

THE INTERNATIONAL LEGAL STATUS OF THE DETAINED PRISONERS BY THE UNITED STATES OF AMERICA IN GUANTANAMO, CUBA, AFTER THE CONFLICT IN AFGHANISTAN*

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The USA claims to be a progressive force for human rights. Military commissions have not been used for more than half a century in the United States, a period which has seen the reinforcement of a broad framework of fair trial guarantees in international human rights law and standards and in international humanitarian law. Executive military commissions have no place in 21st century criminal justice systems.¹

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¹ International Amnesty, *United States of America. Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay*. AI Index: AMR 51/053/2002, April, 2002, p. 61 (Amnesty Memorandum).

I. INTRODUCTION

The response to the events on September 11 in the United States of America (USA) was at a military level,² by the USA and a coalition of States,³ the armed attack to Afghanistan. The reasons, alleges USA, lie in the rejection, by the *de facto* government of the Taliban, of handing over who they consider to be the intellectual author of said attacks, Osama bin Laden, as well as the members of the leading group called Al Qaeda.

The USA claims to have sufficient evidence linking Osama bin Laden and Al Qaeda members with previous attacks to the World Trade Center in New York and its embassies in Tanzania and Kenya. In addition, they state that the Al Qaeda group is an international network of terrorists whose objective is not only the USA but, making the argument as short as possible, the Western culture.

Since the beginning of the fighting in Afghanistan in October 2001, thousands of people have been detained by the international coalition led by USA⁴ and by the anti-Taliban forces, which now are the new government of Afghanistan.

Prisoners are incarcerated in various detention centers in Afghanistan⁵ and Pakistan and even on US military ships.⁶ This, of course, makes it more difficult to know the exact number of prisoners and under which conditions they are. In these centers, the prisoners are subjected by the USA forces to a series of interrogations, in order to select those who could provide them with information that leads them to the capture of the leaders of the Al Qaeda organization or the Taliban, or that they have been an important part of said organizations or have had some relation with the events of September 11. Once the prisoners have been selected, they are transferred to the US military base in Guantanamo, Cuba, for a *possible* trial before

² The strategy of the United States of America has been developed in different fields, for example, in the diplomatic field the intention has been to create the greatest support possible, facing the countries the dilemma of being with the United States of America or against the United States of America; in the economic field it is about detecting and stopping any type of financing to terrorist groups.

³ The main military ally of the United States of America is Great Britain, but troops from Canada and Germany, among other countries, have also participated directly. Indirectly, all of Afghanistan's neighboring countries have participated, with its former ally Pakistan standing out.

⁴ Among the people captured, there are nationals from more than 35 countries. The identity of most of them is unknown. See Amnesty Memorandum, *op. cit.*, note 1, p. 23.

⁵ The facility with the largest number of prisoners, several thousand, is located in Shiburghan, west of Mazar-i-Sharif. Another detention camp controlled by the Americans is located outside Kandahar. There are many other prisons throughout the Afghan territory, some of them controlled by anti-Taliban forces.

⁶ For example, the USS *Peleliu*.

the military commissions.⁷ Regarding the fate of the thousands of prisoners who are in Afghanistan, it is even more uncertain.⁸

The number of Guantanamo detainees is around 384. While 174 more are awaiting transfer in Afghanistan.⁹

The USA has qualified *a priori* the people detained in Guantanamo as terrorists and criminals, thus in its opinion they would be illegal combatants. On the other hand, the large majority of the international community believes that such people should clearly have the status of prisoners of war.

The problem arising is to know what the status, according to international law, of the people detained in Guantanamo is. This will determine the rights that are conferred on these people, as well as the obligations that the USA has regarding them.

II. THE LEGAL STATUS OF THE PRISONERS OF GUANTANAMO

In order to determine the legal status of the prisoners held in Guantanamo, it is essential to know the circumstances in which they were apprehended.

Most of the people in Guantanamo were detained in the context of an armed conflict between the USA, together with an international coalition, against the *de facto* government of the Taliban in Afghanistan. Together with the Taliban allegedly fought members of the organization Al Qaeda.

There is, however, a small group of people who were detained in other places. Such is the case of the Algerian detainees in Bosnia and despite the fact that the Supreme Court of that country had declared there were no elements to detain these people, they were transported, illegally, to the Guantanamo base.¹⁰ Also, they have reported cases of people who have been arrested in Afghanistan and then transferred to other countries for interrogation, where it has even been mentioned the participation of USA agents in them.¹¹ These people have a different legal status than those arrested during a military conflict, and therefore we will not study them on this occasion.

⁷ The Secretary of Defense Ronald Rumsfeld has stated that people who are in Guantanamo are the most likely to be prosecuted before military commissions. With regard to the others, it has not been decided yet what they will do with them. The possibility of detaining them indefinitely has even been mentioned.

⁸ It has been said that there might be some trials by the new Afghan government, but very little is known about the exact number of people arrested, under which conditions they are, their location and what they will do with them.

⁹ CNN, "Guantanamo facilities full, building goes on. Gitmo now holds 384 detainees; 174 more in Afghanistan", May 10, 2002, at <http://www.cnn.com/2002/WORLD/americas/05/10/gitmo.detainees/index.html>. Accessed on May 11, 2002.

¹⁰ See comments in Amnesty Memorandum, *op. cit.*, note 1, p. 12.

¹¹ *Ibidem*, pp. 14-16.



