

Serving God and Caesar: Religious personnel and their protection in armed conflict

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In response to the ability of the human being to grasp metaphysics and the irrational aspect of human nature, many men and women profess faith in a religion. Nor does such a religion lose its importance in extreme situations in and after war. The results of the recently published first Iraq survey of Oxford Research International¹ gave evidence of the increased significance of religious values for people who have lived through the distress of war and also of the trust these people place in their religious leaders.

This article will examine the specific function and current status of protection under international humanitarian law of a group of religious ministers who are terminologically referred to as “religious personnel”, are attached to armed forces and are exclusively engaged in providing spiritual assistance to military personnel. Their protection is compared with that of civilian ministry and the option of an integrated level of protection for religious ministry is discussed. The article will also attempt to point out the challenges and limits these personnel face nowadays as they exercise a spiritual function within the framework of a military mission, and will explore possible legal consequences of recent developments in this regard.

Protection in history

Throughout history the representatives of various religions, who often belonged to a priestly class, have provided spiritual assistance to those most affected by the use of armed force, namely soldiers themselves. Charlemagne’s order that his troops in the field must be accompanied by chaplains has

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remained influential to this day. Before the separation of Church and State, the legal protection of life and limb of these clergy was a matter for religious law. In Europe, the norms of the Catholic Church established two related prohibitions: clergy were not to be targeted in military campaigns, and they were not allowed to actively engage in warfare. In modern times, the task of protection shifted from religious law to the law of the emerging nation-States. Their agreements, like the earliest Geneva Convention of 1864 in its Article 2, granted “the benefit of neutrality” to chaplains in the armed forces. And like the protection of medical personnel, which is structured very similarly, the protection of chaplains underwent minor changes during the successive revisions of the Geneva Convention and has been further enhanced by other legal instruments.² Since the adoption of Additional Protocol I to the Geneva Conventions, the term “religious personnel” has been used to denote the protected category of non-combatants within the armed forces who are ministers of religion.³

The function of religious personnel in armed conflict

Religion in its commonly known civilian environment has a rather broad scope, as religious doctrine attempts to offer a comprehensive approach to life. Questions *inter alia* about the morality of war and peace are addressed in the context of an inclusive search for normative values such as

¹ See Jean-Pierre Langellier, “Hostiles à la coalition, les Irakiens veulent la démocratie”, *Le Monde*, 3 December 2003, and X., “Neunzig Prozent wollen Demokratie”, *Frankfurter Allgemeine Zeitung*, 3 December 2003, p. 5.

² See Art. 9 and 12 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906; Art. 12 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929; Art. 7 of the Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899; Art. 10 of the Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907; Art. 17 of the Regulations respecting the Laws and Customs of War on Land, annexed to Convention (IV) concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter “Hague Regulations”); Art. 16 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.

³ Art. 8 (d) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, (hereinafter “AP I” or “Additional Protocol I”) reads: “‘Religious personnel’ means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached: i) to the armed forces of a Party to the conflict; ii) to medical units or medical transports of a Party to the conflict; iii) to medical units or medical transports described in Article 9, paragraph 2; or iv) to civil defence organizations of a Party to the conflict. The attachment of religious personnel may be either permanent or temporary ...”.

truth or justice. The understanding of a specialized ministry like military chaplaincy is more limited. It certainly does not exclude doctrinal considerations such as those mentioned above, for the very reason that chaplains gather a unique expertise in military matters. But the ministry of military chaplaincy is strongly focused on the individual. A withdrawal of a religion from chaplaincy may occur only if the commands of the military mission and of religious doctrine are irreconcilable and a continuation of ministry in the military would undermine the credibility of the religious testimony.

