

The Legal Status of Taliban Detainees as Unlawful Combatants: International Armed Conflict with a “Failed State”

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Introduction

The present article examines the status of the Taliban in the Law of Armed Conflict at the onset of United States military attacks against Afghanistan in 2001. The Taliban insisted on the international stage that it was the legitimate government of Afghanistan. As members of a regular armed force, Taliban members detained by United States armed forces were expected to claim prisoner of war (POW) status. However, this status was denied them by the U.S. government who classified them alongside al Qaeda members as unlawful combatants.

I. POW Status under the Geneva POW Convention

The process of judging whether those detained by a hostile belligerent state are POWs in accordance with the Geneva POW Convention of 1949¹ can be broadly divided into two phases: first, the question of whether or not the forces to which the detained belongs are the armed forces of a government must be considered; second, the question of whether or not the four requirements stipulated by Article 4(A)(2)(a)-(d), additional requirements to be recognized as POW, have been met.

Geneva POW Convention Article 4

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.
- (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;

¹ Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.

- (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.

In the words of Article 4(A)(2) of the POW Convention, the four requirements, that is, command by responsible persons, wearing insignia, carrying arms openly and conducting their operations in accordance with the laws of war, are meant for irregular forces, not for regular forces. This is because, as pointed out by the POW Convention Commentary, regular armed forces generally fulfill these four requirements. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in Article 4(A)(2).² The four requirements are equally applied to the armed forces of a government, and some academics advocate that presumed status of POW for the member of regular armed forces can be reversed later.³

A. Requirement to Wear Uniform or Insignia

According to the POW Convention's drafting process, the four requirements are meant to put requirements on the POW status of irregular soldiers, not regular soldiers.⁴ Many arguments supporting Taliban members' POW status cite this drafting process as evidence.⁵ On the other hand, opinions that assert the applicability of the four requirements to regular forces^{6,7} refer to precedence of domestic legal cases in acts of espionage and sabotage.

POW status was consistently denied to regular forces members who engaged in acts of espionage or sabotage in the guise of civilians as a matter of national practice⁸ and was theoretically sound.⁹

² Jean S. Pictet, ed., *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, 1960), p. 63.

³ Yoram Dinstein, "Unlawful Combatancy," *International Law Studies*, Vol. 79 (2003), p. 159.

⁴ General SLAVIN (USSR) said that according to the first paragraph, sub-paragraph I of the working text, it would appear that members of the Armed forces would have to fulfill the four traditional requirements mentioned in (a), (b), (c) and (d) in order to obtain prisoner of war status, which was contrary to the Hague Regulations (Article I of the Regulations concerning the Laws and Customs of War, 18 October 1907).

General DEVIJVER (Belgium) pointed out that the above reproduced working text had been drafted with due regard to the Hague Regulations, and the first paragraph, sub-paragraph (I) of the working text, carefully specified that only members of militia or volunteer corps should fulfill all four conditions. Special Committee of Committee II, Twenty-First Meeting, 23 June, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A, p. 466.

⁵ Jiri Toman, "The Status of Al Qaeda/Taliban Detainees under the Geneva Conventions," *Israel Yearbook on Human Rights*, Vol. 32 (2003), p. 271; Rüdiger Wolfrum and Christiane E. Philipp, "The Status of the Taliban: Their Obligations and Rights under International Law," *Max Planck Yearbook of United Nations Law*, Vol. 6 (2002), p. 559; Robert K. Goldman and Brian D. Tittmore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," *ASIL Task Force on Terrorism* (December 2002), p. 1.

⁶ Yoram Dinstein, "The Distinction Between Unlawful Combatants and War Criminals," in *idem*, ed., *International Law at a Time of Perplexity* (Martinus Nijhoff Publishers, 1989), p. 105; Ruth Wedgwood, "Al Qaeda, Terrorism, and Military Commissions," *American Journal of International Law*, Vol. 96 (2002), pp. 328-337.

⁷ Ingrid Detter, *The Law of War*, 2nd ed. (Cambridge, 2000), p. 136.