Every armed conflict is governed by a subsystem of rules of international law called international humanitarian law (IHL).¹²

III. BRIEF EXPLANATION OF THE INTERNATIONAL HUMANITARIAN LAW (DIH) SUBSYSTEM

IHL is a set of rules of a conventional or customary nature and of principles,¹³ which seeks to limit the effects of armed conflicts for humanitarian reasons. It protects people who do not take part in hostilities, such as civilians and medical and religious personnel. It also protects people who no longer participate in the fighting, that is, those who are *hors de combat*, for example, wounded or sick combatants, shipwrecked people and prisoners of war. It also limits the means and methods of waging war.¹⁴

IHL applies in situations of armed conflict¹⁵ of an international or non-international nature, for which reason it is also called *jus in bello*. But it does not cover situations of internal tensions or internal disturbances, such as isolated acts of violence. It is only applicable when a conflict has been unleashed and applies equally to all parties, regardless of who initiated it. IHL does not determine if a State has

¹² IHL is often called "Law of War" or "law of armed conflicts".

¹³ Some principles are: elementary considerations of humanity, the need to distinguish between civilians and combatants, the principle of proportionality, the prohibition of causing unnecessary suffering, among others.

¹⁴ The International Court of Justice has indicated that "The 'laws and customs of war'... as they were traditionally called... were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This 'Hague Law' and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the 'Geneva Law' (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and people not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law" Legality of the Threat or Use of Nuclear Weapons, *ICJ Reports*, 1996, (Advisory Opinion), paragraph 75. Some of the international instruments that prohibit the use of certain military weapons and tactics or that protect certain categories of persons or goods are: The Hague Convention of 1954 for the protection of cultural property in case of armed conflict and its two protocols; the 1972 Convention on Bacteriological Weapons; the 1980 Convention on Certain Conventional Weapons, and its four protocols; the 1993 Convention on Chemical Weapons; the Ottawa Treaty of 1997 on Antipersonnel Mines; the optional protocol of the Convention on the Rights of the Child on the participation of children in armed conflicts.

¹⁵ The International Court for the Former Yugoslavia has defined the armed conflict as: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there", *The Prosecutor vs. Dusko Tadic*, Appeals Chamber, Case No. IT-94-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, paragraph 70 (*Tadic Case*).

the right or not, to resort to force, also known as *jus ad bellum*.¹⁶ This issue is regulated by an important —but distinct— part of IHL in the Charter of the United Nations, Article 51. In this sense, both the United States and the United Nations¹⁷ and NATO¹⁸ have reaffirmed the right to self-defense after the September 11 attacks. The current USA exercise of this right has been much debated in the doctrine¹⁹ mainly because the conditions to exercise it as well as the manner it has been done do not correspond to what is established in the general international law.²⁰

IHL is essentially contained in the four Geneva Conventions of 1949²¹ and in its additional protocols of 1977.²² Almost all States, including Afghanistan and the USA, are parties to such agreements. The United States has not ratified the abovementioned protocols, but many of the principles contained in them are already considered part of international customary law and, therefore, mandatory for all countries. As already mentioned, an important part of IHL is contained in customary international law and in the principles of this law. This has been acknowledged in what is known as the Martens clause.²³

IHL distinguishes between international armed conflict and armed conflict without international nature. In international armed conflicts, at least two States con-

¹⁶ For a review of the terms *jus in bello* y *jus ad bellum* see: Kolb, Robert, "Origin of the twin terms *jus ad bellum*/*jus in bello*", *International Review of the Red Cross*, No. 320, 1997.

¹⁷ See, for example, the resolutions of the United Nations Security Council: S/Res/1368 (2001) and S/Res/1373 (2001).

¹⁸ Cfr. Statement by the North Atlantic Council, Press Release (2001)124, September 12, 2001, at <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

¹⁹ Part of that debate has taken place in forums such as *ASIL insights* at <http://www.asil.org/insights/insigh77.htm>. See, for example, the contributions of Cerone, John, *Status of Detainees in International Armed Conflict, and their Protection in the Course of Criminal Proceedings*, and Wedgood, Ruth, *Tribunals and the events of September 11th*.

²⁰ Part of the criticism has also occurred due to a possible "preventive" use of the right to self-defense. This preventive use has already tried to be invoked by other States on different occasions, and has had a great rejection by the international community. Thus, for example, after the Israeli attack in 1981 against an Iraqi nuclear reactor based on an alleged "preventive" right, the United Nations condemned the attack and Mexico declared: "il est inadmissible d'invoquer le droit de légitime défense quand il n'y a pas eu d'agression armée. Le concept de guerre préventive, qui durant de nombreuses années, a été utilisé pour justifier les abus des Etats les plus puissants, car il laissait à leur entière discrétion le soin de définir ce qui constituait pour eux une menace, a été définitivement aboli par la Charte des Nations Unies", S/PV.2288, June 19, 1981, p. 46, reproduced also in *International Legal Materials*, 1981, vol. 20, p. 991, and in Cot, Jean-Pierre and Pellet, Alain, *La Charte des Nations Unies: commentaire article par article*, 2nd. ed., France, Economica, 1991, p. 779. We hope that the Mexican government continues to maintain the same position.

²¹ I Geneva Convention dated August 12, 1949 to alleviate the fate of the wounded and sick of the Armed Forces in the field. 75 UNTS 31 (G-I). II Geneva Convention of August 12, 1949 to alleviate the fate of the wounded, sick and shipwrecked people of the armed forces at sea. 75 UNTS 85 (G-II). III Geneva Convention of August 12, 1949 relating to the treatment of prisoners of war. 75 UNTS 135 (G-III). IIII Geneva Convention of August 12, 1949 relating to the protection owed to civilians in time of war. 75 UNTS 287 (G-IV).

²² I Additional Protocol to the Geneva Conventions dated August 12, 1949, regarding the protection of victims of international armed conflicts. 1125 UNTS 3 (P-I). II Additional Protocol to the Geneva Conventions of August 12, 1949 regarding the protection of victims of armed conflicts without international character. 1125 UNTS 609 (P-II).