Military chaplaincy as an institution

In the tradition of western States where the legal dogma of a separation of religion and State is followed in one way or another, the exercise of religion in a military environment results in cooperation between two institutions: the State and some form of religious organization. If a religion is unable to organize itself into some sort of institution, it is unfit to provide religious ministry to armed forces, because a religiously neutral State refrains from exercising authority in religious matters — even if only the selection of qualified religious personnel for its armed forces is involved. In States that do not have the dogma of separation, the State becomes identical with the institution providing spiritual assistance. In Iran, for example, religious observance in the armed forces is closely linked to Shiite Islam as the State doctrine. In Pakistan and Bangladesh nearly all State institutions, including military barracks, have their own mosques and an associated religious official (*maulana*).⁴

The pastoral practice of religious personnel is very much conditioned by their national legal status, which varies from country to country. Almost every State takes a different approach in the way it integrates religious personnel into its military, whether they wear a uniform, are part of the chain of command or teach ethical precepts. These differences are of no relevance for international humanitarian law as long as its requirements for the definition of religious personnel — discussed below — are met. This became evident in the discussion about placing greater emphasis on the civilian character of Protestant chaplains in the German federal armed forces: the various alternatives proposed were checked against their compatibility with the notion of attaching religious personnel to the armed forces in order to ensure their protection under humanitarian law. It turned out, however, that the

⁴ See Martin Bock, *Religion within the Armed Forces*, Sozialwissenschaftliches Institut der Bundeswehr, Strausberg, 1998, pp. 250 ff.

broad concept of religious personnel in humanitarian law and its requirements do not dictate a specific national legal status for religious personnel.⁵

Spiritual needs of service personnel

Conversely, the spiritual needs of members of the armed forces are very similar around the globe. Especially during difficult and dangerous missions, the demand for spiritual assistance increases. In the hostile environment of a combat operation, chaplains draw closer to servicemen and -women and their sometimes hidden desire for spiritual stability. Troops make use of the services provided by religious personnel who share their situation and live under the same circumstances but devote themselves to the spiritual well-being of those troops. Religious personnel — unlike other professional services in the armed forces such as military psychologists, psychiatrists and entertainment specialists — do not serve a military-related purpose. By their presence, chaplains convey a sense of human solidarity to those in hardship.⁶ This closeness, paired with extreme exposure to enmity, sorrow, injury, crisis and also the threat of death, gives rise to questions that servicemen and -women would not ask themselves with the same urgency in ordinary circumstances at home. Crisis, war and metaphysical homelessness induce a remarkable and sometimes dramatic renaissance of the *Gretchenfrage*, the big question as to one's own position vis-à-vis religion. According to chaplains on missions, these questions tend to go beyond the scope of the military campaign and touch on the very meaning of human activity and existence. In many cases, soldiers react to their own questions with surprise and sometimes even with fear of the depths into which they are venturing. Religious personnel, themselves supported by a religious spirituality — the reference to the transcendent — can provide valuable assistance in interaction and conversations with them by offering answers and interpretations from a religious perspective.

Recognition and appreciation for the services of chaplaincy are nothing new: as early as 1862 Henry Dunant in his *Memory of Solferino* praised the ministry of Emperor Napoleon's chaplain, the Abbé Laine, who "[in] the thickest of the fight (...) went from one field hospital to the next bringing consolation and sympathy to the dying".⁷

5 See Claude Nicolas, *L'Assistance spirituelle dans le droit de la guerre*, Diss. iur., Université Paris-Sud XI, Paris, 1991, p. 104.

6 See Jean-Luc Hiebel, "Droit de l'aumônerie, droit de l'assistance spirituelle", *Annuaire français des droits de l'homme*, Vol. 1, 1974, p. 535.

7 Henry Dunant, *A Memory of Solferino*, International Committee of the Red Cross, Geneva, 1986, p. 31.

Ties with religious doctrine

Some religions see the service of chaplaincy in the context of humanitarian law, associating it with the efforts of the international community to contain the effects of war. Attempts to root human dignity and the protection of the victims of war in transcendent sources can facilitate the abstention from using all available means of combat in order to ensure victory at any price. The protection of religious personnel is, for instance, also a postulate of Muslim law. Long ago the first caliph Abu Bakr (573-634) is said to have told his army that they would encounter pious people who lived in monasteries to serve God in seclusion, and would have given orders to leave them in peace, not to kill them and not to destroy their monasteries.⁸

