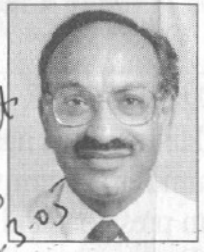
Bad news for Guantanamo Bay inmates

COMMENT



IJAZ HUSSAIN

Troops qualify for POW status even if they belong to what the Bush administration terms as "pseudo-states" or "rogue states". Therefore, the US contention about the inapplicability of the Geneva Convention to soldiers belonging to Afghanistan under the Taliban government or those from Iraq under Saddam Hussein is utterly flawed

THE RECENT APPOINTMENT OF ALBERTO R Gonzales in place of Ashcroft as the US attorney general is a significant development. It was he who, in his previous incarnation as the White House counsel, provided the legal underpinning for the shabby treatment of prisoners at the Guantanamo Bay. He did so by declaring in a 2002 draft memorandum submitted to President Bush that the Geneva Convention on Prisoners of War (POWs) was "obsolete" and "quaint". The Bush administration then took the stand that the Geneva Convention did not apply to a terrorist organisation like Al Qaeda and that Taliban had lost the POW privileges for violating laws of war.

US also contended that the provisions of the Geneva Convention made sense in the context of hostilities between nation states such as Israel and Arab states or India and Pakistan. They did not apply to non-state actors like Al Qaeda that target civilians and disregard distinction between combatants and non-combatants, besides operating without regard to borders. The argument was that it is hard to control terrorist networks of suicidal operatives, with no citizens or borders to defend. The Bush administration also excluded from application of the Geneva Convention the "pseudo-states", which it defined as states having neither the will nor the means to comply with laws of war. States like Somalia, Afghanistan and Iraq under Saddam Hussein, it said, fell in that category.

To understand the relevant provisions of the Geneva Convention we need to go back to the Hague Convention which at the end of the 19th century for the first time defined the status of belligerents, *i.e.* those to be treated as lawful combatants. According to it, guerrilla troops and militia were subject to laws of war if they satisfied the following four conditions: they were properly commanded; had a fixed distinctive emblem recognisable from a distance; openly carried arms; and conducted their operations in accordance with the laws and customs of war.

incendiary weapons and delayed-action mines, etc. Besides, following the 1972 Stockholm Conference on Human Environment, a need was felt to update laws of war to bring them in conformity with the imperative of preservation of environment. Consequently, these rules were revised during 1976-77 resulting in Protocols I and II additional to Geneva Conventions

the inapplicability of the Geneva Convention to soldiers belonging to Afghanistan under the Taliban government or those from Iraq under Saddam Hussein is utterly flawed. In fact, refusal by the Bush administration to apply the Geneva Convention to prisoners at the Guantanamo Bay smacks of sheer racism. This is so because the US not only did not deny benefits of laws of war to Nazi ringleaders but also insisted on their prosecution through the Nuremberg Tribunal.

Similarly, the US contention that Taliban cannot enjoy benefits of the laws of war because they themselves violated them is not justified. This is evident from Article 1, common to all the four Conventions, which provides that the parties "undertake to respect and to ensure respect for the present Convention *in all circumstances*". In other words, the obligation to respect the Conventions is general and absolute and is not dependent on reciprocity by the other party to the conflict. In consequence, the US is bound to apply the Geneva Convention irrespective of whether Taliban applied it or not. It is equally noteworthy here that in case of an unlawful war waged by an aggressor state, the state attacked and members of its armed forces are bound to apply the Geneva Rules to the aggressor and its armed forces.

As far as the applicability of the Geneva Convention to non-state actors is concerned, soldiers belonging to a liberation movement enjoy *a priori* belligerent status, though the US has reservations towards it.

Can we assimilate POWs belonging to organisations such as Al Qaeda to liberation movements? In the light of recent development relating to terrorism the situation appears to suffer from ambiguity. However, it does not signify that the US is justified in treating soldiers belonging to Al Qaeda or Baathist Iraqi regime as "enemy combatants" thus depriving them of the POW status. This is so because Article 5 of the Geneva

the laws and customs of war.

The Hague Rules were however found inadequate during the World War II to meet the needs of humanitarian law. They were reviewed in 1949 giving birth to the four Geneva Conventions. The Geneva Convention in question carried *muatatis mutandis* the above-mentioned four conditions for conferment of the status of belligerency. Additionally, it stipulated that in case of *levee en masse*, those called to arms, in order to enjoy the status of lawful combatants, must also fulfil the above-mentioned four conditions. However, in case of spontaneous uprising on the approach of enemy it stipulated the fulfilment of only two conditions, namely, of carrying arms openly and respecting laws and customs of war.

The Geneva Rules, in turn, became outdated following the developments, which took place during the 1950s and 1960s, necessitating their revision. The factors responsible for this revision were: new kinds of warfare such as the Vietnam war; wars of national liberation and anti-colonial struggles; development of new kinds of weapons such as cluster bombs, fragmentation bombs,

These Protocols, particularly Protocol I brought about some fundamental changes in humanitarian law. For example, as opposed to the previous rule according to which belligerent status was dependent on the recognition and actual dimension of the rebellion, Article 1(4) of Protocol I confers *a priori* belligerent status on all liberation movements. This change was based on the view that a rebellion by a people fighting for self-determination is to be automatically interpreted as an inter-state war even though it might not amount to more than a civil war. Similarly, Article 44 of Protocol I made the POW status available to persons still considered unlawful combatants except, of course, for spies and mercenaries.

The above narrative of the evolution of humanitarian law shows that the rule on treatment of POWs in inter-state conflict has not undergone any change. Consequently, troops only need to fulfil the four conditions mentioned above, irrespective of the fact that they belong to what the Bush administration terms as "pseudo-states" or "rogue states". Therefore, the US contention about

of doubt about its applicability to a certain category of POWs, they are to be protected until such time that their status is determined by a competent tribunal. The US did not undertake any such exercise. Instead it straightaway excluded them from the POW protection. In consequence, it is clearly guilty of violating the Geneva Convention.

In conclusion, we would suggest that the Geneva Conventions be reviewed given the recent developments relating to terrorism. This would provide the US with an opportunity to argue its case for updating them. It is a different matter that the US may not succeed in its endeavour as has happened with its plea for rewriting of Article 51 of the United Nations Charter to accommodate the principle of pre-emptive strike. In the meantime the appointment of Alberto R Gonzales as the US attorney general is bad news for the inmates of the Guantanamo Bay.

The writer, a former dean of social sciences at Quaid-e-Azam University, is an associate lawyer at Cornelius, Lane and Mufti law firm