²³ "The Martens clause is part of the law of armed conflicts since it appeared, for the first time, in the Preamble of the (II) Hague Convention of 1899 related to the laws and customs of land warfare: "until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as a result of the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." Ticehurst, Rupert, "The Martens Clause and the Law of Armed Conflict", *International Review of the Red Cross*, No. 140, 1997, p. 131.



front each other. They should observe, *inter alia*, the standards contained in the Geneva Conventions and Additional Protocol I.

In non-international armed conflicts, the regular armed forces and dissident armed groups, or armed groups, face each other on the territory of the same State. In them a more limited set of rules is applied, in particular the provisions of Article 3. common to the four Geneva Conventions and Additional Protocol II.²⁴

This difference in the application of IHL, depending on the international nature or not of the conflict, seems to be being diluted in order to move closer to a general application of IHL, regardless of the nature of the conflict.²⁵

As a general rule we can say that people protected by IHL have the right to have their lives and their physical and moral integrity respected, and they benefit from judicial guarantees. The people will be, in all circumstances, protected and treated with humanity, without any distinction of an unfavorable nature.

In particular, it is forbidden to kill or injure an opponent who has laid down his arms or who is out of combat. The wounded and the sick will be picked up and assisted by the belligerent party in whose power they are. Staff and medical supplies, hospitals and ambulances will be respected.

People who do not fall into the category of prisoners of war (PW) are protected by the G-IV on the protection of civilians in times of war. All detainees fall into one of the categories established in both conventions. There is no intermediate status, no one in the hands of the enemy is outside the law.

IV. RELATION BETWEEN HUMAN RIGHTS AND IHL²⁶

It is important to make the distinction between international humanitarian law and international human rights law (IHRL). Although some of its rules

²⁴ Thus, said third article indicates: "In the event of an armed conflict that is not of an international nature and that arises in the territory of one of the High Contracting Parties, each of the Parties to the conflict shall have the obligation to apply, as minimum, the following provisions: 1) Persons who do not participate directly in hostilities, including members of the armed forces who have laid down their arms and persons put out of action due to illness, injury, detention or for any other reason, will be, under any circumstances, treated with humanity, without any distinction of an unfavorable nature, based on race, color, religion or belief, sex, birth or fortune, or any other analogous criteria. In this regard, at any time and in any place, as regards the above-mentioned persons, the following are prohibited: a) attacks against life and physical integrity, especially homicide in all its forms, mutilation, cruel treatment; and torture; b) taking hostages; c) attacks against personal dignity, especially humiliating and degrading treatment; d) the sentences issued and the executions without previous trial before a legitimately constituted court, with judicial guarantees recognized as indispensable by the civilized peoples. 2) The wounded and the sick will be picked up and assisted. An impartial humanitarian agency, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. In addition, the Parties to the conflict will endeavor to enforce, through special agreements, all or part of the other provisions of this Agreement. The application of the above provisions will have no effect on the legal status of the Parties to the conflict."

²⁵ *Cfr.* Case of *Tadic*, *cit.*, note 15, paragraphs 78-79, 83, 84, 91, 92 and 96-99. See also the separate opinion of Judge Georges Abi-Saab in the same decision. In the same vein, Boelaert Suominen, Sonja, "Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Custody Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?", *Journal of Conflict and Security Law*, vol. 5, no. 1, 2000, *passim*.

²⁶ See, for example, Vité, Sylvain y Doswald-Beck, Louise, "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, no. 293, 1993, *passim*.



are similar, these two branches of international law have been developed separately and appear in different treaties. In particular, IHRL is, in general terms, that body of international law that protects the civil, political, social, economic and cultural rights of human beings. IHRL establishes “negative” obligations for the States, which translates into a non-violation of said human rights. It also establishes “positive” obligations such as taking all necessary measures to ensure their protection and realization. IHRL is applicable in peacetime and many of its provisions can be suspended during an armed conflict, for example, the right of assembly. However, there is a minimum of basic rights²⁷ that cannot be interrupted under any circumstances, not even during the war, as is the right not to be tortured.²⁸

The relationship between IHRL and IHL, when it comes to their application in situations of war, is like that of a gear system. In this case, everything that is not covered by IHL will be covered, in a subsidiary manner, by IHRL, which grants, in a more detailed manner, greater protection to prisoners. In the present work, we will only deal with IHL.

V. PRISONERS OF WAR, GENERAL FRAMEWORK

IHL establishes specific rules that regulate the conditions of detention of PWs. The general rule is that any combatant captured by the enemy is a prisoner of war. The first question that arises is who can be considered a PW?

In accordance with Article 4 of the III Convention, PWs²⁹ are “the people who, belonging to one of the following categories, fall into the hands of the enemy”.

This first section identifies two conditions that, despite being obvious, deserve to be discussed. The first is that to be considered a PW it is necessary to fall into one of the six possible categories indicated herein. The second condition is to fall into the hands of the enemy. In this sense, enemy is any adversary in an armed conflict, in its broadest sense that, regardless of the circumstances, falls into the hands of one of the belligerent parties.

²⁷ Many of these basic rights are found in the international instruments that constitute what has been called the “International Charter of Human Rights”, integrated by the Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights and its Optional Protocol, as well as the Second Optional Protocol to the same agreement to abolish the death penalty.

²⁸ In the case, for example, of the American Convention, Article 27 indicates that articles are not derogable: 3rd. (right to recognition of legal personality); 4th (right to life); 5th (personal integrity right); 6th (prohibition of slavery and servitude); 9th (principle of legality and retroactivity); 12 (freedom of conscience and religion); 17 (protection of the family); 18 (right to name); 19 (children’s rights); 20 (right to nationality), and 23 (political rights), nor of the judicial guarantees indispensable for the protection of such rights.

²⁹ Article 43-45 of the P-I also defines PWs, taking into consideration the characteristics of the type of armed conflicts that arose in the world after the Second World War. See comments in Cassese, Antonio, *International Law*, Oxford University Press, Great Britain, 2001, p. 329-332. However, the United States of America is not part of this protocol. For this reason, for the purposes of this work, we will limit ourselves to what is indicated by G-III.