The international order as a man-made structure — like man — cannot rest on a purely material and worldly fundament. Instead, the irrational in human nature must be taken into account when undertaking the personal transformation of a conversion to peace. Then, spiritual principles may form the basic incentive that stimulates men and women in the building of a modern society.⁹

In some religions the development of conscience in order to foster an authentic desire for peace is considered an important duty of military chaplains.¹⁰ In imparting values they are expected to stress ethical considerations underlying humanitarian law. Swiss chaplains are even expressly required to turn their attention also to compliance with humanitarian law. The dissemination of knowledge of international humanitarian law is in any case supposed to extend to religious personnel.¹¹ Religion and its representatives in

⁸ See Amez Zemmali, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire*, Pedone, Paris, 1997, p. 449; Nicolas, *op. cit.* (note 5), p. 80.

⁹ See Paul VI, "Discours à l'organisation des Nations Unies à l'occasion du 20^e anniversaire de l'organisation", 4 October 1965, available at: <http://www.vatican.va/holy_father/paul_vi/speeches/1965/documents/hf_p-vi_spe_19651004_united-nations_fr.html>.

¹⁰ See John Paul II, "Address to the third international and interdenominational conference of chief military chaplains of Europe and North America", 6 February 1992, available at: <http://www.vatican.va/holy_father/john_paul_ii/speeches/1992/documents/hf_jp-ii_spe_19920206_military-chaplains_en.html>.

¹¹ See Art. 47 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Battlefield, 12 August 1949 (hereinafter "GC I" or "First Geneva Convention") and Art. 48 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (hereinafter "GC II" or "Second Geneva Convention"). One example of measures specifically focusing on religious personnel is an international humanitarian law course organized by the Holy See for catholic military chaplains in March 2003 in fulfilment of its pledge No. Po62 at the 27th International Conference of the Red Cross and Red Crescent, see: <http://www.icrc.org/Applic/p127e.nsf/va_PBA/064EA4AD0ECB671CC1256ADA0038D977?>.

the civilian domain can, too, contribute to respect for and compliance with humanitarian law in times of armed conflict.¹²

Protection of religious personnel — the legal regime

The Geneva Conventions of 1949 lay down the principle that “chaplains attached to the armed forces (...) shall be respected and protected in all circumstances.”¹³ They may not be subjected to military attack. This protection applies at any place and at any time throughout the duration of an armed conflict, both on the battlefield and behind the lines. The Rome Statute of the International Criminal Court strengthened the existing protection in its law enforcement aspect.¹⁴ In accordance with the legal definition of Article 8(d) of Additional Protocol I, religious personnel are nowadays defined as “military or civilian persons such as chaplains who are exclusively engaged either temporarily or permanently in the work of their ministry (spiritual assistance) and attached to the armed forces or to medical units, medical transports, or civil defence organizations”.¹⁵ This definition clearly includes the two criteria that are constitutive of protection for religious personnel: attachment and exclusivity.

The requirements of attachment and exclusivity

For religious personnel to benefit protection under international humanitarian law, they need to be attached to the armed forces of a Party to the conflict.¹⁶ The attachment must originate and consist in a spiritual function.

¹² See Giorgio Filibeck, “The force of law against the law of force”, *L’Osservatore Romano* [English], 11-18 August 1999, p. 6 (on the “fruitful synergies” of collaboration between humanitarian organizations and religious leaders); Michel Veuthey, “Remedies to promote the respect of fundamental human values in non-international armed conflicts”, *Israeli Yearbook on Human Rights*, Vol. 30, 2001, p. 37 (on the role of religious leadership in the protection of victims of war).

¹³ GC I, Art. 24. See also GC II, Art. 36 (on protection and respect for religious personnel of hospital ships), and the UN Secretary-General’s Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, 6 August, 1999, p. 3, Section 9.4, UN Doc. ST/SGB/1999/13 (on the applicability of this principle to missions by UN Forces).

