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## I. Human Rights Watch, U.S. Officials Misstate Geneva Convention Requirements

[Source: ROTH Kenneth, U.S Officials misstate Geneva Convention requirements, Human Rights Watch, New York, 28 January 2002, <http://www.hrw.org> <sup>[1]</sup>]

### Human Rights Watch

January 28, 2002

The Honourable Condoleezza Rice

National Security Advisor

The White House

Washington, DC

Dear Ms. Rice,

We write concerning the legal status of the Guantanamo detainees. Our views reflect

Human Rights Watch's experience of over twenty years in applying the Geneva Conventions of 1949 to armed conflicts around the world. We write to address several arguments advanced for not applying Article 5 of the Third Geneva Convention of 1949, which, as you know, requires the establishment of a "competent tribunal" to determine individually whether each detainee is entitled to prisoner-of-war status should any doubt arise regarding their status. Below we set forth each of the arguments offered for ignoring Article 5 as well as Human Rights Watch's response.

**Argument:** The Geneva Conventions do not apply to a war against terrorism.

**HRW Response:** The U.S. government could have pursued terrorist suspects by traditional law enforcement means, in which case the Geneva Conventions indeed would not apply. But since the U.S. government engaged in armed conflict in Afghanistan – by bombing and undertaking other military operations – the Geneva Conventions clearly do apply to that conflict. By their terms, the Geneva Conventions apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Both the United States and Afghanistan are High Contracting Parties of the Geneva Conventions.

**Argument:** A competent tribunal is unnecessary because there is no "doubt" that the detainees fail to meet the requirements of Article 4(A)(2) for POW status.

**HRW response:** Article 5 requires the establishment of a competent tribunal only "[s]hould any doubt arise" as to whether a detainee meets the requirements for POW status contained in Article 4. The argument has been made that the detainees clearly do not meet one or more of the four requirements for POW status contained in Article 4(A)(2) – that they have a responsible command, carry their arms openly, wear uniforms with distinct insignia, or conduct their operations in accordance with the laws and customs of war.

However, under the terms of Article 4(A)(2), these four requirements apply only to militia operating independently of a government's regular armed forces – for example, to those members of al-Qaeda who were operating independently of the Taliban's armed forces. But under Article 4(A)(1) these four requirements do not apply to “members of the armed forces of a Party to the conflict as well as members of militia forming part of such armed forces.” That is, this four-part test would not apply to members of the Taliban's armed forces, since the Taliban, as the de facto government of Afghanistan, was a Party to the Geneva Convention. The four-part test would also not apply to militia that were integrated into the Taliban's armed forces, such as, perhaps, the Taliban's “55<sup>th</sup> Brigade,” which we understand to have been composed of foreign troops fighting as part of the Taliban.

Administration officials have repeatedly described the Guantanamo detainees as including both Taliban and al-Qaeda members. A competent tribunal is thus needed to determine whether the detainees are members of the Taliban's armed forces (or an integrated militia), in which case they would be entitled to POW status automatically, or members only of al-Qaeda, in which case they probably would not be entitled to POW status because of their likely failure to meet the above-described four-part test. Until a tribunal makes that determination, Article 5 requires all detainees to be treated as POWs.

**Argument:** Even members of the Taliban's armed forces should not be entitled to POW status because the Taliban was not recognized as the legitimate government of Afghanistan.

**HRW response:** As Article 4(A)(3) of the Third Geneva Convention makes clear, recognition of a government is irrelevant to the determination of POW status. It accords POW status without qualification to “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.” That is, the four-part test of Article 4(A)(2) applies only to militia operating independently of a government's armed forces, not to members of a recognized (Article 4(A)(1)) or

unrecognized (Article 4(A)(3)) government's armed forces. Thus, whether a government is recognized or not, members of its armed forces are entitled to POW status without the need to meet the four-part test.

This reading of the plain language of Article 4 is consistent with sound policy and past U.S. practice. As a matter of policy, it would undermine the important protections of the Third Geneva Convention if the detaining power could deny POW status by simply withdrawing or withholding recognition of the adversary government. Such a loophole would swallow the detailed guarantees of the Third Geneva Conventions – guarantees on which U.S. and allied troops rely if captured in combat. This reading is also consistent with past U.S. practice. During the Korean War, the United States treated captured Communist Chinese troops as POWs even though at the time the United States (and the United Nations) recognized Taipei rather than Beijing as the legitimate government of China.

**Argument:** Treating the detainees as POWs would force the United States to repatriate them at the end of the conflict rather than prosecuting them for their alleged involvement in terrorist crimes against Americans.

**HRW response:** POW status provides protection only for the act of taking up arms against opposing military forces. If that is all a POW has done, then repatriation at the end of the conflict would indeed be required. But as Article 82 explains, POW status does not protect detainees from criminal offences that are applicable to the detaining powers' soldiers as well. That is, if appropriate evidence can be collected, the United States would be perfectly entitled to charge the Guantanamo detainees with war crimes, crimes against humanity, or other violations of U.S. criminal law – more than enough to address any act of terrorism against Americans – whether or not a competent tribunal finds some of the detainees to be POWs. As Article 115 of the Third Geneva Convention explains, POWs detained in connection with criminal prosecutions are entitled to be repatriated only “if the Detaining

Power [that is, the United States] consents.”

**Argument:** Treating the detainees as POWs would preclude the interrogation of people alleged to have information about possible future terrorist acts.

**HRW response:** This is perhaps the most misunderstood aspect of the Third Geneva Convention. Article 17 provides that POWs are obliged to give only their name, rank, serial number, and date of birth. Failure to provide this information subjects POWs to “restriction” of their privileges. However, nothing in the Third Geneva Convention precludes interrogation on other matters; the Convention only relieves POWs of the duty to respond. Whether or not POW status is granted, interrogators still face the difficult problem of encouraging hostile detainees to provide information, with only limited tools available for the task. Article 17 states that torture and other forms of coercion cannot be used for this purpose in the case of POWs. But the same is true for all detainees, whether held in time of peace or war. (See, e.g., Article 2 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which the U.S. has ratified: “No exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” See also Articles 4 and 5, making violation of this rule a criminal offence of universal jurisdiction.)

Article 17 of the Third Geneva Convention provides that POWs shall not be “exposed to any unpleasant or disadvantageous treatment of any kind” for their refusal to provide information beyond their name, rank, serial number, and date of birth. That would preclude, for example, threats of adverse treatment for failing to cooperate with interrogators, but it would not preclude classic plea bargaining – that is, the offer of leniency in return for cooperation – or other incentives. Plea bargaining and related incentives have been used repeatedly with success to induce cooperation from members of such other violent criminal

enterprises such as the mafia or drug traffickers. These would remain powerful tools for dealing with the Guantanamo detainees even if a competent tribunal finds some of them to be POWs.

**Argument:** The detainees are highly dangerous and thus should not be entitled to the more comfortable conditions of detention required for POWs.

**HRW response:** In light of the two prisoner uprisings in Afghanistan, we do not doubt that at least some of the Guantanamo detainees might well be highly dangerous. Nothing in the Geneva Conventions precludes appropriate security precautions. But if some of the detainees are otherwise entitled to POW status, the Conventions do not allow them to be deprived of this status because of their feared danger. Introducing unrecognized exceptions to POW status, particularly when done by the world's leading military power, would undermine the Geneva Conventions as a whole. That would hardly be in the interest of the United States, since it is all too easy to imagine how that precedent will come back to haunt U.S. or allied forces. Enemy forces who might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying POW protections.