1. “Members of the armed forces of a party to the conflict, as well as members of the militias and volunteer bodies that are part of these armed forces.”

The first part refers to the members of the armed forces, that is, to the forces of air, land, sea or any other category that belong to the military corps of one of the parties. It is therefore what is commonly known as the army in its professional aspect and broader concept. Normally the armed forces wear uniforms, have a hierarchical order and know the rules of IHL.

In the second part, which refers to militias or bodies of volunteers, it is important to mention them because in many States most of the armed forces are conformed precisely by this type of bodies. Generally, these bodies are made up of members of the civilian population who receive military training and who in case of armed conflict are called to participate in the armed forces.

In the case of the conflict in Afghanistan in particular, the Taliban may well be considered the armed forces of Afghanistan, and the members of Al Qaeda members of the militias or volunteer corps that are part of those forces.

2. “The members of the other militias and of the other volunteer corps, including those of organized resistance movements, belonging to one of the Parties to the conflict and acting outside or within the territory itself, although this territory be occupied, provided that these militias or these volunteer corps, including these organized resistance movements, meet the following conditions: a) be commanded by a person who responds to his/her subordinates; b) have a fixed distinctive sign, recognizable from a distance; c) carry the weapons in sight; d) direct their operations in accordance with the laws and customs of war.”

This second category has a historical reason already recognized in the Hague Convention of 1907.³⁰ The reason for its inclusion was due to the, so to speak, atomization of the conflicts that had taken place in Europe. In these conflicts countless bodies of militiamen arose, and it was, therefore, necessary to try to recognize and grant those groups of people a legal protection. The same problem arose during the Second World War where, alongside the great armies, numerous groups of “partisans” also fought, who were sometimes granted the protection of a prisoner of war.

³⁰ These same conditions were originally indicated in Article 1 of the Regulation concerning the laws and customs of the land war of the Fourth Hague Convention of October 18, 1907 which states: “Quality of Belligerent. Art. 1. The laws, rights and duties of war refer not only to the army but also to the militias and the bodies of volunteers who meet the following conditions: 1. To have as head a person responsible for their subordinates; 2. To have a signal as a fixed distinctive sign recognizable from a distance; 3. To bear weapons ostensively; 4. To abide in their operations to the laws and customs of war. In countries where the militias or the Volunteer Corps form the army or are part of it, both those and these are included under the name of army”.

To qualify for the status of prisoners of war, these bodies of combatants had to meet certain requirements.

The first requirement refers to the existence of a hierarchical order, where there are those who issue orders and those who obeys them; which makes the determination of responsibilities easier.

The second requirement is a distinctive sign that combatants must wear. This is essential since, in the absence of a uniform, combatants must differentiate themselves from the rest of the civilian population.

Thirdly, to carry weapons in sight is a requirement that, as ICRC points out, should not be understood as detrimental to the surprise factor in any military operation.

Ideally any combatant in an armed conflict should know the rules of IHL, however, this is not the case. The ICRC recognizes that combatants.

In all their operations, they must be guided by the moral criteria which, in the absence of written provisions, must direct the conscience of man; in launches attacks, they must not cause violence and suffering disproportionate to the military result which they may reasonably hope to achieve. They may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honor and loyalty as they expect their enemies to do.³¹

In the conflict in Afghanistan it could be argued that the members of Al Qaeda do not meet the conditions listed above, however, this has to be determined before the corresponding judicial instance, as we will see later.

3. “Members of the regular armed forces who follow the instructions of a government or authority not recognized by the detaining power”.

This provision is of great importance, since none of the belligerent parties, simply because they do not know the authority of their enemy, may not grant PW status to combatants. Thus, for example, during World War II, the forces of General de Gaulle were supposed not to consider PWs because the Axis forces did not recognize de Gaulle’s government in exile. The solution that was given was to associate these forces to one of the belligerent parties in this case, who was fighting for the United Kingdom.

³¹ Cfr. Pictet, Jean (ed.), Commentary on the Convention (III) relative to the Treatment of Prisoners of War. Geneva, August 12, 1949, ICRC, *International Humanitarian Law*, CD-ROM, 1998 (ICRC CD ROM).

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In the case of the Afghan conflict, the USA can not argue that because the de facto government of the Taliban was never recognized by them, they can not grant PW status to the people captured during the armed conflict.³²

4. "People who follow the armed forces without actually forming an integral part of them, such as the civilian members of military aircraft crews, war correspondents, suppliers, members of work or service units responsible for the well-being of the military, provided that they have received authorization from the armed forces they accompany, with the latter having the obligation to provide them, for this purpose, with an identity card similar to the model attached".

This article refers to the people who accompany the armed forces without being members of them. While this article refers to the need for the armed forces to provide an identity card to the people who accompany them, this requirement, in the opinion of ICRC, is not absolute. The determining factor, ICRC emphasizes, is the capacity in which the person was serving, with the identity card being an additional guarantee.³³

5. "Members of the crews, including skippers, pilots and cabin crew of the merchant marine, and civil aviation crews of the Parties to the conflict who do not benefit from more favorable treatment under of other provisions of international law."

This fraction establishes protection for crew members of the merchant navy or civil aviation, who by the nature of their activities may be under the power of one of the belligerent parties.

6. "The population of an unoccupied territory that, when the enemy approaches, spontaneously takes up arms to fight against the invading troops, without having had time to become regular armed forces, if it carries the weapons in sight and respects the laws and customs of war."

This is the case of the mass uprisings of a population to face an invading enemy. On this occasion the conditions to be considered PW are reduced to only two and



³² See comments in Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by the US Forces*, January 19, 2002, p. 6.