¹⁴ See Art. 8(b)xxiv of the Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 (which criminalizes intentionally directing attacks against personnel using the distinctive emblem. The specific mention made of them in various elements of crimes adds to the protection of religious personnel from being murdered, mutilated, treated cruelly, tortured, degraded, taken hostage, and sentenced without due process).

¹⁵ Pietro Verri, *Dictionary of the International Law of Armed Conflict*, International Committee of the Red Cross, Geneva, 1992, p. 97.

¹⁶ Quoted *supra* (note 3).

A drafted clergyperson not officiating as chaplain cannot claim protection as a non-combatant, but becomes a combatant. However, they are to be treated as retained personnel if they are called upon to minister to their fellow captives.¹⁷ The decision on the attachment of religious personnel rests with the competent military authorities and creates an official relationship between chaplain and armed forces.¹⁸ In the case of chaplains ministering to protected persons belonging to combatant groups other than regular armed forces — as listed in Article 13 of the First Geneva Convention — the attachment is effected with the consent of their responsible leader. A unilateral declaration of the religious ministers themselves or their religious community is insufficient to constitute chaplain status. Instead, they must be received into the group they are attached to, designated for or at least accepted by.

As an exclusive assignment to religious ministry is demanded from religious personnel, lay preachers who pursue another full-time occupation and are involved only part-time in religious ministry do not fulfil the exclusivity criterion.¹⁹ On the other hand, carrying out medical tasks does not infringe the exclusivity criterion.²⁰

Protective signs

The armband with the distinctive emblem of the Red Cross or Red Crescent and an identity card are the external signs of the protection to which religious personnel are entitled.²¹ In addition, they should wear headgear and clothing bearing the distinctive emblem when carrying out their duties in the battle area.²² These signs alert the belligerents to the entitlement to protection and are designed to avoid religious personnel — especially those in uniform — being mistaken for combatants. However, they do not constitute

¹⁷ See Art. 36 of the Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (hereinafter “GC III” or “Third Geneva Convention”); Jean Pictet, *The Geneva Conventions of 12 August 1949*, Commentary, Vol. 1, International Committee of the Red Cross, Geneva, 1952, p. 220.

¹⁸ See Pictet, *op.cit.* (note 17), pp. 219 ff.

¹⁹ See Sigmar Stadlmeier, “Die Stellung des Militärseelsorgers im humanitären Völkerrecht”, in Hans Walter Kaluza (ed.), *Pax et Iustitia*, Duncker & Humblot, Berlin, 1990, p. 531; Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., Manchester University Press, Manchester, 2000, pp. 25-26.

²⁰ See Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols*, International Committee of the Red Cross, Geneva, 1978, p. 127, para. 362.

²¹ See Art. 40 of GC I, Art. 42 of GC II, and Art. 18 (1) AP I.

²² See Art. 4 (2) of Annex I to Additional Protocol I (as of 8 June 1977) and Art. 5 (4) of Annex I to the Additional Protocol I as amended on 30 November 1993.

any protection in themselves. It is the responsibility of the party to conflict, and not of the chaplain's religious community, to issue and provide them.

Even though the conveyance of religious personnel may be considered a medical transportation and a vehicle exclusively assigned to that purpose may therefore be considered a medical transport,²³ authorization to display the distinctive emblem on means of transportation for religious personnel is handled differently in various countries.²⁴

Since the stipulations of both the Geneva Conventions and the Additional Protocols concerning identification are also applicable to civilian religious personnel, religious personnel attached to a civil defence unit may also use the red cross/red crescent emblem instead of the distinctive emblem of civil defence organizations.²⁵

Use of arms by religious personnel

Conventional norms allowing medical personnel the possession and use of arms in self-defence without compromising their protection²⁶ are commonly applied to religious personnel as well. Although the protection of religious personnel runs parallel in many respects to that of medical personnel, such an interpretation ignores the systematic stipulations in Chapter III of the First Geneva Convention with regard to medical personnel bearing arms, a chapter that deals with medical units and establishments only, whereas the norms relating to both religious and medical personnel are found in the following Chapter IV. Accordingly, the provisions applicable to medical personnel cannot simply be applied to religious personnel as well.²⁷ However, the generally recognized principle of self-defence should not be withheld from chaplains and carrying arms and their use in self-defence is permitted. Nonetheless, many countries have chosen not to equip their religious personnel with arms.²⁸

²³ See API, Art. 8 (f) and (g).

