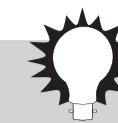




LAWSCAPE



LAW letter



The Continuing debate over the legal status of Guantanamo detainees

JOANNE MARINER

The undoubtedly dismay of U.S. officials, the debate over the legal status of the detainees held in Guantanamo Bay, Cuba, has yet to subside. Although the Bush administration has held firmly to its stated view that none of the detainees has any claim to prisoner of war status under the Geneva Conventions, the question continues to elicit considerable commentary, including recent analyses published in the New York Times, the Washington Post, the International Herald Tribune, and a whole host of foreign newspapers.

While the administration's position has a handful of prominent defenders, including Yale Law Professor Ruth Wedgwood, most expert opinion has weighed in on the other side of the scales. Notably, the International Committee of the Red Cross (ICRC), the official guardian of the Geneva Conventions, has publicly expressed its disagreement with the U.S. view.

So have such international legal scholars as DePaul University Law Professor M. Cherif Bassiouni and human rights authorities such as U.N. High Commissioner for Human Rights Mary Robinson. Even the British, Washington's most loyal allies, have expressed qualms about the U.S. position on the detainees.

What then, in brief, are the main areas of disagreement?

The factual background: The detainees and the options

All of the detainees were captured in Afghanistan during the armed conflict; they are presumed to be members of the Taliban or Al Qaeda forces. The United States first began transporting captured detainees to the U.S. Naval Base in Guantanamo Bay on January 11.

At present, the government is holding 300 men from twenty-six countries in captivity there. An additional 194 men are being detained by U.S. forces in Afghanistan; they face transfer to Guantanamo as soon as planned permanent prison facilities are ready.

None of the detainees has yet been charged with any crime. Secretary of Defense Donald Rumsfeld listed the future options facing the detainees. He said that they could be prosecuted in U.S. federal court, tried before a military court or commission, returned to their native countries (for possible prosecution), released (if believed to pose no law enforcement threat), or held indefinitely.

For many detainees, however, criminal prosecution seems an unlikely option. Despite weeks of interrogation, the authorities have reportedly been unable to collect sufficient evidence to support many individual prosecutions.

Because of the absence of individualized proof, the Bush administration is said to be considering the possibility of classifying membership in al Qaeda as a war crime. By doing so, the administration would be able to prosecute many detainees who cannot be linked to specific acts of violence or terrorism.

The Legal debate: status, and the applicability of the Geneva Conventions

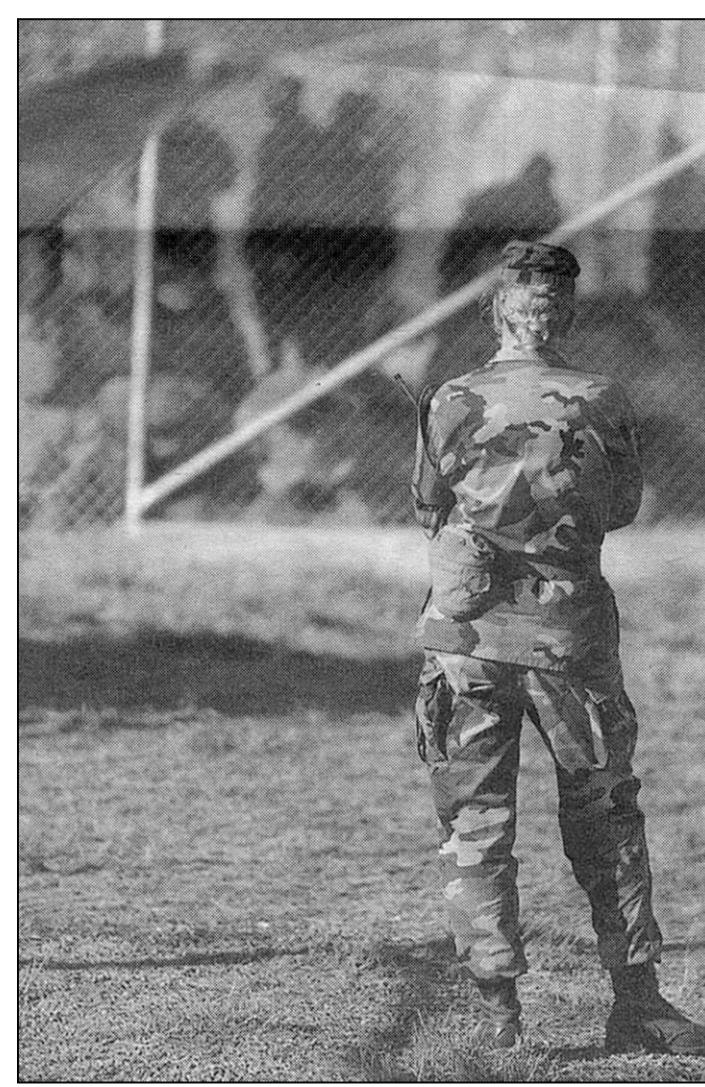
There is significant legal debate not only as to the precise status of the Guantanamo detainees, but also as to the more general question of the applicability of the Geneva Conventions to the war in Afghanistan and, indeed, to the broader counter-terrorism effort.