³³ ICRC indicated: "The Conference considered that the capacity in which the person was serving should be a determining factor; the possession of a card is therefore an indispensable condition of the right to be treated as a prisoner of war, but a supplementary safeguard". See ICRC CD ROM, *op. cit.*, note 31.

not to four of the second paragraph. The conditions are: carry the weapons in sight and respect the laws and customs of war.

Some of the people detained in Afghanistan can also be in this category.

Thus, the assumptions that this article covers go from the most particular to the most general. From the regular armed forces to the spontaneous uprisings of the population. In this sense, a PW group can be formed by people belonging to one of the different categories already mentioned. It is not necessary that everyone is under the same assumption.

In part B of the same Article 4, it is pointed out that PW will also be accorded to military personnel who are in an occupied territory and to military personnel who are in a neutral country.

This same article does not affect the status of health and religious personnel, as set forth in Article 33 of this agreement.³⁴

Article 5 of the G-III states that this agreement will apply to the people mentioned in Article 4 from the moment they fall into the hands of the enemy and until their liberation and final repatriation. It also indicates that in case of doubt regarding belonging to one of the categories listed in Article 4 of the people who have committed an act of belligerency and who have fallen into the hands of the enemy, said people shall benefit from the protection of this agreement, pending the determination of its statute by a competent court.³⁵

There are two fundamental principles in this article. The first is that of the application of the G-III, and by extension, of all the protection of IHL, for those people who fall into the hands of the enemy. The second principle is that even when there is doubt as to the status of the person imprisoned, the person must enjoy the protection of the agreement until a court with jurisdiction determines his/her status. This court is understood to be the same as that normally used by members of the armed forces of the detaining power in case of conflict in the application of IHL.

In the case studied here, we find the situation that the USA government initially ruled out the application of IHL; later, it indicated that only some of the prisoners would enjoy some of the provisions of the Geneva law such as the enjoyment of the statute of PW. All this without having gone to the corresponding judicial instance to settle any type of doubt, but simply by decision of the Executive Branch. This constitutes serious violations of the Geneva Conventions.

³⁴ Article 33 states that the members of health and religious personnel held by the detaining power to assist the PW will not be considered as such. However, they will enjoy, at least, all the advantages and protection of the G-III, as well as they will be given anything they need to provide their services.

³⁵ See also Green, Leslie C., *The Contemporary Law of Armed Conflict*, 2nd. ed., Great Britain, Juris Publishing and Manchester University Press, 2000, p. 198.



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It is important to mention that despite the refusal of the USA government to grant PW status to those detained in Guantanamo, international organizations such as the Office of the United Nations High Commissioner for Human Rights³⁶ and the ICRC,³⁷ and International NGOs, such as Amnesty International and Human Rights Watch, have pointed out the clear obligation of the USA to grant PW status, because it is a right the Guantanamo prisoners have, as well as the application of IHL.

It is interesting to note that the European Parliament, in a resolution of February 7, 2002, expressed its solidarity with the USA in the fight against terrorism, but expressed its concern about the conditions of detention of prisoners detained in the US base of Guantanamo. The Parliament considered that these prisoners do not meet the conditions prescribed by the Geneva Conventions and that the standards established in these conventions should be revised in order to deal with new situations generated by the development of international terrorism. The Parliament invited the United Nations and its Security Council to adopt a resolution with a view to establishing a competent court for issues related to Afghanistan and whose objective is to clarify the legal status of prisoners.³⁸

On April 25, 2002, the European Parliament approved another resolution in which it called for the status of the Guantanamo prisoners to be clarified, also indicated that the establishment of military commissions represented a clear violation of the international obligations of the United States, particularly the International Covenant on Civil and Political Rights. In the same vein, the high representative for the Foreign and Security Policy of the European Union, Javier Solana, stated that the detainees in Guantánamo should enjoy the status of prisoners of war.³⁹

It is important to indicate that even if the detained persons were judged by a court with jurisdiction and found not to have PW status, this does not mean that they would be totally defenseless, in particular, they would enjoy the protection of the fourth agreement as well as of those rules that are part of international customary law.⁴⁰

³⁶ See, for example, *Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba*, January 16, 2002. OAS, as well as the Inter-American Commission on Human Rights, have expressed their support for the fight against terrorism and for the desire that the detainees' human rights be respected. They have also criticized the creation of military commissions. See Resolution on terrorism and human rights of the IACHR of December 12, 2001.

³⁷ See ICRC press release of February 9, 2002.

³⁸ RSP/2002/2513, European Parliament Resolution on the conditions of detention of the prisoners in Guantánamo, February 7, 2002.

³⁹ See Washington Times, "EU Parliament slams US military tribunals", April 25, 2002, <http://www.washtimes.com/upi-breaking/25042002-083751-5834r.htm>.

⁴⁰ An example of these rules can be found in Article 75 of the P-I that refer to fundamental guarantees and that establish a minimum standard of human treatment and due process of law that must be respected for all people, regardless of their status.

VI. RIGHTS OF PRISONERS OF WAR

In this section we will mention some of the rights conferred by the G-III. As already indicated, in all that is not explicitly indicated in IHL, IHRL must be used, in a subsidiary manner and where applicable.

The general rule, in terms of guarantees of the PWs, is to apply the same conditions, rights and duties to the PWs that had the armed forces of the detaining power.

Our analysis will focus on two broad categories, namely: human treatment and judicial guarantees.

1. Human Treatment

PWs must be treated humanely all the time. This means, among other things, that they should not be tortured, insulted or exposed to public curiosity. Their dignity must be respected without having to suffer any discrimination, being one of the categories the one of nationality.⁴¹ Likewise, the G-III establishes that the rights of the PW are inalienable rights.⁴²

Prisoners must be placed in facilities with similar conditions to those found in facilities where the forces of the detaining power are. In particular, it is pointed out that said facilities for the PWs must be adequately illuminated and ventilated. PWs can only be interned in facilities that are on the ground with all possible hygiene and health measures. PWs should be provided with food and medical attention.⁴³

The evacuation or transfer of the PWs will always be carried out humanely and under conditions that should not be less favorable than those that would be enjoyed by the armed forces of the detaining power.⁴⁴

A first comment regarding these rights is about their inalienable nature. That is, they are not waived in any manner whatsoever.