²⁴ E.g.: *Fleet Marine Force Manual (FMFM) 3-61: Ministry in Combat*, U.S. Marine Corps, 22 June 1992, para. 3003(d) (for the U.S.); Wolf Werner Rausch, "Seelsorge im humanitären Völkerrecht", *Humanitäres Völkerrecht – Informationsschriften*, Vol. 5, 1992, p. 116 (for Germany).

²⁵ See API, Art. 15 (5); see also Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for the Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, p. 395.

²⁶ See GC I, Art. 22, and GC II, Art. 35.

²⁷ See Knut Ipsen, "Combatants and Non-Combatants", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 92.

²⁸ E.g.: Walter Rabus, "Religious personnel", in Fleck, *op.cit.* (note 27), p. 372, para. 820 (for Germany), *Fleet Marine Force Manual (FMFM) 3-61: Ministry in Combat*, *op. cit.* (note 24), para. 1004(f) (for USA).

Retention of captured religious personnel

During the legal history of the Geneva Conventions various approaches were adopted with regard to the status of captured religious personnel and to the question whether they can be retained or not.²⁹ Captured chaplains can nowadays be retained only to meet the spiritual needs of prisoners of war (POWs) and only in numbers appropriate for that purpose.³⁰ Though retention will in most cases be the rule in practice, repatriation as the dominant principle has priority. The International Committee of the Red Cross (ICRC) recommends that one chaplain be retained for every 1,000 to 2,000 POWs.³¹

Because of their status as non-combatants, religious personnel retained in captivity are not considered as prisoners of war. They do, however, benefit — as a minimum — from the POW provisions of the Third Geneva Convention.³² They thus enjoy a specific standing that combines the protection applicable to POWs and the exercise of religious functions.

Retained religious personnel are subject to the military laws and regulations of the Detaining Power and under the authority of its competent services. Even though their liberty is restricted in this way, they are allowed to continue to carry out their spiritual duties for the benefit of POWs and to freely exercise their ministry in accordance with their religious conscience. Religious personnel must be granted all facilities necessary to provide for religious ministrations to POWs.³³ In order to carry out their spiritual duties, thus for their ministry and not as personal privileges, chaplains enjoy special facilities regarding visits to POWs outside the place of detention and correspondence, the right of direct access to the detaining authorities, and they are exempted from any work outside their religious duties.³⁴

²⁹ See the different approaches in Art. 3 of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864; Art. 12 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906; Art. 12 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.

³⁰ See GC I, Art. 28; GC II, Art. 37; GC III, Art. 33. The religious personnel of hospital ships must not be captured, see GC II, Art. 36.

³¹ See “La Rétention et la relève du personnel sanitaire et religieux, accords-types et commentaires”, *International Review of the Red Cross*, Vol. 37, 1955, p. 10.

³² See GC I, Art. 28; GC III, Art. 4 (C) and 33.

³³ See GC III, Art. 33 and 35.

³⁴ See GC I, Art. 28 (2); GC III, Art. 33.

Ministry to prisoners of war

With the consent of the Detaining Power, a treatment similar to that of detained chaplains may be granted to prisoners of war who are ministers of religion without having officiated as chaplains to their own forces.³⁵ Sceptical about inter-religious ministry, the Geneva Conventions allow chaplains only to minister to service personnel of their own religion. Hence the normative framework takes into account the situation of POWs who do not have the assistance of either a retained chaplain or a POW minister of their faith and — rather sensible in tone and stipulations — introduces a procedure to select another minister to assist the POWs.³⁶ The person appointed may well be a chaplain or civilian minister of the Detaining Power, as was the case in the US military base in Guantánamo Bay, which is discussed below.