On transporting the first detainees to Guantanamo in January, the Bush administration announced that it did not consider them to be prisoners of war, but rather "unlawful combatants" entirely outside of the protections of the Geneva Conventions. In early February, having come under intense criticism for these views, President Bush revised his initial stance somewhat. Rather than asserting that the Geneva Conventions did not even apply to the war in Afghanistan, he announced that their protections applied to the armed conflict with the Taliban, but not to the conflict with Al Qaeda.

The Bush administration continued, however, to maintain that neither

Taliban nor Al Qaeda detainees qualified as prisoners of war. Specifically, administration officials explained that the detainees did not meet the following criteria for recognition as a POW: being under a responsible command; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war.

The Bush administration may be correct that both the Taliban and Al



Al-Qaeda suspects in a holding area at Camp X-Ray, Guantanamo Bay

Qaeda forces do not meet the four listed criteria. However, as far as the Taliban detainees are concerned, this failure is irrelevant.

Under Article 4 of the Third Geneva Convention, members of the armed forces of parties to a conflict - i.e., forces such as the Taliban - are not assessed under the four criteria cited by Bush administration. Instead, all

captured members of a party's armed forces automatically enjoy POW status. So do "members of militias or volunteer corps forming part of such armed forces."

The four criteria cited by the Bush administration are found in Article 4, but, as described in subsection A(2) of that provision, they only apply to the category of irregular troops: "[m]embers of other militias and members of other volunteer corps." Al Qaeda fighters, unless they can show that they were part of the Taliban armed forces, would fall into this category. Since they are unlikely to be found to be in compliance with these criteria, they should probably not be granted POW status.

ICRC Commentary and plain language: Interpreting the Geneva Conventions

In a recent fine-tuning of the administration's argument, U.S. officials have looked to language in the ICRC's commentary to the Geneva Conventions. This language seems to take for granted that the armed forces of the parties to a conflict will abide by the four criteria specifically applicable to irregular troops. Relying on the commentary's language, the administration has suggested that the Third Convention implicitly applies the four criteria even to the armed forces of a party to the conflict.

This argument prioritizes the language of the commentary, however, over that of the Convention itself. As with any legal document, the language of the Convention has primacy over that of its expert commentary. And, while the drafters of the Convention may have indeed expected that regular armed forces would generally comply with the four criteria, they did not make such compliance a specific requirement for POW status.

A competent tribunal to determine POW status when in doubt

Article 5 of the Third Geneva Convention states that if there is "any doubt" as to whether captured combatants should be recognized as POWs, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." In other words, if doubt exists, the status of each detainee must be determined individually, not by a blanket decision of the President.

The U.S. military issued regulations in 1997 that set out detailed procedures for such tribunals. Under these regulations, the tribunals consist of three commissioned officers. The regulations also provide that persons whose status is to be determined shall: be advised of their rights at the beginning of their hearings; be allowed to attend all open sessions and will be provided with an interpreter if necessary; be allowed to call witnesses if reasonably available, and to question those witnesses called by the tribunal; have a right to testify or otherwise address the tribunal; and not be compelled to testify before the tribunal.

The War on Terror

Besides being extremely problematic with regard to the situation of the present detainees, the Bush administration's grudging and restrictive view of the Geneva Conventions' coverage is a worrisome portent for the future. Already, U.S. ambassador-at-large for war crimes Pierre-Richard Prosper has stated bluntly that the Conventions are outdated and ill-suited to handling the threat of international terrorism.