It is also important to highlight the conditions under which people detained in Guantanamo have been treated. For their transfer from Afghanistan to Cuba, the detainees were sedated, hooded, shaved, chained hand and foot to the seats, and carried a portable urinal. Once in prison, in the so-called X-Ray camp, they were placed in steel cages, which were out in the open and with the lamps on all day. The cells measured 1.80 by 2.40 m, and their toilet was a bucket.⁴⁵

⁴¹ While no PW can be discriminated based on his/her nationality, the G-III itself in its Article 47 condemns the use of mercenaries, who would not enjoy the PW status. So far, the government of the United States of America has not qualified the people detained in Guantanamo as mercenaries. See Green, Leslie C., *op. cit.*, note 35, p 114-117, 199.

⁴² *Cfr.* Articles 7-17.

⁴³ *Cfr.* Articles 13-25.

⁴⁴ *Cfr.* Articles 20 and 46.

⁴⁵ See the description that El Mundo newspaper makes in <http://www.elmundo.es/elmundo/2002/graphics/ene/s3/guantanamo/guantanamo.html>. Also "New Prisoners in Guantanamo", BBC World, May 2, 2002, at http://news.bbc.co.uk/hi/spanish/news/newsid_1963000/1963854.stm accessed on May 8, 2002.

At the end of April, the prisoners were transferred to other facilities within the same Guantanamo base, although these were in better conditions, one of the problems is that they are even smaller than the previous ones.⁴⁶

Undoubtedly, the treatment given to the people detained in Guantanamo has been degrading and may well be described as cruel and inhuman treatment in many cases, which could be considered as torture. The US would never treat its own troops like this.

As we indicated at the beginning, there is not an exact number of all the detainees and it is not known where all of them are. Here it is worth mentioning that although the G-III clearly establishes the obligation that the PWs must be in facilities that are on land, some people have been retained in US military vessels such as the *USS Peleliu*.

The US has also declared that they will only give their citizens all the judicial guarantees for their prosecution. This in itself constitutes discrimination, and this has been done in the case of the American John Walker Lindh, who has received a completely different treatment from the rest of the detained prisoners; despite having been captured in the same conditions as the others. However, even in his case several abuses were committed. Several media outlets reported that American soldiers took photos of the American citizen Walker, alleged Taliban, while he was handcuffed, tied to a stretcher and blindfolded. They even refer that in some photos they made obscene gestures to him. This, of course, constitutes an attack on the dignity of the person, in addition to being considered torture. This last argument has already been used by Mr. Walker's defense attorneys.⁴⁷

2. Judicial Guarantees

PWs can only be tried by a military court or unless the existing laws of the detaining power expressly allow them to be tried by civil courts. Under no circumstances should PWs be judged by any court that does not offer the essential guarantees of independence and impartiality generally recognized, and in particular they cannot be subject to any procedure where they are not granted the necessary rights and means of defense recognized by the G-III.⁴⁸ According to Article 102, PWs can only be validly sentenced if they were sentenced by the same courts and in accordance with the same procedure with which the members of the armed forces of the detaining power had been judged, and provided that the provisions

⁴⁶ The new detention camp is called Campo Delta that cost of several million dollars. In "Transfers in Guantanamo", *BBC Mundo*, April 30, 2002, at http://news.bbc.co.uk/hi/spanish/news/newsid_1958000/1958927.stm accessed on May 8, 2002.

⁴⁷ Masters, Brooke A., "Prosecutors concede limits of their case against Lindh", *Washington Post*, April 2, 2002, p. A11.

⁴⁸ *Cfr.* Article 84.

of this particular convention had been observed, those that were refer to rights and means of defense.⁴⁹

Pursuant to Article 86, PWs may be judged according to the laws of the detaining power for acts committed before being captured. However, even when sentenced, they must enjoy the benefits of this convention.

The Geneva Conventions do not exclude the possibility of judging and punishing prisoners of war for war crimes, crimes against humanity or any of the common order.

PWs have the right to appeal the decision with the possibility that it is annulled or modified.

As for interrogations, PWs are only required to provide their name, rank, date of birth and serial number. Of course, they should not be subject to any kind of torture.⁵⁰ According to some journalistic reports, US troops are carrying out trainings for interrogators now called: *human intelligence collectors* where the line to avoid torture is increasingly difficult to distinguish.⁵¹

The application of these rights by the US government differs greatly from what is prescribed by IHL and even from the US practice itself.⁵² Thus, US agents have stated on several occasions that in case of doubt about the status of a person imprisoned by the US in an armed conflict, this must be treated as a PW until his/her situation is defined by a court with jurisdiction. In accordance with US military law itself, such determination must be made by a military court made up of three members, whose decisions must be subject to trial and must also have a fair trial.

This among many other provisions.⁵³

Despite having clear provisions in US law, itself, the current government has stated that the people detained in Guantanamo are illegal combatants, and that although they could be treated according to the Geneva Conventions, the US would not be obligated to do so. The Secretary of Defense Donald Rumsfeld declared on January 11, 2002 that: "Prisoners are illegal combatants and therefore have no rights under the Geneva Conventions. We have indicated that we plan, for most of them, to treat them in a manner that is reasonably consistent with the Geneva Conventions, to the

⁴⁹ Article 105.

⁵⁰ Article 17.