⁸ W. Hays Parks, "Special Forces's Wear of Non-Standard Uniforms," *Chicago Journal of International Law*, Vol. 4 (2003), pp. 547-560. It lists this kind of practice from Russo-Japanese War to the Gulf War.

⁹ Richard R. Baxter, "So-called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs," *British Year Book of International Law*, Vol. 28 (1951), p. 341.

Typical examples of such practices include *Ex parte Quirin et al.*,¹⁰ and *Osman v. Prosecutor*¹¹ as well as the case of Syozo Yokokawa and Taisuke Oki who were captured and executed by Russia during the Russo-Japanese War.¹² Illegal combatants whose POW status was rejected are normally punished (usually executed) by an enemy State with the aim of preventing the recurrence of similar acts.¹³ Even so, punishment without trial constitutes a war crime.¹⁴

B. Requirement to Conduct Operations in Accordance with the Laws of War

In addition to the requirement to wear uniform or insignia, the requirement to conduct operations in accordance with the laws of war (Article 4 (A)(2)(d)) is sometimes employed to deny POW status to regular forces personnel. However, with respect to organized resistance movements in occupied territories, as agreed in the drafting process of Article 4, a combatant’s POW status should not be denied based upon his or her individual breach of the laws of war as long as an organization to which he or she belongs follows the laws of war as a whole.¹⁵ This is expressed in Article 85 of the POW Convention, which states, “Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”

However, the former Soviet Union and other then-socialist countries expressed reservations about Article 85. Such reservations left open the possibility that a soldier who commits a war crime may not have POW status afforded them after being convicted. The Democratic Republic of Vietnam actually invoked this reservation to deny POW status to detained U.S. military personnel during the Vietnam War.¹⁶ The reservation by the Democratic Republic of Vietnam, in particular, had an effect after detainees were tried and thus was more comprehensive than that by the former Soviet Union, which had an effect only after convicted.¹⁷ (In the end, the issue was resolved when the Democratic Republic of Vietnam released the detained U.S. soldiers.) The reservations by them are still maintained, but the fact that most of these countries have become High Contracting Parties to the

¹⁰ *Ex parte Quirin et al.*, 317 U.S. 1 (1942)

¹¹ *Osman Bin Haji Mohamed Ali and Another v. Public Prosecutor*, Judicial Committee of the Privy Council (U.K.), 29 July 1968. *Krofan and another v. Public Prosecutor*, Federal Court, 5 October 1966.

¹² Syozo Yokokawa and Taisuke Oki, interpreters of the Japanese Army planned to blow up a railroad bridge in Manchuria on 21 February 1904, but were caught by Russia and executed by shooting on 21 April. (Telegram sent on 22 April 1904 and received on 23 April, Reference code B07090891400, Japan Center for Asian Historical Records) Meanwhile, there also existed sabotage by Russian soldiers. Sakuye Takahashi, *International Law Applied to the Russo-Japanese War* (Banks Law, 1908), pp. 174-178.

¹³ Ryoichi Taoka, “That is, making an example of the case to prevent the recurrence of similar crimes,” *KokusaiHougaku Taikou (Essence of International Law)*, Vol. 2 (Ganshodo Shoten, 1939), pp. 203-204.

¹⁴ Case No. 31, Trial of Werner Rohde and Eight Others, British Military Court, 29 May-1 June, 1946, United Nations War Crimes Commission, *Law Reports of Trial of War Criminals*, Vol. V (1948), p. 54.

¹⁵ G.I.A.D. Draper, “The Status of Combatants and the Question of Guerrilla Warfare,” in Michael A. Meyer and Hilaire McCoubrey, eds., *Reflections on Law and Armed Conflicts* (Kluwer Law International, 1998), pp. 230-231.

¹⁶ Claude Pilloud, “Reservations to the Geneva Conventions of 1949 (II),” *International Review of the Red Cross*, No. 181(April 1976), pp. 163, 170 et seq. Similar kinds of reservations were declared by Albania, Belarus, Bulgaria, China, the Czech Republic and Slovakia, German Democratic Republic, Hungary, Democratic People’s Republic of Korea, Poland, Rumania, Ukraine and Democratic Republic of Vietnam.