In conclusion, we hope the U.S. government will agree to establish the "competent tribunal" required by Article 5 of the Third Geneva Convention for the purpose of determining case by case whether each detainee in Guantanamo is entitled to prisoner-of-war status. That decision would uphold international law, further U.S. national interests, and not impede legitimate efforts to stop terrorism. [...]

Kenneth Roth

*Executive Director*

## **II. United States of America, Press Conference of Donald H. Rumsfeld**

[Source: U.S. Department of Defence News Briefing, Secretary Rumsfeld and Gen. Myers, Washington, 8 February 2002, <http://www.defenselink.mil> <sup>[2]</sup>]

### **United States Department of Defense News Transcript**

**Presenter: Secretary of Defense Donald H. Rumsfeld**

**Friday, February 08, 2002 – 1:30 p.m. EST**

**DoD News Briefing – Secretary Rumsfeld and Gen. Myers**

**(Also participating: General Richard Myers, Chairman, Joint Chiefs of Staff)**

**Rumsfeld:** Good afternoon. The United States, as I have said, strongly supports the Geneva Convention. Indeed, because of the importance of the safety and security of our forces, and because our application of the convention in this situation might very well set legal precedence that could affect future conflicts, prudence dictated that the U.S. government take care in determining the status of Taliban and Al Qaeda detainees in this conflict.

The president has, as you know, now determined that the Geneva Convention does apply to the conflict with the Taliban in Afghanistan. It does not apply to the conflict with al Qaeda, whether in Afghanistan or elsewhere. He also determined that under the Geneva Convention, Taliban detainees do not meet the criteria for prisoner of war status.

When the Geneva Convention was signed in the mid-20<sup>th</sup> century, it was crafted by sovereign states to deal with conflicts between sovereign states. Today the war on

terrorism, in which our country was attacked by and is defending itself against terrorist networks that operate in dozens of countries, was not contemplated by the framers of the convention.

From the beginning, the United States armed forces have treated all detainees, both Taliban and al Qaeda, humanely. They are doing so today, and they will do so in the future. Last month I issued an order to our military, which has been reaffirmed by the president, that all detainees – Taliban and al Qaeda alike, will be treated humanely and in a manner that's consistent with the principles of the Geneva Convention.

As the president decided, the conflict with Taliban is determined to fall under the Geneva Convention because Afghanistan is a state party to the Geneva Convention. Al Qaeda, as a non-state, terrorist network, is not. Indeed, through its actions, al Qaeda has demonstrated contempt for the principles of the Geneva Convention. The determination that Taliban detainees do not qualify as prisoners of war under the convention was because they failed to meet the criteria for POW status.

A central purpose of the Geneva Convention was to protect innocent civilians by distinguishing very clearly between combatants and non-combatants. This is why the convention requires soldiers to wear uniforms that distinguish them from the civilian population. The Taliban did not wear distinctive signs, insignias, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas. They were not organized in military units, as such, with identifiable chains of command; indeed, al Qaeda forces made up portions of their forces.

What will be the impact of these decisions on the circumstances of the Taliban and al Qaeda detainees? And the answer, in a word, is none. There will be no impact from these

decisions on their treatment. The United States government will continue to treat them humanely, as we have in the past, as we are now, and in keeping with the principles of the Geneva Convention. They will continue to receive three appropriate meals a day, medical care, clothing, showers, visits from chaplains, Muslim chaplains, as appropriate, and the opportunity to worship freely. We will continue to allow the International Committee of the Red Cross to visit each detainee privately, a right that's normally only accorded to individuals who qualify as prisoners of war under the convention.

In short, we will continue to treat them consistent with the principles of fairness, freedom and justice that our nation was founded on, the principles that they obviously abhor and which they sought to attack and destroy. Notwithstanding the isolated pockets of international hyperventilation, we do not treat detainees in any manner other than a manner that is humane. [...]

**Q:** Mr. Secretary, how do you respond to criticism from people who say that the reason you won't call these detainees prisoners of war is because, as prisoners of war, they might be tried by military courts martial, where their rights would be much more carefully spelled out, as opposed to possible tribunals, which the president has authorized?

**Rumsfeld:** Well, I'll respond factually, by saying that that's not correct. Those issues have never been discussed, nor have they ever been any part of the consideration in the determination. The considerations have been continuously, as they've been discussed by the lawyers, issues as to precedent, what is the right thing to do, what is consistent with the conventions, and what establishes a precedent that is appropriate for the future. We could try them any number of ways. And that has not been a factor at all.

The convention created rules to make soldiers distinguish themselves from civilians, and the reason for that was so that civilians would not be unduly endangered by war. The

convention created, in effect, an incentive system, and it was an extremely important part of the conventions, that soldiers who play by the rules get the privileges of prisoner-of-war status. To give a POW status to people who did not respect the rules clearly would undermine the conventions' incentive system and would have the non-intuitive effect of increasing the danger to civilians in other conflicts. [...]

**Q:** Are you considering any limitations, new limitations or an outright ban on TV or photo coverage of Camp X-ray?

**Rumsfeld:** Am I currently considering anything like that? I don't know that we are. I must say, I have found the misrepresentation of those photos to be egregious, notwithstanding the fact that we had a caption under that, I'm told, from the outset.

**Q:** You're talking about the original photo?

**Rumsfeld:** The original photo. And it has – those people were there in the circumstance when they came out of the airplane, off the bus, off the ferry, off the bus, into that area. They were in there somewhere between 10 and 60 or 80 minutes at the maximum as they were taken individually and processed in a tent right nearby, where they were met, data gathered, and then they were placed in individual cells.

The newspaper headlines that yelled, "Torture! What's next? Electrodes?" and all of this rubbish was so inexcusable that it does make one wonder, as I said to Jamie, [Note: Jamie McIntyre, CNN Correspondent for Military Affairs.] why we put out any photographs, if that's the way they're going to be treated, so irresponsibly.

Jamie's contention was we should put out more photos with captions. I'm not sure – I almost always agree with Jamie, but in this case I'm not quite sure. One thought that

someone has suggested, I don't know if it's still under consideration, is that we release photos but with a mandatory caption, that the caption we supply be used if someone wants to use the picture. But I haven't thought about that. I don't know if that's a good idea or a bad idea. [...]

**Q:** I'm asking you about independent news organizations' coverage by photo or TV. Is there any?

**Rumsfeld:** Well, as you know, there is a – there are – I'm not going to say there are not rules, but there are certainly patterns and practices that have evolved since the Geneva Convention where it is frowned upon to allow photos that could be seen as being embarrassing or there's a couple other words they use, invasive of their privacy, what?

Victoria Clarke, Assistant Secretary of Defense for Public Affairs: Curiosity – holding them up for public –

**Rumsfeld:** Holding them up for public curiosity. So we have to be careful about photographs that are taken. [...]

[On the topic of public curiosity, **see also** United States, Public Curiosity <sup>[31]</sup>

**Q:** Can you explain – I know the administration has said that the Taliban do not qualify for POW status because of these four criteria – (inaudible) – uniforms, special insignia – [...] and yet there's another part of that that says the armed forces of any party in the conflict should qualify as a POW. Why would you not put the Taliban under that category, which does not have those four criteria?