⁵¹ Thus, Sgt. Giersdorf tells students, 'You can put a source in any position you want. You can chain his legs to the chair, you can handcuff his hands behind him', force him to stand at attention or have military police thrust him to the ground. 'If [a prisoner] says it hurts, is it torture?' he asks. 'Yes' say several students. 'No. It is not' The sergeant corrects'. Cfr. Bravin, Jess, "US Army Recruits Learn How to Grill at Interrogation School", *Wall Street Journal Europe*, April 29, 2002, pp. A-1 y A-9.

⁵² See comments in Paust J., Jordan, "Military Commissions: some perhaps legal, but most unwise", November 14, 2001. On file with the author.

⁵³ See, for example: Lacey, M. y Bill, B. (eds.), *US military Judge Advocate General operational Law Handbook*, US, International Law and Operational Law Department, Judge Advocate Generals School, 2000, *passim*.



extent appropriate.” It is important to point out that the term of illegal combatants does not exist in international law.⁵⁴ In addition, the Secretary of Defense declared that even if the military commissions absolved some of the prisoners who are in Guantanamo, if the government of the USA considers that these people are “dangerous terrorists”, it would continue to keep them prisoners. These statements by the Secretary of Defense have been in contradiction with what has been said by other high military members, who have clearly indicated the conditions in which they have captured the people who are in Guantanamo. Thus, for example, the Pentagon general counsel stated that: “The people that we are detaining, for example in Guantanamo Bay, Cuba, are enemy combatants that we captured on the battlefield seeking to harm US soldiers or allies.”⁵⁵

That is, the United States intends to decide how, when, what and to what extent, if they do, they would apply IHL.⁵⁶ The United States of America not only finds itself in violation of its conventional obligations, but also of all those principles of IHL which are already part of the international customary law. In addition to going against the US practice in the matter.⁵⁷

It is important to indicate that the US has declared that the US Constitution does not apply to its Guantanamo military base because Cuba exercises sovereignty. Therefore, prisoners do not enjoy the rights granted by the Constitution, nor of the possibility of access to civil courts, so they are left with only the path of military commissions.⁵⁸

Unfortunately, the treatment of the PWs by other participating States in the international coalition has not been entirely homogenous either. Thus, while Britain has decided to grant PW status to the people it has captured, Canadian forces have preferred to transfer the people captured by them to US forces so they can make the corresponding determination.⁵⁹

Finally, it is worth mentioning that failure to comply with the abovementioned rights can be considered a war crime.⁶⁰

⁵⁴ See Human Rights Watch, Background Paper on Geneva Conventions and Persons Held by the US Forces, January 19, 2002.

⁵⁵ Department of Defense news briefing, March 21, 2002, reproduced in Amnesty Memorandum, *op. cit.*, note 1, p. 12.

⁵⁶ The US Secretary of Defense declared: “We have indicated that we do plan to, for the most part, treat [the prisoners] in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate, and that is exactly what we have been doing”, Department of Defense news briefing, January 11, 2002, *ibidem*, p. 31.

⁵⁷ Amnesty International has noted that: “The USA’s ‘pick and choose’ approach to the Geneva Conventions is unacceptable, as is its failure to respect fundamental international human rights standards” *idem*. See also Human Rights Watch, Background Paper on Geneva Conventions and Persons Held by the US Forces, January 19, 2002, *passim*.

⁵⁸ See “U.S. praises court decision to throw out detainees’ lawsuit”, February 22, 2002, www.cnn.com/2002/LAW/2002/02/22/inv.justice.detainees.suit/index.html. Accessed on May 7.

⁵⁹ See Graham’s note, Bradley, “British to turn over Prisoners to Afghanistan”, *Washington Post*, April 30, 2002, p. A01.

⁶⁰ See G-III, Article 130, and G-IV, Article 147. Regarding war crimes see, for example: Benavides, Luis, “The obligation of States to suppress war crimes as part of international criminal justice”, *Magazine of Mexican Public Law*, Mexico,

VII. MILITARY COMMISSIONS

On November 13, 2001, the president of the United States of America issued a military order for the detention, treatment, and prosecution of some non-US nationals in the war against terrorism. In said order it was declared that:

1. Terrorist attacks on facilities and against US citizens have been of such a scale that they have created a state of armed conflict.
2. The persons subject to said order would be all those who were not US citizens and who were part of a terrorist organization.
3. If judged, it would be for violations of the laws of war and other laws applicable by military courts.
4. In the case of military commissions, the principles of law and the rules of evidence that are commonly applicable in criminal cases before district courts were not applicable.
5. It indicates that the people to be judged must be treated humanely, without distinction based on race, color, religion, gender, birth, wealth or any other similar criterion (of course, they forgot the nationality one).
6. The death penalty is applicable.
7. It indicates that the defense will have a fair trial.
8. The accused has no right to seek a remedy in a direct or indirect manner or that is made in its representation before any US court or before any court of another country or before an international court.

This military order was widely criticized by various international and American human rights organizations.⁶¹

Part of the incongruity that USA has shown in the treatment of PWs is found precisely in this document. This is, for example, the fact of considering the laws of war applicable and judging prisoners for violations thereof, but not considering them PWs in accordance with the Geneva Conventions. It also constitutes a violation to lower the standard of a fair trial for the specific case of military commissions.

Despite this reaction, the US government issued, on March 21, 2002, another military order in which it establishes the rules of procedure for military commissions.

ITAM, No. 3, 2002, *passim*.

⁶¹ See what is argued by Amnesty International, Human Rights Watch, The Center for Justice & Accountability, Lawyers Committee for Human Rights, etcetera. Amnesty International, for example, pointed out that such an order should be revoked because it threatened international principles of justice, including the separation of powers, non-discrimination, among many others, in "Presidential order on military tribunals threatens fundamental principles of justice", November 15, 2001. AMR 51/165/2001.