¹⁷ Richard A. Falk, “The Geneva Convention and the Treatment of Prisoners of War in Vietnam,” in idem, *The Vietnam War and International Law*, Vol. 2 (Princeton University Press, 1969), pp. 388, 405 et seq.

Additional Protocol I to the Geneva Conventions¹⁸ has solved the problem for all practical purposes.¹⁹ As for the Afghanistan conflict, this kind of problem could not have occurred since both the United States and Afghanistan do not make such a reservation. In addition, denying POW status due to violations of laws of war by the Taliban contradicts the U.S.'s own past practices.

II. Application of the POW Convention to Taliban Detainees

A. Views of the U.S. Government

U.S. President George W. Bush performed an about-face by allowing the application of the Geneva Convention in February 2002. Still, he maintained the previous view that the Taliban were unlawful combatants, saying, "Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs."²⁰

The entire story as to how this was reached is not available, but the opinion of Assistant Attorney General Jay S. Bybee,²¹ which had been presented to President Bush a few days before the statement was released, is considered to have exercised great influence. The Bybee Memo, which refers to the fact that the Taliban call themselves a militia, first examines whether or not the Taliban as irregular forces have POW status (I) in light of the requirements stipulated in Article 4 (A)(2), and then takes up whether or not the Taliban are assumed to be the armed forces of a government, which are also subject to the same four requirements as irregular forces, and thus may have POW status (II). The relevant parts of the memo are summarized as follows:

(1) Taliban Members as Irregular Forces

The POW Convention stipulates the four requirements for the members of irregular forces to be recognized as POWs, but Taliban detainees fail to meet them, with the exception of carrying arms openly (Article 4 (A)(2)(c)). Even with regard to carrying arms openly, because many ordinary citizens in Afghanistan carry weapons anyway, it was almost impossible to distinguish Taliban members from ordinary citizens. As a result, Taliban detainees cannot be regarded as POWs.

(2) Taliban as the Armed Forces of a Government

Even if Taliban members made up the armed forces of a government as claimed by some people, the four requirements for the members of irregular armed forces in Article 4 (A)(2), that is, (a) command by responsible persons, (b) wearing insignia, (c) carrying arms openly and (d) conducting their

¹⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

¹⁹ Article 44 (2), Additional Protocol I to the Geneva Convention "While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war..." However, if similar reservations are expressed about this article, the same sort of problem will arise.

²⁰ White House Fact Sheet, "Status of Detainees at Guantanamo," 7 February 2002, available at <http://geneva.usmission.gov/press2002/0802detainees.htm>.

²¹ Memorandum from Assistant Attorney General Jay S. Bybee to The White House Counsel on the status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949, 7 February 2002, p. 2, available at <http://news.findlaw.com/hdocs/docs/torture/bybee20702mem.html>.

operations in accordance with the laws of war, are interpreted to also apply to the members of regular forces. Taliban members, as stated above, did not meet most of the four requirements, and therefore POW status could not be given even if they were regular forces.

As seen above, the U.S. Government does not necessarily categorize the Taliban as the armed forces of a government. Meanwhile, the fact that the Taliban fails to meet all or most of the four requirements in Article 4 (A)(2) is a critical factor in denying Taliban detainees POW status, regardless of what the nature of the Taliban is; regular or irregular. In particular, parts of the U.S. view holding that not wearing distinctive signs and not observing the laws of war warrant the denial of Taliban members’ POW status are supported by some academics.²²

B. Status of the Taliban as a Legitimate Government

The aforementioned view of U.S. Government officials classifies the Taliban as irregular forces rather than armed forces of a government, but many other views generally presume the Taliban to be regular forces based on the assessment that the Taliban was a *de jure* and a *de facto* government in Afghanistan in 2001.²³ The Taliban then put around 90% of Afghan territory under its effective control with governing institutions and, in addition, acquired recognition as a legitimate government from Pakistan, Saudi Arabia and the United Arab Emirates. Opinions that are critical to U.S. policies toward the Taliban often use the reasoning that it is inappropriate not to give POW status to Taliban members who were, in fact, regular forces. Even those who are supportive of the U.S. Government sometimes affirm without reservation the Taliban’s status as regular forces.

