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Focus

Article 87 of the GCIII

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts. When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that *the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance,* and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

Article 100 of the GCIII

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since *the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance*, and that he is in its power as the result of circumstances independent of his own will.

The puzzling trial of John Walker Lindh, the American Taliban

In marked contrast to the anonymity of the nearly 600 detainees held at the US base in Guantanamo Bay, the story and trial of John Walker Lindh, labelled the American Taliban, has been widely reported in the American press, almost on a daily basis.

John Lindh was captured by the Northern Alliance after the fall of Kunduz by the end of November 2001. He was then detained in the prison of Mazar-I-shariff, locked in a container without food or clothes, blindfolded and strapped down and subsequently interrogated in Afghanistan, aboard an American warship and again in the US. During his detention in Mazar-I-Shariff, an uprising took place and one of the CIA agents who had interrogated Lindh was killed by the detainees. Upon arrest, Lindh immediately admitted fighting for the Taliban against Northern Alliance forces and training at an al-Qaeda-associated camp but denied having killed or participated in the killing of the CIA agent.

Lindh was indicted in February 2002 for crimes committed against the US Criminal Code. As any US national his criminal activities, whether committed on the territory of the US or abroad, fall within the ambit of domestic American legislation. In July this year, he struck a deal with the prosecution. He decided to plead guilty to collaborating with the Taliban and using, carrying and possessing firearms and destructive devices during crimes of violence (count 10 of the indictment), and offered to co-operate with the American investigation into the crimes committed by Al Quaeda members. In exchange, the prosecution dropped the more serious charges against him such as conspiracy to murder US nationals or conspiracy to provide material support and resources to foreign terrorist organisations, and it recommended a sentence of 20 years in prison rather than lifetime as he was originally facing. As part of the bargain he also dropped claims he had been tortured and mistreated by US personnel. This all means that he explicitly waived his right to trial and that a sentencing date has been set for October, 4.

On the said day, a court in Alexandria, Virginia, sentenced John Walker to 20 years in jail for fighting for the Taliban in Afghanistan. The trial unfortunately does not shed any light on what the US understands under using, carrying and possessing firearms and destructive devices during crimes of violence.

Concerning international humanitarian law, the main issue is whether Lindh qualifies as a combatant although he is a national of the State against which he fought via the Northern Alliance. To answer this question, one needs to look at State practice and more particularly at the case of *Public Prosecutor v. Oie Hee Koi* (1967). Malaysian citizens who were members of the Indonesian armed forces were captured by the Malaysian forces during the armed conflict that raged between these two countries. The British Privy Council declared that although the detainees were sent by the Indonesian government, they could not, because of their nationality, be considered as prisoners of war. Grounds for such a decision were that although article 4 of the Third Geneva Convention on its face is capable of including the nationals of the detaining power, the primary intention of the States was to protect members of the national forces of each against the other and that articles 87 and 100 of the Third Geneva Convention point convincingly in this direction. Both of them rest upon the assumption that a prisoner of war is not a national of the detaining power. To confirm this position, one may stress that, according to French law, only French nationals who were forcefully integrated in the German army during World War II can obtain a pension for having been prisoner of war. Others who cannot prove the forceful incorporation are not allowed to receive money.

Consequently one may assert that Lindh is not protected by the Geneva Conventions and that his status is entirely left to the domestic criminal law of the United States.

Responsibility

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