THE INTERNATIONAL LEGAL STATUS OF THE DETAINED PRISONERS BY THE UNITED STATES OF AMERICA

Some of the characteristics are:

1. The secretary of defense is the one who establishes the military commissions.
2. These military commissions will be formed by a minimum of three and a maximum of seven members.
3. The members of the commissions must be military officers, but only the president of the commission needs to be a lawyer.
4. The jurisdiction of the commission will be about violations of the laws of war and "other offenses" that may be tried by military commissions (it does not say what those other offenses are).
5. Two thirds of the votes are required to find a person guilty.
6. The death penalty can even be applied. But this can only be applied by a commission of seven members.
7. A decision made by the commission may be appealed before a review panel of three military officers, in which one must have experience as a judge.
8. The review panel can return the case to the commission that knew of it or send it to the secretary of defense. The latter can return the case again to be judged or send it to the president to issue a final decision.
9. The sentence of the commission is final when the president of the USA or the secretary of defense issues a final decision for that purpose.

Among the rights set out by these rules of the commissions are: to make the trials public, to prove beyond a reasonable doubt, the existence of a presumption of innocence, to grant access to defense attorney to the documents of the prosecution to prepare his/her case, questioning witnesses and the right of the accused not to testify against him/her.

These provisions are still far from complying with the minimum international human rights standard, and for this we will take as an example the right to the presumption of innocence. It is impossible to think that the right to the presumption of innocence is fulfilled when the president of the United States has declared, with respect to the people detained in Guantanamo, that: "These killers-these are killers". The secretary of defense has also declared on different occasions, with respect to the same people that they are: "hard-core well trained terrorists" and "among the most dangerous, best trained, vicious killers on the face of the earth".⁶²

These statements are extremely serious when it is precisely the president and the secretary of defense who establish the commissions in which the detainees in Guantanamo will be judged and who make the final decision about their fate.



⁶² Reproduced in Amnesty Memorandum, *op. cit.*, note 1, p. 41.

Also, these commissions are created by the Executive Branch, so it is difficult to speak of independent bodies for the administration of justice.

VIII. CONCLUSIONS

The determination of the legal status of any person detained during an armed conflict is essential to know the rights conferred by IHL. Likewise, the obligations that the States have, with respect to said prisoners, are essential to determine, in the case of a violation thereof, the legal consequences to which the State that detains them is subject to.

In this case, it is clear that the people currently detained in Guantanamo were captured during the conflict in Afghanistan, and therefore they enjoy the protection of IHL. It is presumed, given the USA's own information, that these people participated in combats and that they were captured during the course of them. This fact gives them the status of prisoners of war. IHRL, as well as the customary law in the matter, complement any gap that may exist in terms of the treatment that should be granted to prisoners of war.

The United States has wanted to deny the status of prisoners of war to those detained in Guantanamo, qualifying them *a priori* as terrorists and criminals, so in their opinion they would be illegal combatants. The determination of this status does not depend on the will of the detaining power, but on whether or not it complies with the above-mentioned conditions, which are objectively stated in the Geneva Convention. In case of doubt about whether or not they belong to said category, this must be determined by a court of law.

The disqualification that the USA has tried to make of IHL calling it obsolete and inadequate is unfounded. Instead, it responds to a policy with a dual purpose, on the one hand it seeks to justify its action, and if it cannot do so, it tries to create exceptions to existing rules that legalize its actions.

The treatment that the United States is giving to detainees in Guantanamo is in violation of general international law and of humanitarian law in particular, for this reason the United States is internationally responsible for the treatment of the people detained in Guantanamo.⁶³

In conclusion, with respect to Mexico we can say the following. Not to oppose such actions or at least not to declare them illegal *ab initio* puts us in a very risky position, because:

1. The acquiescence to these rules can give rise to the birth of new rights that can acquire force of international custom in which we could not declare ourselves persistent objectors, with all the consequences that this entails.

⁶³ Pursuant to Article 91 of the P-I, "The Party to the conflict that violates the provisions of the Agreements or of this Protocol shall be obliged to compensate, if applicable. It will be responsible for all acts committed by people who are part of its armed forces." In addition to the applicable rules of international responsibility.

2. Failure to act also entails a responsibility - remember that we are also responsible for omission. Many of the violations committed constitute *erga omnes* obligations, in which all States have a legitimate right to enforce them. There is also, of course, a moral responsibility that is worthy of consideration.
3. The violation of an incipient yes, but an important, *State of international law*, should concern us all.

At a time when the Ministry of Foreign Affairs declared that it would denounce human rights violations anywhere,⁶⁴ the secretary should be reminded that silence in the elaboration of rules of international law has a price, and this can be very expensive.

⁶⁴ "I come to this forum with the mandate of my government and of the Mexican society to manifest our new commitment to respect and contribute with the international community so that human rights are respected throughout the world. The Mexican government has chosen this forum to present a series of actions that testify a fundamental change in our policy towards these transcendental values... It has been argued that the defense and promotion of human rights are internal matters of each country that should not be subject to international scrutiny. Mexico does not share this thesis. It categorically affirms that human rights represent values with absolute and universal validity... As universal values, the situation of human rights in any State is a legitimate concern of the international community as a whole. The work of promoting their validity and respect is a common undertaking of all governments and all peoples, and cannot be subordinated to the exclusive will of a government ... It is important to avoid that ulterior motives undermine an initiative aimed at promoting human rights. Therefore, we favor a balanced treatment, on objective and non-selective bases, of the situation of human rights in the world and we reiterate our unwavering interest in working for human rights in all States. Our voice will be clear and our vote will reflect the actual and objective context in which it is issued." Words of the Secretary of Foreign Affairs, Jorge Castañeda, in the 57th. session of the UN Human Rights Commission, Geneva, Switzerland, March 20, 2001. In http://www.sre.gob.mx/derechoshumanos/doctos_rel57cdh.doc accessed on May 21, 2002.