Still, only the above three states and Chechnya recognized the legitimacy of the Taliban at that time.²⁴ The Taliban took control of Kabul, the capital of Afghanistan, in 1996. Every year since then, the Taliban had demanded the right to represent Afghanistan in the United Nations. The Credentials Committee of the General Assembly of the United Nations deferred a decision every time such a demand was made, and, as a result, the Taliban never got the General Assembly seat.²⁵ The seat for Afghanistan in the United Nations continued to be occupied by the former regime.

In the field of cultural property also, there is no evidence that the Taliban is treated as a legitimate government. In 1981, the government in power proposed that the stone Buddhas of Bamiyan Valley be put forward as a World Heritage candidate, but its registration had been long shelved until it was partially destroyed by the Taliban in March 2001, and subsequently registered as a World Heritage in Danger in 2003. After the Taliban threatened its destruction in 1997, the registration application was

²² Christopher Greenwood, “International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces,” Report filed in Federal Court, *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, Court File Number T-324-07, 14 August 2007, pp. 16-17, available at [http://web.ncf.ca/fk624/data/Report%20-%20Greenwood%20\(14%20Aug%2007\).pdf](http://web.ncf.ca/fk624/data/Report%20-%20Greenwood%20(14%20Aug%2007).pdf).

²³ Paust, “Executive Plans and Authorization,” p. 833.

²⁴ United Kingdom Materials on International Law 2001, *British Year Book of International Law*, Vol. 72 (2001), pp. 577-578.

²⁵ “10. Having considered the question of the credentials of Afghanistan, the Committee decided to defer a decision on the credentials of representatives of Afghanistan on the understanding that the current representatives of Afghanistan accredited to the United Nations would continue to participate in the work of the General Assembly pursuant to the applicable rules of procedure of the Assembly.” Report of the Credentials Committee, A/52/719, 11 December 1997, available at <http://www.un.org/ga/52/credcomm/reporscr.htm>. The United States is a member of this Credentials Committee.

taken up again as a priority issue. The relevant documents²⁶ at that time show that Director-General of UNESCO discussed the issue frequently with the Rabbani Administration. Article 11 of the World Heritage Convention²⁷, which has also been ratified by Afghanistan, prescribes that each signatory must submit an inventory including property forming part of the cultural and natural heritage, situated in its territory, for inclusion in the World Heritage List. The Taliban has never been recognized as a government with the ability to execute the Convention.²⁸

For example, the resolution adopted by the General Assembly of States Parties to the World Heritage Convention in October 2001 refers to the Government of the Islamic State of Afghanistan currently in exile as an entity in charge of the registration procedure for heritage sites. With respect to the Taliban, meanwhile, the resolution regards the Taliban only as Taliban forces, and criticizes the willful destruction of the Buddhas of Bamiyan in March 2001.²⁹

Similar kinds of practices can be seen in the human rights sector. An investigation by the United Nations confirmed that the Taliban committed a number of massacres and atrocities against hostile forces and ordinary citizens during the course of the civil war. The United Nations Special Rapporteur on the situation of human rights in Afghanistan announced the statement that called the two warring parties in Afghanistan to refrain from resumption of hostilities at the end of January 2001. The statement, in particular, pointed out that the fighting in Hazarajat from December 2000 to January 2001 caused hundreds of casualties in the civilian population, most of which were deliberately executed by the Taliban.³⁰ This statement also demonstrates that the Taliban is seen as an armed insurgency confronting a legitimate government.

While these facts are only fragmentary, they are enough to reaffirm the fact that the international community continuously rejected the Taliban's status as a legitimate government despite its military predominance in the civil war.