When the administration considers whether it really needs to wage a "war" on terror free of Geneva Convention restraints, it should remember that the Conventions do much more than simply protect prisoners of war. Indeed, perhaps more importantly, the Conventions represent the most widely recognized and influential set of protections for civilian life in time of war. Given terrorism's brutal targeting of civilians, such protections should be acknowledged as more crucial than ever.

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Torture in the name of law

Imagine a sadist pushing a water bottle filled with boiling water through your rectum. Pain sears through you. As soon as you think it has stopped, the sadist pushes it in further. You wonder why you are being subject to such excruciating pain. You wonder whether the perpetrators will ever be held accountable for their actions. You wonder even more if the perpetrators are the law enforcement officials. Now stop imagining. We can't imagine such torture because we never had to undergo it. However, my father, Muhiuddin Khan Alamgir, was not so fortunate. In his own words he mentioned that he was subject to such torture. He mentioned it in a court of law.

In any other law-abiding country, an allegation such as this by a public leader would cause many investigations to open. In any other law abiding country, the law enforcement officials would not perform torture with the directive of the government. In any other law abiding country, political leaders of the opposition would not be subject to detentions without charge. In any other law abiding country, the court would not have to explicitly state to the law enforcement officials not to torture a detainee. In any other law abiding country, the law enforcement officials would honor the directive of the court. Law abiding is the operating word here. For we in Bangladesh do not have a political leadership at the helm of the government right now that respects the law. Consequently, we do not have law-abiding leadership in the law enforcement agencies.

Lack of a leadership leads directly to a complete disregard of civil and political rights. Lack of civil and political rights lead to political persecution. Shahriar Kabir, a renowned writer, initiated a fact-finding mission to find out and document the alleged persecution of minority community and perpetrators of the persecution. He went to India to interview some of the refugees. He came back and was charged with treason for trying to uncover the truth. Shahriar Kabir did not commit treason.

My father, Dr. Alamgir, succumbed to this spiral of political vengeance/persecution. The authorities arrested him upon his arrival on March 15, 2002. He was detained. The authorities denied him essential medications (although the officials had it with them). The authorities denied him safe drinking water. They interrogated him. They took him to unknown locations blindfolded. He was beaten. He was sodomized. The authorities ignored court directives not to torture him. They ignored court directives to produce him before the court.

With such blatant disregard of court directives and institutionalized torture, one must conclude that right now in the country we are carrying out torture in the name of law. Torture becomes legal if no one does anything about it. Torture becomes legal when law enforcement officials repeatedly perform it and get away with it.

Torture does not go with the word "civil". Institutionalized torture is married to institutionalized "uncivility". Under civilized government leadership, the government would be the protector of the citizens. I wish I could say that my country made the above statement true.

Joy Alamgir
on e-mail

Good luck to Star Law Network

I have gone through your Sunday announcement. It gives me immense pleasure that the Law Desk of the Daily Star initiated an innovative programme to establish a pool of pro-active and socially committed persons for contributing effectively towards ongoing efforts and discourses on law, legal education, legal system, legal decision. Though I do not have formal background in law, I take special interest in law and ongoing human rights programmes. I think the newly launched Star Law Network may encourage the beginner so that they can begin to contribute to this section. As a reader of the Daily Star, I find Law and Our Rights' informative and interesting.

I wish this journey every success.
Abu Rushad Palash
Executive (HRD)
DPEZ, Savar



HUMAN RIGHTS monitor

State of Human Rights III

Human Rights Practices in Bangladesh 2001

BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR

Freedom of Speech and Press

The Constitution provides for freedom of speech, expression, and the press, subject to "reasonable restrictions" in the interest of security, friendly relations with foreign states, public order, decency and morality, or to prohibit defamation or incitement to an offense; however, there were numerous examples of the Government limiting these rights in practice. Some government leaders encouraged violence against journalists by ruling party members.

In the past, journalists pressed for repeal of the Official Secrets Act of 1923, and such discussion resurfaced during the year. According to the Act, a citizen must prove why he or she needs information before the Government will provide it. By placing the burden of proof on the citizen, the Official Secrets Act protects corrupt government officials from public scrutiny, hindering transparency and accountability of government at all levels.

