanese case is an example, as are the similar conditions that existed on the Eastern Front, where racial hatred and totalitarian ideology combined to reduce the chances of either German or Soviet prisoners surviving the war, and hence of surrendering in the first place. In cases where the advantages of reciprocity held up, however—as it did at most times between the United States and Germany, for instance—combatants on both sides had a realistic chance of having their surrender accepted, and of living to return home when peace was restored.

It is self-evident that this kind of mutuality of interest does not and cannot exist between the United States and terrorist organizations like al Qaeda. The latter are incapable of entering into or honoring international agreements, while the United States is unwilling to accept any of the legal burdens that would otherwise follow from its rhetorical characterization of the struggle against terrorism as "war." What is perhaps less obvious is that international law respecting prisoners of war no longer rests as firmly as it once did upon the stern logic of reprisal. It is for this above all that the Geneva Conventions and their Additional Protocols are notable. In their terms, the rights of non-combatants and soldiers rendered *hors de combat* by wounds or capture are no longer strictly descended from the reciprocal obligations of belligerents. They also have something of the *sui generis* nature of human rights, to which people are personally entitled. POWs are now, in effect, another protected class within the ambit of international humanitarian law, albeit one whose rights are more extensive than those of other victims of war, including civilians.

The case becomes complex when applied to Taliban soldiers taken while fighting alongside their al Qaeda comrades—assuming for the moment that such a distinction can be made realistically with respect to individuals. Afghanistan is both a party to the Geneva Conventions and a member of the United Nations, albeit one whose seat was vacant at the time of the war, owing to doubts about the legitimacy of the Taliban regime. Such doubts would not affect the right of Afghan soldiers to be treated as POWs, however, for under Geneva law these do not depend upon mutual recognition, simply upon the material fact of armed conflict. Additional Protocol I, which the United States has signed but not ratified, extends the Conventions' protections even to those engaged in "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights to self-determination," a characterization that might be stretched to cover al Qaeda itself, at least in its own eyes. But one need not go this far as concerns the Taliban. If one accepts that its soldiers were acting openly as members of an organized army with a recognizable command structure, then they are most of the way home as far as POW status is concerned.

The final step, embodied in the Hague Convention of 1907, and reaffirmed by Geneva law, requires that the Taliban conduct themselves in accord with the "laws and customs of war." While the United States has never explained precisely why it does not regard its Taliban captives as POWs, it is presumably on this point that the matter turns, and then only indirectly, since the claim is apparently not that the prisoners engaged in illegal conduct on the battlefield, but that they fought for a regime that harbored terrorists, refused to cooperate with lawful international authority, and so on. A similar note has lately crept into official pronouncements about Iraq, which have included the suggestion that Iraqi soldiers who employ weapons of mass destruction against American armed forces will be held personally responsible for having done so. Much trouble lies at the end of this line of reasoning, not least because the United States currently has thousands of uniformed personnel charged with the care and operation of nuclear weapons. Neither the United States nor any of its similarly situated allies would accept that such individuals automatically become war criminals in the event the weapons are fired.

The United States is in fact firmly on record as opposing the idea that individual combatants lose their legal protections, including their right to POW status, simply because the conduct of their governments is deemed criminal by the other side. The issue arose when the 1949 Geneva Conventions were being negotiated, and concerned the question of what to do about POWs who were charged with war crimes by their captors. The United States feared that, in some future conflict with the Soviet bloc, American POWs might get shipped off to the Gulag as a consequence of some charge of having waged "aggressive war," or of having murdered civilians by indiscriminate aerial bombardment—fear that was fully vindicated

during the Vietnam war, when captured American pilots were indeed threatened with trial for war crimes. It is as a consequence of this American concern that Geneva law now affords protection even to convicted war criminals, provided they are also POWs: a prisoner of war who is tried and found guilt of crimes committed before capture retains the full protections of POW status throughout the length of whatever criminal sentence might be handed down.

This last observation is a reminder of why the United States is reluctant to accord POW status to its Taliban captives. The legal rights thus conveyed are indeed extensive, more so than is generally understood. Initial public outcry on this issue seems to have been motivated by misguided concern that prisoners were being physically or psychologically mistreated, which has nothing to do with POW rights. There are no circumstances in which any prisoner, legal POW or not, may be subject to such abuse under international law. Although Geneva law includes detailed specifications for the physical care of POWs—requiring, in essence, that POWs receive food, clothing, housing, sanitation, medical care, and so on, to the same standard as the armed forces of the country that is holding them—such provisions were mainly designed to address conditions of wartime shortage, in which POWs might be deliberately starved or exposed to the elements in order to improve conditions for one's own fighting forces. It is for the same reason that POWs are exempt from any kind of forced labor, scarcely an issue under present circumstances.

There is, moreover, nothing in Geneva law that prevents a POW from being tried as a war criminal; though, as has been shown, it does limit the conditions under which they may be held if convicted, and it does require that evidence be produced about personal misconduct, not merely association with the misdeeds of others—a provision common to the municipal laws of all advanced societies in any case. POWs have a continuing right to be visited by outsiders, including agents of the International Red Cross and the representatives of a neutral country designated to act as a "Protecting Power." This means that several third parties are available to certify that prisoners are properly treated. POWs may not legally be interrogated, even politely, except to the extent of being obliged to give their name and rank. And of course, most critically, POWs must be allowed to go home when the conflict in which they are captured ends.

It is an interesting question how the United States would respond to a request by the government of Afghanistan that its nationals be returned. Presumably the dependence of the new regime in Kabul upon the United States assures that, by the time the question gets asked, the answer will also be obvious. One reason to continue holding Taliban prisoners, perhaps the most compelling in practice, is that, even in the absence of any plan to bring further legal action against them, returning them to their homeland would threaten the stability of that country. On this issue, at least, the logic of international reciprocity seems capable of reasserting itself.

More generally, however, the muddle surrounding the status of Taliban prisoners exposes one of the more unsettling aspects of the American campaign against terrorism, which is that a struggle waged on behalf of the rule of law should have found it so difficult to identify any coherent legal regime on which to base itself. The Hague and Geneva Conventions, the International Criminal Court, and large sections of U.S. municipal law have all been found wanting as applied to counter-terrorism, and abrogated, amended, or ignored as the exigencies of the moment have seemed to require. One does not need to regard such conduct as cynical or hypocritical to recognize that it is an unpromising course of action in the long run. Unilateral measures by a strong country can demolish international legal norms—they have often done so in the past—but by their nature they cannot create new ones, however desperately these may be required. For that some kind of consensus must be reconstructed. In its absence, it is difficult to believe that international cooperation against terrorism will rise to the level of efficiency that the threat so obviously requires.

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