However, it is difficult to deny that the Taliban existed as a *de facto* government. The conditions in Afghanistan were such that there were two governments in one State, or a *de facto* division of

²⁶ UNESCO, Acts Constituting "A Crime Against the Common Heritage of Humanity" (Resolutions of the Thirteenth General Assembly of States Parties and the Thirty-first General Conference of UNESCO), WHC-01/CONF.208/23, 22 November 2001, Part I. Chronology of Events Related to the Nomination for Inclusion on the World Heritage List of the Statues of Bamiyan and Other Afghan Cultural Heritage Properties, pp. 2-11, available at <http://whc.unesco.org/?cid=60&&meeting=25COM>.

²⁷ Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted on 16 November 1972.

²⁸ Another example is that the Taliban condemned "in the strongest terms" a U.N. invitation to followers of ousted President Burhanuddin Rabbani to attend the U.N. drug conference. "Taliban Denounces U.N. Invitation to Ousted Afghan Govt," Dow Jones International News, 6 June 1998.

²⁹ Resolution on the protection of the cultural heritage of Afghanistan adopted by the General Assembly of States Parties to the World Heritage Convention at its Thirteenth session (Paris, 30-31 October 2001), available at <http://whc.unesco.org/archive/13ga01-res.htm>.

³⁰ Letters dated 29 January 2001 Addressed by the Special Rapporteur to the Head of the Taliban Council, Mullah Mohammad Omar, and to the President of the Islamic State of Afghanistan, Mr. Burhanuddin Rabbani, relating to the reported Summary Execution of Civilians and Other Breaches of International Humanitarian Law in the Course of Resumed Armed Hostilities in the Yakawlang Area (December 2000-January 2001), in "Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World," Report on the situation of human rights in Afghanistan submitted by Mr. Kamal Hossain, Special Rapporteur, in accordance with Commission resolution 2000/18, E/CN.4/2001/43, 9 March 2001, Annex II, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/AllSymbols/461FBE09F16ECEB4C1256A10004E40E3/\\$File/G0111632.pdf?OpenElement](http://www.unhcr.ch/huridocda/huridoca.nsf/AllSymbols/461FBE09F16ECEB4C1256A10004E40E3/$File/G0111632.pdf?OpenElement).

the country,³¹ at that time. We have to therefore accept the validity of certain measures taken by the Taliban within areas of Afghanistan under its rule.

The most prominent view in favor of allowing the Taliban to have an identity in international law to some extent is one that regards the Taliban as an unrecognized *de facto* regime.³² If the Taliban is a sort of government, human right violations committed by the Taliban can be seen as state acts,³³ which makes it easier to charge the Taliban with violating human rights treaties.

C. Status of *De Facto* Governments in the Law of Armed Conflict

So then, in the application of the Law of Armed Conflict, does the Taliban have a legal identity? There is no fact that the legitimate government of Afghanistan or the government of the United States made an explicit recognition of belligerency towards the Taliban.³⁴ However, it naturally leads one to believe that the United States recognized the Taliban’s identity in international law by employing Article 4 of the POW Convention. Common Article 3 of the Geneva Conventions applies to non-international armed conflicts and would have been sufficient if the United States had been fighting against the Taliban in the name of assistance to the legitimate government of Afghanistan. The application of Article 4 that regulates international armed conflict shows that the U.S. side perceived its relations with the Taliban as *quasi*-international.

As seen above, the U.S. attack against Afghanistan, regardless of U.S. perception of the status of the Taliban, had the effect of internationalizing of armed conflict, as the form of intervention was an exercise of the right of self-defense rather than assistance extended to the legitimate Afghani government. Nevertheless, the internationalization of armed conflict does not immediately answer the following question: Does the recognition of the Taliban as armed forces of a government come from U.S. perception of an international conflict or the fact that the Taliban effectively rules most of Afghanistan?

Meanwhile, some remarks and papers by high-ranking U.S. government officials categorically deny the Taliban’s status as a government, and even regard Afghanistan as a failed state. They conclude that the Taliban’s function as a *de facto* government gives it just a qualification for irregular forces. The question as to what extent a party in a conflict may subjectively interpret and apply the POW Convention is not an easy one to answer.