The press, numbering hundreds of daily and weekly publications, is a forum for a wide range of views. While most publications support the overall policies of the Government, several newspapers report critically on government policies and activities, including those of the Prime Minister. In addition to an official government-owned wire service, there is one privately owned wire service affiliated with a major international company.

Newspaper ownership and content are not subject to direct government restriction. However, if the Government chooses, it can influence journalists through financial means. Government-sponsored advertising and allocations of newsprint imported at a favorable tariff rate are central to many newspapers' financial viability. Government-sponsored advertising is the largest source of revenue for many newspapers. In allocating advertising and publications, the Government discriminates in favor of the Prime Minister. In addition to an official government-owned wire service, there is one privately owned wire service affiliated with a major international company.

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The Government owns and controls virtually all radio and television stations with the exception of a few independent stations, such as Ekushey Television (ETV) and Radio Metrowave. The activities of the Prime Minister occupy the bulk of prime time news bulletins on both television and radio, followed by the activities of members of the Cabinet. Opposition party news

sons accused remained on bail. In November 2000, a new sedition charge was filed against an editor, previously charged, Bahauddin, for publishing a parody of the national anthem mocking the Prime Minister. When the police arrived at Bahauddin's residence to arrest him, he was not there, so they arrested his brother Mainuddin instead (see Sections 1.d. and 1.f.). Mainuddin was arrested under the PSA, and therefore was not eligible for bail. Mainuddin was not charged; after 16 days he was released. Charges against editor Bahauddin remain pending in both sedition cases.

Virtually all print journalists practice self-censorship to some degree, and commonly are reluctant to criticize politically influential personalities in both the Government and the opposition; however, some journalists do make such criticism. Many journalists cite fear of possible harassment, retaliation, or physical harm as a reason to avoid sensitive stories. Violent attacks on journalists and newspapers, and efforts to intimidate them by government leaders, political party activists, and others frequently occur and violence against journalists increased during the year. Political parties and persons acting on their behalf conducted attacks both on media offices and on individual journalists targeted as a consequence of their news reporting. These crimes largely remained unsolved and the perpetrators, often identified by name or party affiliation in press reports, have not been held accountable. Attacks by political activists on journalists also are common during times of political street violence, and some journalists were injured in police actions.

On April 18, armed men led by Chittagong City Corporation's Ward Commissioner and Awami League member Mamunur Rashid assaulted two reporters from Chittagong's Bengali language newspaper Purbokon following the publication of a report critical of Rashid. The attackers confined the two journalists in the newspaper office until 3:30 a.m. and beat them. The gang then ransacked the office of the newspaper. On August 7, several persons including a nephew of former BNP Minister Major General (retired) Md. Majidul Haq, repeatedly stabbed and seriously injured Bulu Sharif, the Magura district correspondent of the Dhaka based Bengali-language newspaper Jugantor while he was returning home from assignment.

Political activists frequently attacked journalists. On January 15, several activists reportedly from the student wing of the Awami League attacked, ransacked, and looted the Baful residence of the correspondent of the Dhaka-based Bangla-language daily Ittefaq. The attackers destroyed the journalist's camera, fax machine, and furniture, and stole money. They also issued a death threat against him. On January 25, political activists, reportedly with the support and backing of M.P. Joynal Hazari, beat and stabbed the United News of Bangladesh's (UNB) correspondent in Feni, Tipu Sultan. His injuries required treatment in Bangkok. Local police initially refused to cooperate when Sultan sought to lodge a complaint. The Awami League's political opponents blamed a pro-Awami League student front and Awami League activists for the attack.

On April 13, three political activists beat M. Abdullah, a staffer of the Bangla-language daily Inqilab, near the official residence of the leader of the Parliamentary opposition, Begum Khaleda Zia. The police rescued him. Reports alleged that a BNP leader incited the activists to assault Abdullah for publishing press accounts connected to the BNP.

On April 24, Muniruddin Ahmed, a staff correspondent of the Dhaka-based Bangla-language daily Inqilab in Khulna, was assaulted, allegedly by Awami League activists, at the Picture Palace Crossing in Khulna City while on assignment. Awami League activists declared Ahmed an unwelcome person for his reporting about then-Prime Minister and Awami League leader Sheikh Hasina.

