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The Janus moon rising - Why 2014 heralds United States' detention policy on a collision course... with itself

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2014 will serve as a test of the United States' claims that its detention policy is consistent with the law of armed conflict (LOAC). If, as President Obama has repeatedly stated, U.S. involvement in the armed conflict in Afghanistan will end this year, then any LOAC based detention of belligerents linked solely to that conflict ends as well. That should mean the release or transfer of members of the Taliban currently detained at Guantanamo. It won't.

This note outlines the LOAC rationale for detention in armed conflict and the unsurprising conclusion that if the United States is not a party to the conflict, the conflict cannot serve as the basis for continued detention by the United States of belligerents captured therein. Under the LOAC, the United States must release or transfer the Taliban. Yet, this note predicts that within the next year the United States will simultaneously claim that it is no longer a party to the conflict and that its support of Afghanistan renders continued U.S. detention of the Taliban consistent with the LOAC.

On 28 January 2014, President Obama delivered his State of the Union address to the U.S. Congress.¹ During his speech, he stated that “[w]ith Afghan forces now in the lead for their own security, our troops have moved to a support role. Together with our allies, we will complete our mission there by the end of this year, and America's longest war will finally be over.” In that same address, President Obama referenced the war in Afghanistan “ending,” “finally be[ing] over,” “finally coming to an end,” and “draw[ing] to a close.” That the head of state of a party to an armed conflict is declaring his country's involvement over triggers, or should anyway, the release of enemy belligerents captured during that conflict.

Detention of belligerents in an armed conflict to

1 Washington Post (29 January 2014), “Obama's 2014 State of the Union address”.

incapacitate them and prevent their return to the battlefield is a fundamental incident of waging war, a proposition on which the U.S. Supreme Court claimed “universal agreement and practice”.² This is not a U.S. view, but a recitation of the widely recognized understanding that both treaty-based and customary LOAC reflect an inherent power to detain.³

But the predicate to LOAC detention authority is an armed conflict in which the detaining state is a party. While the ongoing non-international armed conflict (NIAC) in Afghanistan will most likely continue beyond 2014, President Obama is quite clear that U.S. participation will end. There is no basis, under the LOAC, for the continued detention of belligerents captured in a conflict to which the United States is no longer a party.

This does not mean that on 1 January 2015 the U.S. must open the gates of Guantanamo and release any and all detainees. The United States will likely still be able to credibly claim to be engaged in armed conflict (or perhaps a series of conflicts) with al-Qaeda. The pros and cons of this argument are beyond the scope of this missive. Suffice to say, there is at least a potential argument to be made for the continued LOAC based detention of members of al-Qaeda.

But even assuming *arguendo* that U.S. claims of a global NIAC with al-Qaeda are legitimate, the Taliban remain beyond even that argument's considerable reach. The Taliban exist in Afghanistan and Pakistan, which is where they have engaged in armed conflict and been captured. The Taliban is a party to an armed conflict in Afghanistan (and Pakistan), but not beyond.

2 Supreme Court of the United States (28 June 2004), “HAMDY et al. v. RUMSFELD, SECRETARY OF DEFENSE, et al.”, No. 03—6696

3 See Pejic, Jelena (31 March 2011), “The protective scope of Common Article 3: more than meets the eye”, *International Review of the Red Cross*, No. 881.

Simply put, if the United States is no longer a party to the armed conflict in Afghanistan, there is no LOAC basis for U.S. detention of the Taliban.

In Guantanamo detainee litigation in U.S. federal courts, the United States has claimed its detention policy derives from, or is informed by, the LOAC.⁴ Certainly deriving from or being informed by does not mean full or complete compliance, nor should it. As a matter of law, Geneva Conventions III and IV do not apply to the NIAC in Afghanistan. But the U.S. will not be able to credibly claim any nexus between its detention policy and the LOAC if in 2015 it continues armed conflict based detention while claiming its involvement in that conflict has ended.

At the end of 2014 and the end of U.S. involvement in the armed conflict in Afghanistan, the United States could act consistently with the LOAC. This would entail either releasing the members of the Taliban detained at Guantanamo or transferring them to the only remaining party to that conflict – Afghanistan.

Given U.S. detention policy over the last decade, combined with political dysfunction in Washington, neither of those outcomes is likely. Instead, the United States will likely employ yet another “heads I win, tails you lose” interpretation that has so undermined its standing in the international community and called into question its commitment to the rule of law.

Under this approach, President Obama will, unfortunately, resemble the two faced Roman god Janus. For domestic purposes, the President will claim that for the United States, the war in Afghanistan is over. But in terms of the Taliban at Guantanamo, the United States will continue to claim detention authority based on the armed conflict in which the President said the U.S. is no longer involved. The U.S. will support this contention by citing the continued presence of U.S. service members in Afghanistan, albeit in a support role. Depending on the amount of U.S. troops and their function in Afghanistan, that could have the makings of a credible argument. But it would mean that the U.S. was still a party to the conflict, which flies in the face of President Obama’s pronouncements to the contrary.

⁴ United States District Court for the District of Columbia, “Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay”, Misc. No. 08-442 (TFH).

President Obama’s pronouncements of war’s end, combined with political realities in the United States, juxtaposed against LOAC release requirements create a tautological “do loop” akin to Joseph Heller’s *Catch-22* – you would think a state would stop detaining individuals held to prevent their return to a conflict in which the State is no longer a party.

Don’t be too sure.

About the author

Chris Jenks is an assistant professor of law and directs the criminal justice clinic at the SMU Dedman School of Law in Dallas, Texas. He has published articles on drones, child soldiers, extraordinary rendition, law of war based detention, targeting and government contractors. He has also spoken on those same topics at universities and institutes in Australia, Brazil, Italy, South Africa and the United States, and with the militaries of the Republic of Yemen and several different European and African countries. Chris has served for over 20 years in the U.S. military, including as the primary international and operational law advisor near the demilitarized zone between North and South Korea.