**Rumsfeld:** Well, the president has said the Taliban does apply – the convention does apply

to the Taliban.

**Q:** It applies to the Taliban – but not POW status. [?]

**Rumsfeld:** Well, that's a different set of criteria for that.

**Q:** Exactly, and that's what I'm saying. The second criteria – you have four criteria, and it's outside – [...]. One of the articles says that you qualify for POW status if you are a member of the armed forces of a party in conflict. Why does the Taliban not qualify as POW under that? Why have you put them in this separate category, where they would be militia?

**Rumsfeld:** I think you're – I may not be following the question, but I think we're mixing apples and oranges. [...]

**Q:** But there is another category that says they qualify for POW status if they are a member of the armed forces of the party to a conflict. I don't want to get in these big legal issues –

**Rumsfeld:** Yeah, because I'm not a lawyer, and –

**Q:** – but that's written exactly above the militia, where the four –

**Rumsfeld:** We'll ask the lawyers. This was a decision not made by me, not made by the Department of the Defense. It was made by the lawyers and by the president of the United States. And we'll –

**Q:** But would you say the Taliban is the armed forces of that country?

**Rumsfeld:** We will take your question and see if the lawyers that made the decision would like to address it. [...]

**Q:** [...] In Geneva, a spokesman for the International Red Cross is saying that the decision falls short because the International Red Cross says that all al Qaeda or Taliban are POWs unless a competent tribunal decides otherwise. What would be your reaction to that?

And also, you didn't mention how this decision would affect them legally, such as their access to legal counsel, the way they're interrogated. Two angles to that, first the International Red Cross.

**Rumsfeld:** With respect to the second part of the question, I'm told it doesn't affect their legal status at all, nor does it affect how they'd be treated. And – that is to say, it does not affect their status from the way they have been being handled prior to the decision by the White House or now. There's no change either – to my knowledge – in their status or how they'll be treated.

**Q:** Or answer questions like – they may not give any more than their name, rank, serial number? Does it affect how they're interrogated?

**Rumsfeld:** That, I believe, applies to a prisoner of war, under the Geneva Convention.

With respect to the International Committee of the Red Cross, my guess is that if they have lawyers who encourage them to say what they say, that very likely the lawyers that came to the opposite conclusion will have something to say about what they said. And that's the way the world works. These kinds of things – if we begin with the truth, and that is that it's not affecting how they're being treated, and then take this whole issue and say that it really revolves around a discussion between lawyers as to precedents for the future, it seems to

me that it's appropriate to let the lawyers discuss those things. The announcement was made by the White House – Ari Fleischer – and I suppose that the answers to those kinds of legal questions should come from Ari Fleischer as well. [...]

**Q:** Have you made any progress that you can share with us in deciding the next step? In other words, will these people be sent to commissions, to tribunals, to the civilian justice system, back to their countries? Have you made any progress in any of that?

**Rumsfeld:** Sure. Sure. Sure. We are interviewing them. They've – I forgot what the number is, but it's something like, if there were 158 down there prior to the latest [look], I think something like 105 of those have been interrogated and met with, and the intelligence information is being gathered from them. The question as to whether any of them will be subject to the presidential military order for a military commission, some people call it tribunal, but commission I think is in the order, the answer is that's up to the president. He decides whom – which among these people – he would want to put into the category, and he has not made any decision with respect to anyone being dealt with in that manner.

**Q:** But I believe you were working on a plan here at the Defense Department on what the standards were for how these people would be sorted out and treated.

**Rumsfeld:** We have been, you're right.

**Q:** Is there anything you could share with us about any progress you've made in those decisions?

**Rumsfeld:** Except to say we've made a lot of progress, we've cleared away a lot of underbrush, we have four or five things that I think we're reasonably well settled on that we would use. And there, obviously, has to be then discretion – a degree of discretion – left to

the individual commissions as to how they deal with a variety of different issues. [...]

**Q:** Mr. Secretary, the Geneva Conventions of course cover many other things besides prisoners of war. They govern, for example, what's a legitimate target, what's not a legitimate target. As U.S. military operations go forward against al Qaeda in the future, will those operations be governed by any or bounded by any international legal constraints at all?

**Rumsfeld:** Well, I guess the phrase is, "In accordance with the laws and customs of war, that's how the men and women in the armed services are trained. That's how they conduct themselves" – I think is the appropriate answer.

**Q:** Because it's your own will to conduct that way. But you don't see any laws that actually would apply to U.S. military operations against al Qaeda, I mean international laws of war that would apply to military operations against al Qaeda?

**Rumsfeld:** We've not noted that the al Qaeda have adhered to any international laws of war or customs. The United States does, has and will. That is how every single man and woman in the United States armed forces is trained, and they understand that. [...]

**Q:** Whether it's obligated to or not?

**Rumsfeld:** Yeah. I mean, we have said that as a matter of policy, that's the way we behave, that's the way we will handle people, that's the way we will function, and have been.

**Q:** Mr. Secretary, you mentioned one of the principles from the Geneva Convention that soldiers should be distinguishable from civilian populations. But isn't it true that you have Special Forces in Afghanistan have grown beards, they're not wearing insignia uniform?

And how would you feel if a member of the U.S. Special Forces – God forbid – were captured in Afghanistan, but were treated humanely, would you object if they were not given prisoner of war status?

**Rumsfeld:** The short answer is that U.S. Special Forces – I don't know that there's any law against growing a beard. I mean, that's kind of a strange question.

**Q:** Yeah, what about not wearing insignia – [...]

**Rumsfeld:** [...] They do wear insignia, they do wear uniforms. Those photographs you saw of U.S. Special Forces on horseback, they were in the official uniform of the United States Army, and they wear insignia and they do carry their weapons openly, and they do behave as soldiers. That's the way they're taught, that's what they do. They may have a beard, they may put a scarf over their head if there's a sand storm, but there's no rule against that.

They certainly deserve all of the rights and privileges that would accrue to somebody who is obeying the laws and customs of war. And they carry a card. You've probably got one in your pocket right now, of their Geneva Convention circumstance.

**Myers:** Yeah, the ID they carry are Geneva Convention cards. I mean, that's the standard.

**Rumsfeld:** And they all have that. [...]

**Q:** Can you say how many of the detainees are al Qaeda, how many are Taliban?

**Rumsfeld:** I don't know. I've looked at several of the forms that are being used to begin to accumulate the data. They have photographs, they have identifying features. Then they have the information that the individual has given us, that is to say their nationality, roughly

when they were born, what languages they speak so you can talk to them, and a whole series of things like that. Whether they say they're al Qaeda, whether they say they were Taliban, what units – activities they were doing, where they were trained – those types of things. There's a form that they fill out that's the preliminary information. Whether it's true or not – there's a lot of them who don't tell quite the truth.

**Q:** But haven't they been screened at this point?

**Rumsfeld:** Yes.

Let's – you want to go through the screening process. Let's ... it might be useful.

Someone who is detained – and they may be detained by Afghan forces, Pakistani forces, U.S. forces – a sort is then taking place. The ones that we have, they will be interviewed by a team of people, three or four or five people – sometimes Department of Justice, sometimes Army, mixture of Army, sometimes CIA, sometimes whatever. And they're met with, and they're talked to, and they're interviewed. And a preliminary discussion takes place and a preliminary decision is made.