On July 16, armed cadres of Chatra League, the student wing of the

Awami League, launched an armed attack on the residence of M. Zahirul Islam, the Gouronadi correspondent of the Dhaka-based Bangla-language daily Prothom Alo. They stabbed the journalist and stole his fax and cell phone. The attackers also threatened to set fire to his house and business if he informed the police about the incident. The incident was believed by the press to be a reprisal for several previous critical reports by the journalist about the persons in question.

On July 22, the police recovered the mutilated body of Ahsan Ali, the Rupganj correspondent of the Dhaka-based Bengali-language daily Jugantor, from the DND canal near the Gandharbapur High School in Rupganj. Ali's wife stated that her husband had been missing since July 20. She stated that the Secretary of Rupganj Chatra League had previously threatened to kill Ali. On February 25, Tangail district police indiscriminately beat journalists in front of the Tangail Press Club, injuring nine journalists including two members of the Tangail Press Club Executive Committee. Some examinees of Sadaq University College protested their expulsion from the examination at a press conference at the Press Club at which the police beat attending journalists. Seven police personnel later were suspended by the administration.

On April 20, a group of armed men ambushed Prabir Sikder, the Faridpur district correspondent for the Dhaka-based Bangla-language daily Janakantha, near Faridpur while he was on assignment. Eyewitness

accounts recorded in the local press said the attackers threw several Molotov cocktails, shot and stabbed him repeatedly and then fled the scene.

Sikder was later transferred to Dhaka's National Institute of Cardiovascular Diseases where the attending doctors amputated his right leg, which had been shattered by bullets. Local journalists claim Sikder was most likely attacked for his reporting on the alleged collaboration of prominent local figures with Pakistani forces during the 1971 war of liberation, and on current criminal activities. The prominent figures included a close relative of an influential central leader of the Awami League, and a BNP activist and alleged domestic terrorist. Press reports stated that the police charged 10 persons with involvement in the incident on September 10 but excluded the alleged close relative of the influential Awami League leader.

On July 12, a gang of youths armed with swords, axes, and guns were waiting in front of the residence of Tuhin Aronno, the Meherpur district correspondent of the Dhaka-based Bangla-language daily Prothom Alo. However, they fled the area when local residents saw them. Since then, they have threatened Aronno by telephone. Tuhin Aronno ran a story in Prothom Alo on June 25 about pre-election violence being organized by the local Awami League. Aronno also received a death threat by telephone from a person identifying himself as a relative of local BNP M.P. Abdul Ghani, after Aronno ran a story regarding disputes within the four-party alliance.

In January 2000, two unidentified persons threw a bomb at the building that houses the Bangla-language daily Dainik Azadi, causing no major damage; however, a few minutes later, another bomb blast damaged the managing editor's car. Also in January 2000, the leader of the local Jatiyabadi Chhatra Dal (the student wing of the BNP in Munshiganj), attacked Zakir Hossain Sumon-Srinagar, a correspondent for the Ajker Kagoj, reportedly because he published a news item criticizing the student group. When Sumon was attacked, a senior journalist, Shafi Uddin Ahmed, tried to rescue him and also was attacked by the student group. No one was held accountable in either incident.

In January 2000, three unidentified persons shot and killed journalist Mir Illais Hossain in Jhenaidah. The journalist, also the leader of a leftist party, allegedly had received death threats a few weeks before the killing and had

requested police protection. Four persons were arrested for their suspected involvement in the murder. By year's end, charges had not been filed. On February 27, a court in Narayanganj issued an arrest warrant for the editor and other officers of the opposition daily Dinkal on the basis of a complaint lodged by a ruling party M.P., who accused the newspaper of publishing false, malicious, and inaccurate reports about him. On March 8, police officers raided the newspaper's office, threatening journalists and damaging furniture. The police withdrew after approximately 1 hour. On May 20, activists from the ruling party student front, the BCL, assaulted two Dhaka University correspondents and threatened to kill one of them.

In July 2000, two men entered the Jessor office of the Bangla-language daily Janakantha and shot and killed reporter Shamsur Rahman. Rahman had been reporting on the activities of criminal gangs in the southwest part of the country, and the relationship of those gangs to national political parties. By September 2000, 12 persons had been arrested in connection with the murder. Charges were filed during the year and at year's end, their trial was pending.

According to the Committee to Protect Journalists, in October 2000, a group of Juba League activists, the youth wing of the ruling party, threatened Sohrab