

Replies and Comments:

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Focus

Should the detainees at Guantanamo Bay be classified as POWs? Yes.

Is there a viable process to be followed? Yes.

Sources:

Directives from the Vietnam War era:

-US MACV (Military Assistance Command, Vietnam)

-Directive 381-46, 27.12.67: classification of detainees; POW status

-Directive 190-6, 08.01.69: ICRC visits to detainees

US Army Field Manual 27-10 (1956), Law of Land Warfare

Ch 3- POWs

- para. 61, definition
- para. 71 a, doubt
- para. 71 a, 71 c, 73, competent tribunal

Can the practice from the Vietnam war be used in Guantanamo?

There has been a lot of discussion lately about military tribunals, military commissions, and courts-martial in relation to the detainees at the US Naval base at Guantanamo Bay, Cuba. Those held in Guantanamo have not been classified as prisoners of war (POWs) or charged as criminals. They continue to be held in a state of limbo, in violation of the Third Geneva Convention Relative to the Treatment of Prisoners of War of 1949.

The application clause of GC III, Art. 2, states that the convention shall apply to an armed conflict between two of the parties. Both the US and Afghanistan are states-parties to this convention.

Members of the armed forces of the Taliban were certainly members of the armed forces of a party to the conflict as set out in Art. 4 A (1). The Taliban were the *de facto* government of Afghanistan. They controlled 95% of the area of Afghanistan, though they were challenged by the forces of the Northern Alliance.

The Bush administration challenges this conclusion, saying that the armed forces of the Taliban did not meet the four criteria of Art 4 A(2). However, (1) of Art 4 A includes as POWs „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“. The four criteria do not appear in (1). They appear in (2), which applies to groups below the threshold of control that applies to the armed forces of a party to the conflict. Though there may be some doubt as to whether the forces of al Qaeda belong in (1) or (2), there can be no doubt as to the status of the Taliban fighters. Furthermore, the doubt that applies to the al Qaeda forces is exactly the doubt that calls into operation the competent tribunal language of Art 5.

What if there is a question as to the status of a person taken prisoner? Article 5 clearly provides that if there is a doubt as to a detainee's status, it should be determined by a competent tribunal. The Commentary to AP I, analyzing the same „competent tribunal“ language of GC III, provides that a competent tribunal may be administrative in nature, which includes military tribunals (ICRC Commentary AP I, Art 45, para. 1745.)

Indeed, the US followed exactly this procedure during the war in Vietnam, in accordance with US Army FM 27-10, para. 71 (c) (1956) and US Military Assistance Command Vietnam (MACV) directives, among them, Directive 381-46, 27.12.67 and Directive 20-15, 15.03.68. According to the manual and these directives, captives were screened by a military tribunal and most Vietcong fighters, the archetypal guerrilla fighters, were granted POW status. According to Directive 381-46, detainees were classified as POWs if they were Vietcong main force, Vietcong local force *OR Vietcong irregulars if captured while in combat or engaging in a belligerent act under arms, other than an act of terrorism, sabotage, or spying*. If a Vietcong irregular was detained while not engaged in combat or a belligerent act under arms, he could also be classified as a POW if he admitted or there was any proof that he participated in actual combat or engaged in a belligerent act under arms. Admission of an act or proof of an act was sufficient for POW classification. Can this procedure not be followed today?

It should be, because at present the failure of the US to classify those detained at Guantanamo Bay violates the 3rd Geneva Convention.

Responsibility

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