Whether or not a party to a conflict recognizes a belligerent has no affect whatsoever on the application of the Geneva Conventions and Protocols. In the case of an armed conflict between parties to the Conventions, there is no doubt in their application to the parties’ relations even if they do not

³¹ The Situation in Afghanistan and its Implications for International Peace and Security, Report of the Secretary-General, A/52/358, S/1997/719, 17 September 1997, available at http://www.unama-afg.org/docs/_UN-Docs/_repts-SG/1997/1997-719.pdf.

³² Rüdiger Wolfrum and Christiane E. Philipp, “The Status of the Taliban: Their Obligations and Rights under International Law,” *Max Planck Yearbook of United Nations Law*, Vol. 6 (2002), pp. 584-585.

³³ Articles on Responsibility of States for Internationally Wrongful Acts: Article 5 (Conduct of persons or entities exercising elements of governmental authority) The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002), pp. 154-155.

³⁴ Wolfrum and Philipp, “The Status of the Taliban,” pp. 578-584.

recognize each other.³⁵ Some criticize the past practices of certain nations to subjectively distinguish governments from rebels in conflicts with complex circumstances such as divided States, wars of liberation and occupations. Given such criticism, it is not desirable to leave the matter to the subjective and arbitrary judgments of countries concerned.

D. Requirements for POW Status under a *De Facto* Government as per Article 4 (A)(3)

Article 4 (A)(3) of the POW Convention may be applied based on the fact that the Taliban was a *de facto* government in 2001. The article, which gives POW status to “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power,” was drafted with soldiers under the French National Committee in mind. The committee was a *de facto* government led by General de Gaulle during World War II.³⁶ The only difference between subparagraphs (1) and (3) is that, concerning regular forces, according to (3), the detaining power does not recognize the detainee’s government. The Government of Germany finally afforded POW status to the Free French and later the Fighting French during World War II.³⁷ This decision is said to have taken account of the fact that these armed forces met all four requirements of having a responsible commander, wearing uniforms, carrying arms and observing the laws of war.³⁸

Following these precedents, the POW Convention Commentary lists recognition from a third State as an implicit requirement to be a *de facto* government under Article 4 (A)(3).³⁹ The recognition of the Taliban from the aforementioned three countries, meanwhile, were withdrawn one after another after the U.S. attack was launched in October 2001. In such a situation, is the Taliban considered to be a *de facto* government force under Article 4 (A)(3)? It seems difficult to otherwise convince the U.S., a country that thinks of the withdrawal of recognition as, “[this] universal refusal to recognize the Taliban militia as a government.”⁴⁰

E. International Armed Conflict with Non-State Actors?

Through the previous paragraphs, the Taliban’s status as *de jure* or *de facto* government forces was discussed. Meanwhile, belligerent parties to an international armed conflict are not limited to regular forces of a State, as the U.S. advocates. Recently, in particular, an increasing number of people think that a conflict with irregular forces or non-State forces can constitute an asymmetric international armed conflict, as demonstrated by instances such as the civil war in Bosnia after the collapse of the former Yugoslavia⁴¹, Iraq after the fall of the former regime⁴², and the Second Lebanon conflict

³⁵ Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols,” *Recueil des cours*, Tome 163 (1979), pp. 128-130.

³⁶ Pictet, *Commentary III*, pp. 61-63.

³⁷ Charles Rousseau, *Le droit des conflits armés* (A. Pedone, 1983), pp. 74-75.

³⁸ F. E. Oppenheimer, “Governments and Authorities in Exile,” *American Journal of International Law*, Vol. 36 (1942), pp. 568, 575.

³⁹ Nguyen Quoc Dinh, *Droit international public*, 6th ed., revised and updated by Patrick Daillier and Alain Pellet (Librairie Générale de Droit et de Jurisprudence, 1999), p. 418.

⁴⁰ Memorandum on the Application of Treaties and Laws to al Qaeda and Taliban Detainees, 22 January 2002, pp. 20-21.