In some cases, they just let them go. They're foot soldiers, and they – they're going to go back into their village, and they're not going to bother anybody. In some cases, they're al Qaeda, senior al Qaeda, in which case they're treated in a totally different way, in a very careful way. In some cases, it's unclear, and they then are sent someplace, if we have custody of them, and they will go either to Bagram or they'll go to Kandahar. In one or two cases, they've gone to a ship for medical treatment. And then, in some cases, they end up at Guantanamo Bay.

If the Afghans hold them, they'll tell us what they've got, what they think they've got. And

as we have time, we then send these teams in and do the same kind of a screening and make a judgment. Same thing with the Pakistanis when they have clusters of them.

There are, you know, 3(,000) or 4(,000), 5(,000), 6(,000), thousands of these people. We have relatively few that we have taken and retained custody over.

**Q:** But have you determined the – of the ones that you do have, have you determined their status individually, on an individual?

**Rumsfeld:** Yes, indeed, individually.

**Q:** So you know which are al Qaeda and which are Taliban?

**Rumsfeld:** “Determined” is a tough word. We have determined as much as one can determine when you’re dealing with people who may or may not tell the truth. [...] So yes, we’ve done the best we can.

**Q:** So there’s no need for status tribunals to decide who’s Taliban and who’s al Qaeda?

**Rumsfeld:** My understanding is that when there’s – when doubt is raised about it – a process then is a more elaborate one, where they then are brought back into discussion and interrogation, and other people will ask about them. Well, we will ask other people in the mix who these people are and try to determine what the story is. But – and now, once they’ve gone through one or two sorts like that and they’re determined to be people we very likely will want to have a longer time to interrogate and want to get out of the imperfect circumstance they’re in – they may be in – that the Pakistanis would like to get rid of them or the Afghans would like to get rid of them, or there’s not enough room in Kandahar – we take them to Guantanamo Bay as soon as the cells are made fast enough.

And there they will go through a longer process of interrogation. [...]

**Q:** And on the question of POW status, are you confident that you're not setting a precedent here that could rebound to the disadvantage of American troops captured sometime in the future in another conflict?

**Rumsfeld:** Of that I – again – first of all, to know what kind of a precedent you're setting you have to be very, very smart and see into the future. That's hard to do. It's hard even for very smart lawyers – which I'm not.

I am very confident that we are not doing anything to – in any way disadvantage the rights and circumstances of the U.S. military. I think that the decision was made by the president with that very much in mind, and it was expressed by a number of the people in the deliberative process, and it was expressed over a period of time because it was very carefully dealt with. It was not a hasty decision. This took us some days.

What I cannot say about the precedent is that that decision, or any other decision, conceivably could end up having an effect, a precedential effect down the road that is difficult to anticipate now. And it was because of that caution and that concern that they wanted to apply it very carefully that so much time was taken in attempting to make that judgment. But the one thing that I am reasonably satisfied with is the question you asked, and that is that we have taken every care to ensure that the decision would not in any way adversely affect U.S. armed forces. [...]

**Q:** Are the Afghan forces that are participating with the U.S. troops wearing clear uniforms, insignia and the other parts of that Geneva Convention?

**Rumsfeld:** You know, I can't speak to all of those units. But I certainly have seen Afghan

forces that had uniforms on, and insignia, and were carrying their weapons openly, and were part of one of the various Northern Alliance elements. Have I seen them all in Afghanistan? No, so I can't answer your question as to whether there might be some. But I certainly have seen Afghan forces that do in fact comport themselves in a manner that would be consistent with the Geneva Convention. [...]

**Q:** ... are there not CIA agents or intelligence agents of some kind on the ground who are not wearing uniforms and insignia? And are they not in a combatant role, in other words, helping to coordinate things such as airstrikes?

**Rumsfeld:** I don't know of people doing that who are coordinating airstrikes. [...]

**Q:** And secondly, on the photos, a number of lawyers who deal in international law have suggested that this is kind of an unprecedented interpretation of the restriction on photographs. In other words, that the idea was that you not parade prisoners out to a jeering public.

**Rumsfeld:** Right.

**Q:** It wasn't intended to bar incidental news photos.

**Rumsfeld:** Yeah, so that's why you have to be somewhat careful. And that's why we've tried to be somewhat careful. You know, should the pendulum be over here or over here? It's hard to know. This is – this is a new set of facts for us. It's a new situation. They've been down there, these prisoners, detainees, what?, I don't know, 20 days. Something like that, 25? Not long.

**Myers:** And just to remind you, we have the International Committee of the Red Cross

down there essentially continuously talking to the detainees. [...] You know, we get pretty far down on these arguments. We go down to the third and fourth level of detail on these arguments about the Geneva Convention and treatment and so forth, and I think we've answered those forthrightly and we've taken lots of people down. In fact, I think there's a congressional delegation down there today. But let's never forget why we have them in the first place. We have them because probably there's a good chance that one or two or all of them know of the next event. And that's – it's our obligation, consistent with humane treatment and the Geneva Convention, to try to find that out. And I think as we have these, in some cases, more esoteric debates on this business, we're trying to find out what's going to keep another incident from happening, in this country or in our friends' and partners' countries. [...]

**Q:** On the four criteria, and your description of why you believed the Taliban forces did not meet the criteria for POW status – you talked about lack of differentiation from civilians, no proper unit, no real hierarchy – but I wish we all had a dollar here for every briefing we heard during Enduring Freedom when we were told that we were attacking Taliban command and control, we were attacking identifiable Taliban forces, and that these were clearly differentiable by our Special Forces from civilians. Those seem to be rather different from your entire statement.

**Rumsfeld:** Well of course it's because it's of a different order. The kinds of things that the Geneva Convention talks about are the kinds of things you see when you're standing right next to a person looking at how they're handling themselves.

The kind of things that we were talking about on command and control would be communication intercepts, it would be people firing at Northern Alliance forces and attacking them, it would be concentrations of artillery or surface-to-air missiles, and those types of things that would – and knowledge that they are not Northern Alliance. And yet

you see them there and you can identify a series of things that tell you they are combatant forces that are engaged in fighting against the Northern Alliance forces, and it enabled the people on the ground and the people in the air to make those kinds of judgments.

Is that pretty –

**Q:** But just to pursue, wasn't it clear that the Taliban forces were operating as units? Whether they call themselves companies or platoons or ... is another matter, but they were operating as coherent military, which our air strikes could attack, and it's clear they were receiving orders down the chain of command and control, which is why we're attacking command and control.

**Rumsfeld:** There's no question but that on any one of those things, you might be exactly right, that you could make that case. No one, I think, could make the case on all four of those criteria.

**Q:** But were they the armed forces of Afghanistan at the time that the United States was attacking them? Were they considered?

**Rumsfeld:** That's a legal question. The president has said he is going to – I shouldn't repeat what he said, what the statement from the White House said. You know what it said. And he applies the convention to the Taliban. And the answer to your question is, either as a matter of policy or a matter of law, they are being considered as being covered by the Geneva Convention. I don't know why you would ask the question. [...]

