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### Al Warafi's Active Hostilities

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# *al Warafi's* active hostilities

by [Deborah Pearlstein](#)

May 28, 2015

As Marty Lederman's [earlier post](#) explains, a D.C. district court is now considering the habeas petition of Guantanamo detainee Mukhtar Yahia Naji al Warafi, found in an earlier habeas case to be a member of the Taliban's armed forces, who argues that because "hostilities" between the United States and the Taliban have ceased, the domestic statute (the AUMF) on which the United States has relied no longer authorizes his detention. Marty and I are, I believe, in substantial agreement about most aspects of the case. (And thanks to Marty for the link to my [article](#), where I've written about the merits of these issues, and the role of the courts in resolving them, at length.)

But because both the briefs and (therefore) Marty's post devote so much time to parsing the President's statements about the existence of an *armed conflict* between the U.S. and the Taliban – statements I think only marginally relevant to the merits of al Warafi's case – I want to clarify what this case mostly is, or should be, about.

Warafi's petition is, appropriately, based on Article 118 of the Third Geneva Convention (GCIII), requiring that prisoners "shall be released and repatriated without delay after the cessation of active hostilities." By its terms, GCIII only applies to international armed conflicts – that is, conflicts between two or more states. As I think all would agree, the conflict in Afghanistan has for some years been a non-international armed conflict – that is, a conflict between states (Afghanistan and the United States) on one side and several non-state parties (including a Taliban insurgency) on the other. But because Justice O'Connor expressly cited Article 118 in explaining the Court's understanding of the scope of the AUMF in *Hamdi*, there has been little dispute since *Hamdi* that Article 118's limitation on the duration of detention informs the "necessary and appropriate" scope of AUMF detentions.

Article 118 does not require a court (or anyone else) to determine whether the parties are in fact still in a state of "armed conflict" within the meaning of international law. The

existence or not of an “armed conflict” can matter a great deal in some circumstances – most commonly, in the determination whether an individual may be tried for war crimes, a question at issue in our own military commission trials as we speak. It may also ultimately matter in *al Warafi*, for reasons I discuss below. But “armed conflict” (see GCIII Common Article 2) and “active hostilities” (in Article 118) are separate terms in the treaties, and were deliberately designed to refer to separate concepts, as well. As the Commentary to GCIII makes clear, the drafters of Article 118 were interested in *hastening* the release of prisoners, requiring their release at an earlier point than previously assumed – i.e., in the current version of the Conventions, as soon as the fighting stops. (In an interstate armed conflict, which is what Article 118 addresses directly, this point can occur before the end of the conflict.) The notion was in part to prevent parties from continuing to hold prisoners on some pretext, as some of the Allies did after World War II, keeping prisoners for purposes of forced labor. (For more on how the United States has ended its detention operations in wars of the past century, see [here](#). Notably, the United States has often released prisoners back into conditions of hostilities far more active than what the U.S. brief now describes in Afghanistan.) The Article 118 rule was equally driven by an interest in letting prisoners return home without having to wait for a formal peace agreement to be concluded (or some other manifestation of often unattainable clarity in the relations between the parties).

Because Article 118 is thus aimed directly at the facts on the ground, as it were, claims based solely on what the President (or the Taliban, for that matter) says about the mission of the United States or the existence of an “armed conflict” can hardly be dispositive of whether “active hostilities” actually continue—and that is the relevant question, as the Government suggests in the back end of its brief (see the end of Marty’s post), but that *Al Warafi* strangely ignores.

So what is actually happening on the ground in Afghanistan?

Between the DOD General Counsel’s speech at ASIL some weeks back, and the U.S. brief filed in *al Warafi*, one might expect that we would have important insights into the answer to that question. Alas, we don’t yet know very much. This is no doubt due in part to some significant redactions in the government’s brief – passages the relevance of which is impossible to evaluate. And some unredacted parts of the government’s brief

describe circumstances *other than* fighting: the presence of U.S. troops, for example, or the presence of a threat from Al Qaeda rather than the Taliban. These facts are of limited significance to the question of whether “active hostilities” between the U.S. and the Taliban continue. The U.S. military maintains a presence in numerous countries; that is hardly enough to constitute “active hostilities.” And the existence of a generalized, chronic “threat” from Al Qaeda or the Taliban – a claim the government brief makes repeatedly – likewise should not suffice. U.S. troops, civilian employees and nationals face threats all over the world. There is a difference between the threat of hostilities and actual, “active” hostilities.

What matters here is the handful of unredacted incidents the government notes on pages 14-15 of its brief – incidents involving actual attacks by the Taliban. Interestingly, however, of the four incidents cited, only one appears to involve a Taliban attack on U.S. military forces as such. One incident involves a Taliban infiltration of Afghan forces, in which three American civilian contractors were killed. Two others involve attacks on NATO forces, in which two U.S. troops were killed. The last involves “an attack by a suicide car bomber” near a U.S. military base, which is not reported to have resulted in any American casualties.

Without for a moment discounting the immeasurable human cost of such incidents, it is here that understanding the meaning of “active hostilities” might be informed with reference to the nature of “armed conflict.” Article 118 uses the term “active hostilities” rather than “armed conflict” not to suggest that prisoners could be held even *after* the conclusion of full-fledged armed conflict, as long as any low level of hostilities exists. Rather, that article makes the continuation of “active hostilities” the condition for continued detention for the opposite reason – that is, to facilitate the release of prisoners as soon as conditions make it possible, whether or not the parties have succeeded in agreeing to a formal end to armed conflict. It is difficult to imagine that the drafters of this provision imagined a condition of zero violence would be required before prisoners would be entitled to release. That is, it is difficult to imagine the drafters wished to replace one too-practically-difficult condition for the termination of detention with another too-practically-difficult condition, given their express concern for the reality, as the Commentary puts it, “that captivity is a painful situation which must be ended as soon as possible.” The “active hostilities” term is better read as embodying a

pragmatic standard, with a finger on the scale of release. Whether the redacted passages of the government's brief reveal that active hostilities are yet over or not, the legal standard should not require conditions of absolute peace to conclude that they are.

## About the Author(s)

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