⁴¹ ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, Judgment of 15 July 1999.

⁴² Knut Dörmann and Laurent Colassis, “International Humanitarian Law in the Iraq Conflict,” *German Yearbook of International Law*, Vol. 47 (2004), pp. 293-342.

between Israel and Hezbollah.⁴³

Article 4 (A)(2) provides POW status to the members of irregular forces belonging to a Party to the conflict. A certain *de facto* relationship between the irregular forces and a government is generally considered to be enough to fulfill the requirement of "belonging to a Party to the conflict."⁴⁴ Furthermore, it is advocated that a situation where the irregular forces are fighting foreign forces as the practical agent of a State backed by the effective rule over the territory should be regarded as meeting this requirement, thereby constituting an international armed conflict with a non-State actor, or irregular forces, as a party to the conflict. Similar suggestions are made with respect to a case where only a nominal government exists and cannot control the irregular forces.⁴⁵

As for Afghanistan at that time, the United Nations and others recognized that the existing government was not in nominal existence, as already stated. The seat to represent Afghanistan in the United Nations therefore was not shifted to the Taliban, and the international community did not accept the Taliban's status as a legal government. Accordingly, it is possible to conceive of the Taliban as only possessing the status of rebels in the Afghan civil war even at that time. Meanwhile, given the influence that the Taliban then exercised over Afghan territory, there is also sufficient room for giving the Taliban the status of a party to an international armed conflict as irregular forces belonging to Afghanistan.

Conclusion

The U.S. Government's perception of the Afghan War until the establishment of the new government is that the United States does not recognize the Taliban as the legitimate government of Afghanistan even though its fight against the Taliban is an international armed conflict. An international armed conflict usually supposes confrontation between regular forces of States. On the other hand, not only in the United States but also in international society as a whole, considerable doubts were expressed regarding the Taliban's status as a legitimate government. The present article therefore examines the meaning of members of irregular forces in applying the POW Convention. If the Taliban is regarded as a *de facto* government not recognized by a detaining power, the structure of the POW Convention suggests that Taliban detainees are to be dealt with by Article 4 (A)(3) rather than 4 (A)(1) which concerns regular forces. However, according to the drafting process of the POW Convention, Article 4 (A)(3) supposes the rare case of armed forces of a government which existed separately from a legal government (the French Government at Vichy) recognized by a hostile party to a conflict (Germany) and was recognized by many third States (the Allies). After the September 11 terrorist acts and the following U.S. military intervention, the recognition given to the Taliban were retracted one after another. Whether or not the Taliban meets the requirements under the POW Convention appears to depend on who makes the decision.

Nevertheless, the Geneva Conventions and Protocols require that they be applied to signatories regardless of recognition policies. Therefore, it may be most appropriate to automatically employ Article 4 (A)(1) in regulating relations between the United States and the Taliban from a humanitarian

⁴³ Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006; James G. Stewart, "The UN Commission of Inquiry on Lebanon," *Journal of International Criminal Justice*, Vol. 5 (2007), p. 1043.

⁴⁴ Pictet, *Commentary III*, pp. 57-58.

⁴⁵ Stewart, "The UN Commission of Inquiry on Lebanon," p. 1043.

perspective, although discussing Taliban's status, either as regular or irregular forces, is almost meaningless if the POW Convention is interpreted to demand regular forces to meet the same four requirements as irregular forces, such as wearing uniforms or distinctive signs and observing the laws of war. With regard to whether the Taliban's behavior fulfills the requirements or not, no consensus has been reached. There is a debate over the POW status of the members of the Taliban not wearing traditional uniform or insignia. While the United States regards the Taliban as unlawful combatants who engaged in sabotage, some do not agree such a view.

The issue of the Taliban's POW status is a secondary point in an argument that has arisen around the treatment of al Qaeda members, but still raises many questions about how to apply the Geneva POW Convention. Non-state actors are expected to be involved in armed conflicts on more and more occasions. It is desirable to clarify the nature of such armed conflicts as well as the status and responsibility of persons belonging to non-state armed groups as soon as possible.