### **III. UN Human Rights Commission, Report on the situation of detainees at Guantánamo Bay**

[Source: UN Human Rights Commission, “Situation of detainees at Guantanamo Bay”, UN Doc. E/CN.4/2006/120, 27 February 2006; available at [www.un.org](http://www.un.org) [4]. Footnotes omitted.]

## **UN COMMISSION ON HUMAN RIGHTS**

### **ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

### **CIVIL AND POLITICAL RIGHTS**

## **Situation of detainees at Guantánamo Bay**

Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt

### **Summary**

The present joint report is submitted by five holders of mandates of special procedures of the Commission on Human Rights who have been jointly following the situation of detainees held at the United States of America Naval Base at Guantánamo Bay since June 2004.

[...]

2. Since January 2002, the five mandate holders have been following the situation of detainees held at the United States Naval Base at Guantánamo Bay. In June 2004, they decided to continue this task as a group because the situation falls under the

scope of each of the mandates.

[...]

4. The present report is [...] based on the replies of the Government to a questionnaire concerning detention at Guantánamo Bay submitted by the mandate holders, interviews conducted by the mandate holders with former detainees currently residing or detained in France, Spain and the United Kingdom and responses from lawyers acting on behalf of some Guantánamo Bay detainees to questionnaires submitted by the mandate holders. It is also based on information available in the public domain, including reports prepared by non-governmental organizations (NGOs), information contained in declassified official United States documents and media reports. [...]

## **I. THE LEGAL FRAMEWORK**

[...]

### **B. The obligations of the United States of America under international law**

8. The United States is party to several human rights treaties relevant to the situation of persons held at Guantánamo Bay, most importantly the International Covenant on Civil and Political Rights (ICCPR) [...].
9. The United States is also party to several international humanitarian law treaties pertinent to the situation in Guantánamo Bay, primarily the Geneva Convention relative to the Treatment of Prisoners of War (Third Convention) and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention), of 12 August 1949, many provisions of which are considered to reflect customary international law. Although the United States is not a party to the Additional Protocols I and II to the Geneva Conventions, some of their provisions – in particular article 75 of Additional Protocol I – are regarded as applicable as they have been recognized as declaratory of customary international law.

[...]

## **E. The complementarity of international humanitarian law and human rights law**

15. The application of international humanitarian law and of international human rights law are not mutually exclusive, but are complementary. As stated by the Human Rights Committee in general comment No. 31 (2004):

“the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purpose of the interpretation of the Covenant rights, both spheres of law are complementary, not mutually exclusive”.

16. In its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ clearly affirmed the applicability of ICCPR during armed conflicts [See ICJ, Nuclear Weapons Advisory Opinion <sup>[5]</sup>]. The Court stated that “the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict”. The Court confirmed its view in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*: “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the [ICCPR]” [See ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory <sup>[6]</sup>].

## **II. ARBITRARY DETENTION AND INDEPENDENCE OF JUDGES AND LAWYERS**

[...]

18. The legal regime imposed on detainees at Guantánamo is regulated by the Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism of 13 November 2001 (hereafter referred to as the “Military Order”). It allows suspects to be detained indefinitely without charge or trial, or to be

tried before a military commission. [...]

#### **A. Deprivation of liberty at Guantánamo Bay**

19. The fundamental proposition of the United States Government with regard to the deprivation of liberty of persons held at Guantánamo Bay is that “[t]he law of war allows the United States – and any other country engaged in combat – to hold enemy combatants without charges or access to counsel for the duration of hostilities. Detention is not an act of punishment but of security and military necessity. It serves the purpose of preventing combatants from continuing to take up arms against the United States”. While the Chairperson of the Working Group and the Special Rapporteur would not use the term “enemy combatant”, they share the understanding that any person having committed a belligerent act in the context of an international armed conflict and having fallen into the hands of one of the parties to the conflict (in this case, the United States) can be held for the duration of hostilities, as long as the detention serves the purpose of preventing combatants from continuing to take up arms against the United States. Indeed, this principle encapsulates a fundamental difference between the laws of war and human rights law with regard to deprivation of liberty. In the context of armed conflicts covered by international humanitarian law, this rule constitutes the *lex specialis* justifying deprivation of liberty which would otherwise, under human rights law as enshrined by article 9 of ICCPR, constitute a violation of the right to personal liberty.
20. The United States justifies the indeterminate detention of the men held at Guantánamo Bay and the denial of their right to challenge the legality of the deprivation of liberty by classifying them as “enemy combatants”. For the reasons the Chairperson of the Working Group and the Special Rapporteur will elaborate, [...] the ongoing detention of the Guantánamo Bay detainees as “enemy combatants” does in fact constitute arbitrary deprivation of the right to personal liberty.
21. Because detention “without charges or access to counsel for the duration of hostilities” amounts to a radical departure from established principles of human rights law, it is particularly important to distinguish between the detainees captured by the United States in the course of an armed conflict and those captured under circumstances that did not involve an armed conflict. In this context, it is to be noted

that the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law.

## **B. Detainees captured in the course of an armed conflict**

22. The Third Geneva Convention provides that where, in the context of “cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties” (art. 2 (1)), a person “having committed a belligerent act and having fallen into the hands of the enemy” may be detained as a prisoner of war until the end of the hostilities. The Fourth Geneva Convention allows a party to the conflict to detain (“intern”) civilians because they constitute a threat to the security of the Party or intend to harm it (arts. 68, 78 and 79), or for the purposes of prosecution on war crimes charges (art. 70). Once the international armed conflict has come to an end, prisoners of war and internees must be released, although prisoners of war and civilian internees against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings. As the rationale for the detention of combatants not enjoying prisoner of war status is to prevent them from taking up arms against the detaining power again, the same rule should be applied to them. In other words, non-privileged belligerents must be released or charged once the international armed conflict is over.
23. The indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the provisions of the Geneva Conventions. Information obtained from reliable sources and the interviews conducted by the special procedures mandate holders with former Guantánamo Bay detainees confirm, however, that the objective of the ongoing detention is not primarily to prevent combatants from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaida network.
24. The Chairperson of the Working Group and the Special Rapporteur note that, while United States Armed Forces continue to be engaged in combat operations in Afghanistan as well as in other countries, they are not currently engaged in an international armed conflict between two Parties to the Third and Fourth Geneva Conventions. In the ongoing non-international armed conflicts involving United States forces, the *lex specialis* authorizing detention without respect for the guarantees

set forth in article 9 of ICCPR therefore can no longer serve as a basis for that detention.

### **C. Detainees captured in the absence of an armed conflict**

25. Many of the detainees held at Guantánamo Bay were captured in places where there was – at the time of their arrest – no armed conflict involving the United States. The case of the six men of Algerian origin detained in Bosnia and Herzegovina in October 2001 is a well-known and well-documented example, but also numerous other detainees have been arrested under similar circumstances where international humanitarian law did not apply. The legal provision allowing the United States to hold belligerents without charges or access to counsel for the duration of hostilities can therefore not be invoked to justify their detention.
26. This does not of course mean that none of the persons held at Guantánamo Bay should have been deprived of their liberty. Indeed, international obligations regarding the struggle against terrorism might make the apprehension and detention of some of these persons a duty for all States. Such deprivation of liberty is, however, governed by human rights law [...]. This includes the right to challenge the legality of detention before a court in proceedings affording fundamental due process rights, such as guarantees of independence and impartiality, the right to be informed of the reasons for arrest, the right to be informed about the evidence underlying these reasons, the right to assistance by counsel and the right to a trial within a reasonable time or to release. Any person deprived of his or her liberty must enjoy continued and effective access to *habeas corpus* proceedings, and any limitations to this right should be viewed with utmost concern.

[...]

## **IV. US Government, Reply to the Report to the UN Human Rights Commission**

[Source: Government of the United States, “Reply of the Government of the United States

of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba”, 10 March 2006; available at [www.asil.org](http://www.asil.org) [71]

## **Reply of the Government of the United States of America to the Report of the Five Special Rapporteurs on Detainees in Guantanamo Bay, Cuba**

**March 10, 2006**

### **I. INTRODUCTION**

[...]

1. The United States profoundly objects to the Report both in terms of process and of substance and underscores that the Report’s factual and legal assertions are inaccurate and flawed. [...]

### **IV. LAW OF WAR**

[...]

2. Nowhere does the Report set out clearly the rules that apply according to international and United States law. It is important to recall the context of the Guantanamo detentions. The war against Al Qaida and its affiliates is a real (not a rhetorical) war. The United States is engaged in a continuing armed conflict against Al Qaida, and customary law of war applies to the conduct of that war and related detention operations. The International Covenant on Civil and Political Rights, by its express terms, applies only to “individuals within its territory and subject to its jurisdiction” [...], and thus does not apply to Guantanamo.
3. The Report acknowledges that both lawful and unlawful combatants may be detained without charges, trial or counsel until the end of active hostilities [...]. The Report also acknowledges that the law applicable in armed conflict is the *lex specialis* [...]. However, the Report’s legal discussion and conclusions rest on the erroneous position

that the ICCPR applies to Guantanamo detainees because, “while United States armed forces continue to be engaged in combat operations in Afghanistan as well as in other countries, they are not currently engaged in an international armed conflict between two Parties to the Third and Fourth Geneva Conventions” [...]. This is incorrect: the existence of an armed conflict is determined *inter alia* by the intensity, and scope and duration of hostilities, not by whether the situation is afforded Geneva Convention protection. [...].

4. Prisoners of war may be detained until the end of active hostilities, and in recognition of battlefield conditions, investigation and prosecution of combatant detainees is not required unless they are charged with a crime. The Report does not question this well-established precept of international humanitarian law, yet nevertheless assails the United States for applying a similar detention regime to unlawful combatants, who are not eligible for POW status due to their failure to heed the basic law of war. The approach called for by the Report is unprecedented, and indeed would turn international humanitarian law on its head by affording greater protections to unlawful combatants than to lawful ones. This is not, and cannot be, the law. To the contrary, it is the view of the United States Government that we cannot have an international legal system in which honorable soldiers who abide by the law of armed conflict and are captured on the battlefield may be detained and held until the end of a war without access to courts or counsel, but terrorist combatants who violate those very laws must be given special privileges or released and allowed to continue their belligerent or terrorist activities. Such a legal regime would signal to the international community that it is acceptable for armies to behave like terrorists.

## **V. ONGOING ARMED CONFLICT**

5. As the Special Rapporteurs are aware, on September 11, 2001, the United States was the victim of massive and brutal terrorist attacks carried out by 19 Al Qaida suicide attackers who hijacked and crashed four U.S. commercial jets with passengers on board, two into the World Trade Center towers in New York City, one into the Pentagon near Washington, D.C., and a fourth into a field in Shanksville, Pennsylvania, leaving more than 3000 innocent individuals dead or missing.

6. The United Nations Security Council condemned the terrorist attacks of September 11, 2001 as a “threat to international peace and security” and recognized the “inherent right of individual and collective self-defence in accordance with the Charter.” [...]
7. On October 7, 2001, President Bush invoked the United States inherent right of self-defense and, as Commander in Chief of the U.S. Armed Forces, ordered the U.S. Armed Forces to initiate action in self-defense against the terrorists and the Taliban regime that harbored them in Afghanistan. The United States was joined in the operation by the United Kingdom and coalition forces, comprising (as of December 2003) 5,935 international military personnel from 32 countries.
8. Prior to this, Al Qaida had directed the October 12, 2000 attack on the USS Cole in the port of Aden, Yemen, killing 17 US Navy members and injuring an additional 39. Al Qaida also had orchestrated the bombings in August 1998 of the US Embassies in Kenya and Tanzania that killed at least 300 individuals and injured more than 5,000. [...] Al Qaida additionally claimed to have shot down UN helicopters and killed US servicemen in Somalia in 1993 and to have conducted three bombings that targeted US troops in Aden, Yemen in December 1992. [...]
9. As the foregoing makes clear, the United States Government, and indeed the international community, concluded that Al Qaida and related terrorist networks are in a state of armed conflict with the United States. Al Qaida trained, equipped, and supported fighters and have planned and executed attacks around the world against the United States on a scale that far exceeds criminal activity.

[...]

10. [...] [I]t is clear that Al Qaida and its affiliates and supporters have planned and continue to plan and perpetrate armed attacks against the United States and its coalition partners, and they directly target civilians in blatant violation of the law of war. Despite coalition successes in Afghanistan and around the world, the war is far from over. The Al Qaida network today is a multinational enterprise that has a global reach that exceeds that of any previous transnational group. The continuing military operations undertaken against the United States and its nationals by the Al Qaida

organization both before and after September 11 necessitate a military response by the armed forces of the United States. To conclude otherwise is to permit an armed group to wage war unlawfully against a sovereign state while precluding that state from using lawful measures to defend itself.

11. The United States therefore fundamentally disagrees with the statement in the Report that “the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law” [...].
12. During the course of hostilities in Afghanistan, the United States military and its allies have captured or secured the surrender of thousands of individuals fighting as part of the Al Qaida terrorist network or who supported, protected or defended the Al Qaida terrorists. These were individuals captured in connection with the ongoing armed conflict. Their capture and detention were lawful and necessary to prevent them from returning to the battlefield or reengaging in armed conflict.
13. Examples of detainees held under U.S. Government custody during Operation Enduring Freedom include:
  - Terrorists linked to documented Al Qaida attacks on the United States such as the East Africa U.S. embassy bombings and the USS Cole attack.
  - Terrorists who taught or received training on arms and explosives, surveillance, and interrogation resistance techniques at Al Qaida camps.
  - Terrorists who continue to express their desire to kill Americans if released.
  - Terrorists who have sworn personal allegiance to Usama bin Laden.
  - Terrorists linked to several Al Qaida operational plans, including the targeting of U.S. facilities and interests.
14. Representative examples of specific Guantanamo detainees include:
  - An Al Qaida explosives trainer who has provided information on the September 2001 assassination of Northern Alliance leader Masood.
  - An individual captured on the battlefield with links to a financier of the September 11th plots and who attempted to enter the United States in August 2001 to meet hijacker Mohammed Atta.
  - Two individuals associated with senior Al Qaida members developing remotely

detonated explosive devices for use against U.S. forces.

- A member of an Al Qaida supported terrorist cell in Afghanistan that targeted civilians and was responsible for a grenade attack on a foreign journalist's automobile.
- An Al Qaida member who plotted to attack oil tankers in the Persian Gulf.
- An individual who served as a bodyguard for Usama Bin Laden.
- An Al Qaida member who served as an explosives trainer for Al Qaida and designed a prototype shoe bomb and a magnetic mine.
- An individual who trained Al Qaida associates in the use of explosives and worked on a plot to use cell phones to detonate bombs.

## ***VI. Lex specialis***

15. The law of armed conflict is the *lex specialis* governing the international law obligations of the United States regarding the status and treatment of persons detained during armed conflict – a legal principle with which the Report agrees. To be sure, many of the principles of humane treatment found in the law of armed conflict find similar expression in human rights law. Further, some of the principles of the law of armed conflict may be explicated by analogy or by reference to human rights principles. However, similarity of principles in certain respects does not mean identical or controlling principles, doctrine, or jurisprudence. [...]
16. The consequences of conflating the two bodies of law would be dramatic and unprecedented. For instance, application of principles developed in the context of human rights law would allow all enemy combatants detained in armed conflict to have access to courts to challenge their detention. This result is directly at odds with well-settled law of war that would throw the centuries-old, unchallenged practice of detaining enemy combatants into complete disarray.
17. Indeed, the Inter-American Commission on Human Rights has recognized that international humanitarian law (the law of war) is the *lex specialis* that may govern the issues surrounding Guantanamo detention. [...]
18. [...] [T]he law of war applies to the conduct of war and related detention operations. The law of war allows the United States – and any other country engaged in armed

conflict – to hold enemy combatants without charges or access to counsel for the duration of active hostilities. [...] Our fight against Al Qaida is different from traditional armed conflicts in that it is not a state-to-state conflict, in which there generally is an identifiable conclusion of hostilities, after which each side releases those combatants it has detained. Sensitive to this reality, the United States evaluates each Guantanamo detainee individually, to determine whether he no longer poses a serious danger of returning to hostilities against us. This concept of an individual analysis has some support in historical practices that contemplate parole, as well as releases of enemy combatants held for extended periods, based on individualized determinations that the combatant does not present a continuing threat.

[...]

## Discussion

### I. Qualification of the conflict

1. How would you qualify the conflict in Afghanistan between the Taliban and the United States in 2001? Does the non-recognition of the Taliban regime as the legitimate government of Afghanistan influence the qualification of the conflict (*Document I*)? Can the Taliban be seen as a rebel group opposing an internationally recognized government, even though they had *de facto* control over most of the country, including the capital? Does IHL deal with issues of recognition?
2.
  - a. How would you qualify the fighting between al-Qaeda and the United States in Afghanistan? As an international police operation? An armed conflict? An international armed conflict?
  - b. Does IHL apply to that fighting? Does it apply because there is an armed conflict between al-Qaeda and the United States? Or because there already is an armed conflict on the territory of Afghanistan (between the United States and the Taliban)?
3. How would you qualify the conflict in Afghanistan between the Taliban, on the one hand, and the United States and its NATO allies, on the other, in 2010? What, if

anything has, changed?

4. Do you think that in 2001 the two conflicts in Afghanistan (i.e. between the United States and the Taliban and between the United States and al-Qaeda) should be treated separately? Or do they constitute one single armed conflict? What is your answer in respect of 2010? What are the implications of the answers to these questions?
5. (*Document IV, paras [5]-[14]*) How would you qualify the fighting between the United States and al-Qaeda outside Afghanistan? As an international police operation? An armed conflict? An international armed conflict? A transnational non-international armed conflict?
6. Is every armed conflict not covered by Art. 2 common to the Conventions a non-international armed conflict? Is the treaty definition and the customary law definition of international armed conflicts the same? Do States apply the same IHL rules to certain armed conflicts against armed non-State actors as they do to conflicts between them? [**See also** United States, *Hamdan v. Rumsfeld* <sup>[8]</sup>]

## II. Qualification of the persons

7.
  - a. Under IHL, are members of the Taliban armed forces captured in 2001 combatants? Under what conditions? If they are captured, do they benefit from prisoner-of-war status? In case of doubt, how should they be treated? Is your answer different depending on whether they were captured by the Northern Alliance or the United States? (GC III, Arts 4(A) <sup>[9]</sup> and 5 <sup>[10]</sup>; P I, Arts 43 <sup>[11]</sup>-45 <sup>[12]</sup> and 75 <sup>[13]</sup>)
  - b. (*Documents I and II*) When the United States considers that the conflict opposing it to the Taliban is covered by the Geneva Conventions, but that members of the Taliban armed forces “do not meet the criteria for prisoner-of-war status”, what criteria is it talking about? Do the members of the Taliban armed forces have to comply with the criteria of Art. 4(A)(2) of Convention III? Even if they fall under Art. 4(A)(1) or (3)?
8.
  - a. How do you qualify al-Qaeda members captured in 2001 during the conflict in Afghanistan? Could they be considered combatants? Do they fall under any of the categories of Art. 4(A) of Convention III (GC III, Art. 4(A)(1)-(3) <sup>[9]</sup>)? Do they benefit from POW status? If they are not combatants, what is their status?

In case of doubt, how should they be treated?

- b. Is question 8.a relevant if one is of the view that in 2001 there was a separate non-international armed conflict in Afghanistan between the United States and al-Qaeda?
9. (*Document III, para. 25*) How would you qualify the six men of Algerian origin arrested in Bosnia-Herzegovina? More generally, how would you qualify persons captured in territories on which there was no armed conflict at the time of capture? Can IHL apply to them? Is it necessary for there to be an armed conflict on the territory of capture for IHL to apply to their detention? What if the persons captured belong to a party to an armed conflict?
10. (*Document IV, paras [13]-[14]*)
  - a. How would you qualify each example of detainees mentioned by the United States and captured during Operation “Enduring Freedom”? [**See** Afghanistan, Operation “Enduring Freedom”] Does it matter when and where they were captured? Does IHL necessarily apply to them because they were captured during an armed conflict? Even if they were detained for reasons not related to that armed conflict? May they be detained for crimes committed before the armed conflict in Afghanistan? If IHL applies to them, were the acts committed unlawful under IHL? Does it depend on their status?
  - b. How would you qualify each example of Guantanamo detainees mentioned by the United States? Does it matter when and where they were captured? Does IHL apply to them? If IHL applies to them, were the acts committed unlawful under IHL? Does it depend on their status?
11. If in your view alleged members of al-Qaeda or Taliban fighters detained following the conflict in Afghanistan in 2001 are not prisoners of war, what would their status be under IHL? Are they civilian internees under Convention IV? Are they “unlawful combatants”? Is this category foreseen by IHL? What is your response to the Commentary on Art. 4 of Convention IV that “there is no intermediate status; no individual in the hands of the enemy can be outside the law”? Does your response vary depending on the nationality of the detainee? (GC IV, Arts 4 <sup>[14]</sup> and 5 <sup>[15]</sup>; the Commentary is available on <http://www.icrc.org/ihl> <sup>[16]</sup>)
12. Must the status of a Taliban fighter be decided by a competent tribunal if the

Detaining Power has doubts? If the Detaining Power considers that there is no doubt that a category of detainees does not benefit from prisoner-of-war status, but an objective evaluation raises doubts on this? Who decides on the status of prisoners and the need to determine this status before a competent tribunal? If it is the Detaining Power's decision as to whether there is doubt, what is the significance and effect of Art. 5 of Convention III? (GC III, Art. 5 <sup>[17]</sup>; P I, Art. 45 <sup>[18]</sup>)

13. Do you think that IHL, having been “crafted by sovereign states to deal with conflict between sovereign states” (*Document II*), is not adequate for the kind of conflict dealt with in this case? Or do you think that IHL provides answers to the questions raised when determining the detainee's status?

### III. Treatment of detainees

14. a. On what basis can someone be detained during an international armed conflict? During a non-international armed conflict? On what basis can Taliban members arrested in 2001 be detained? Al-Qaeda members? What if they were arrested in 2010? (GC III, Arts 3 <sup>[19]</sup>, 21 <sup>[20]</sup> and 118 <sup>[21]</sup>; GC IV, Arts 41 <sup>[22]</sup>-43 <sup>[23]</sup>, 68 <sup>[24]</sup>, 70 <sup>[25]</sup>, 78 <sup>[26]</sup>-79 <sup>[27]</sup>) Can someone be detained for the sole purpose of interrogation (*Document III, para. 23*)? Does your answer to this question change according to the status of the detainee?
- b. According to IHL, how should prisoners of war be treated? How should civilian internees be treated? (GC III, Arts 17-81 <sup>[28]</sup>; GC IV, Arts 79-116 <sup>[29]</sup>)
15. What does IHL say about the publication of photos of detainees that could expose them to public curiosity? Does such publication represent a grave breach of IHL? (GC III, Art. 13(2) <sup>[30]</sup>; GC IV, Art. 27(1) <sup>[31]</sup>) What does IHL say in regard to the detainees practising their religion? (GC III, Arts 34 <sup>[32]</sup>-37 <sup>[33]</sup>; GC IV, Art. 93 <sup>[34]</sup>)
16. a. According to IHL, did the United States have the right to transfer detainees arrested in Afghanistan in 2001 out of the country? If they are prisoners of war? If they are civilians? Prisoners with no clearly defined status? Does it have the right to transfer them to the territory of a State not party to the conflict (Cuba)? To a military base controlled by the United States army on such territory? (GC III, Arts 12 <sup>[35]</sup>, 21 <sup>[20]</sup>, 22 <sup>[36]</sup> and 46-48 <sup>[28]</sup>; GC IV, Arts 49(1) <sup>[37]</sup>, 76 <sup>[38]</sup> and 127 <sup>[39]</sup>)

-128 <sup>[40]</sup>)

- b. Could Afghanistan at the end of 2001 be considered as a territory occupied by the United States? Only the areas under direct control of the United States (military bases, detention centres)? Are the rules of IHL regarding occupied territories applicable? Is the Afghan territory “effectively placed under the authority of the enemy army”? Does the fact that the United States captured individuals in Afghan territory imply the automatic application of these provisions, especially Art. 49? If Section III of Part III of Convention IV on occupied territories is not applicable, were civilian Afghans arrested by the United States still protected civilians? Were they covered by Section II? Can there be protected civilians covered by neither Sections II nor III, but only Section I? What are the implications of the qualification of Afghanistan as being occupied for your answer to question 14.a? (HR, Art. 42 <sup>[41]</sup>; GC IV, Arts 4 <sup>[42]</sup>, 27-78 <sup>[43]</sup> and 126 <sup>[44]</sup>)

17.

1. According to IHL, when should the Guantanamo detainees arrested in Afghanistan in 2001 be repatriated? If they are prisoners of war? Civilian internees? If they do not have either status? If they are subject to penal prosecution? (GC III, Arts 118 <sup>[45]</sup> and 119 <sup>[46]</sup>; GC IV, Arts 132 <sup>[47]</sup>-135 <sup>[48]</sup>)
  - a. (*Document III, paras 19-26, and Document IV*) Assuming that some of the detainees in Guantanamo face no criminal charges, how long may they be detained? Should they have been released in 2002, when the Taliban regime collapsed and was replaced by the Karzai government? Or can it be considered that the armed conflict has continued into 2010? Can detainees be held in captivity for so long if they face no criminal charges? Does your answer vary according to whether the detainee is a Taliban or an al-Qaeda member? (GC III, Art. 118 <sup>[49]</sup>; GC IV, 46 <sup>[50]</sup>)
  - b. May detainees who are neither Afghan nor US nationals but were arrested in Afghanistan in 2001 be repatriated to their country of origin? Under what conditions? What if, because of their supposed affiliation with al-Qaeda, they risk persecution? Must the United States ensure that they will not be tortured, that they will, if need be, benefit from a fair trial and be treated in conformity

with human rights? Is the principle of *non-refoulement* prescribed by IHL? Is it part of customary law? (GC III, Art. 12 <sup>[35]</sup>; GC IV, Arts 45 <sup>[51]</sup> and 134 <sup>[52]</sup>)

18. Does recognizing an individual as a prisoner of war prevent the detaining power from trying him for any crimes he is accused of? From questioning him? Is it true that prisoners of war are only obliged to give their “name, rank, serial number and birth date” (*Document I*)? (GC I-IV, Arts 49(2) <sup>[53]</sup>/50(2) <sup>[54]</sup>/129(2) <sup>[55]</sup>/146(2) <sup>[56]</sup> respectively; GC III, Arts 17(1) <sup>[57]</sup> and (4) <sup>[57]</sup>, 82 <sup>[58]</sup>, 85 <sup>[59]</sup>, 99 <sup>[60]</sup> and 102 <sup>[61]</sup>; P I, Art. 85(1) <sup>[62]</sup>)
- 19.
- a. Does the ICRC have the right to visit prisoners held following an international armed conflict? Is the detaining power obliged to accept these visits? Is it obliged to accept all the visiting procedures (interviews without witnesses, etc.)? (GC III, Art. 126(4) <sup>[63]</sup>; GC IV, Art. 143(5) <sup>[64]</sup>)
  - b. Does this right vary depending on the status of the detainee?

#### IV. Human rights and IHL

20. (*Document III, paras 16, 19 and 24; Document IV, paras [2]-[4] and [15]-[18]*)
- a. Why does the Report to the Human Rights Commission say that IHL is the *lex specialis* governing detention in international armed conflicts? Because it is more developed than human rights law? Why does the Commission say that IHL is no longer the *lex specialis* during non-international armed conflicts? Is the IHL of non-international armed conflicts less developed than human rights law on this issue?
  - b. Can customary IHL be taken into account when determining whether IHL or human rights law is the *lex specialis* on a specific issue? Can the practice and case-law of international human rights bodies be taken into account?
  - c. Do you agree with the United States that the ICCPR does not apply to the detention of al-Qaeda members? Do you agree that only IHL applies? If IHL applies, does it mean that human rights law cannot apply at the same time?
  - d. Do you agree with the United States that applying human rights law to al-

Qaeda members detained in Guantanamo would give them greater protection than that granted to lawful combatants captured during an international armed conflict? What privileges would such an al-Qaeda member have compared with a POW? How could such privileges be justified? (*Document IV, para. [4]*)

21. Do you agree with the United States that the ICCPR does not apply to detainees in Guantanamo because Guantanamo is not located on US territory? Is it not sufficient that the United States has effective control over the territory and the persons held in the camp?

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