The legal position of retained religious personnel is strengthened by the rights of POWs as recipients of spiritual assistance: POWs are entitled to complete latitude in the exercise of their religious duties, including attendance at the service of their faith.³⁷ This right is conditional upon compliance with the disciplinary routine prescribed by the military authorities. Special challenges in reconciling the two apparently opposing standards of latitude and disciplinary routine arise with regard to religious practices of a physical character, methods of preparing food, periods of fasting or prayer or the wearing of ritual adornments.³⁸ In addition, specific stipulations apply for the receipt of articles of a religious character, activities of representatives of religious organizations in POW camps, spiritual assistance to POWs serving a penal sentence and religious burial of deceased POWs.³⁹

Non-international armed conflict

Even though the concise norm of Article 3 common to the Geneva Conventions cannot serve as a basis to claim active support for religious activities, its humane treatment requirement may also be deemed to result in some safeguards for religious freedom, given that free exercise of religion forms a crucial aspect of human dignity.⁴⁰ Significant support for religious

³⁵ See GC III, Art. 36.

³⁶ See GC III, Artt. 35 and 37.

³⁷ See GC III, Art. 34.

³⁸ See Jean Pictet, *The Geneva Conventions of 12 August 1949, Commentary*, Vol. 4, International Committee of the Red Cross, Geneva, 1958, p. 405.

³⁹ See GC III, Artt. 72, 125, 108 (3) and 12 (4).

⁴⁰ See Jean-Luc Hiebel, "Human rights relating to spiritual assistance as embodied in the Geneva Conventions of 1949", *International Review of the Red Cross*, No. 214, 1980, p. 4.

freedom in non-international conflicts also comes from international human rights law.⁴¹ Only Additional Protocol II to the Geneva Conventions provides explicitly for religious personnel to be respected, protected and granted all available help for the performance of their duties. They must not be compelled to carry out tasks that are not compatible with their humanitarian mission.⁴² In addition, the respect for convictions and religious practices of non-combatants, which is one of the fundamental guarantees of the Protocol may be interpreted as including the right to receive spiritual assistance from those performing religious functions.⁴³ As almost every non-international armed conflict nowadays involves forces of warring parties incapable of performing the official act of attachment, this problem must be solved by analogy. An expression of attachment by the responsible leadership of those forces must suffice to establish non-combatant status of religious personnel.

Neutrality of religious personnel

Spiritual assistance is conceived to be non-partisan and able to cross front lines, though the reality is often different and religious personnel focuses on their own Party's interests. As an Occupying Power is under an obligation to give "moral care" to the wounded and sick,⁴⁴ such care may be provided by a chaplain of the Occupying Power to those in need, to wounded, sick and shipwrecked even if they are members of enemy armed forces.⁴⁵ The neutral function of religious personnel also comes into play with regard to the escape of retained chaplains. Unlike other POWs, some countries do not require them to escape as long as their status as detainees is respected. As chaplains are not POWs but retained personnel, with their ministry they remain to some extent in the service of their country of origin. An escape thus may violate their service obligations or even constitute desertion and be punished by their home country. In any case, an attempt to flee can be considered a breach

⁴¹ See Art. 18 of the Universal Declaration of Human Rights, New York, 10 December 1948, and Art. 18 of the International Covenant on Civil and Political Rights, New York, 16 December 1966; the latter norm is non-derogable even in times of armed conflict, see Art. 4 (2) of the Covenant.

⁴² See Art. 9 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977 (hereinafter "AP II" or "Additional Protocol II"). The definition of "religious personnel" given in Art. 8 (d) AP I is applied, see Jean-Luc Hiebel, *Assistance spirituelle et conflits armés*, Henry Dunant Institute, Geneva, 1980, p. 355.

⁴³ See AP II, Art. 4 (1), and Green, *op. cit.* (note 19), p. 327.

⁴⁴ See GC I, Art. 18(4).

⁴⁵ See Rabus, *op. cit.* (note 28), p. 370.

of camp discipline and punished by disciplinary measures of the Detaining Power.⁴⁶

It is important to emphasize that religious personnel must not become instigators of conflict. As early as 1612, Gentili stressed that force did not consist merely in inflicting wounds. If religious men aided their countrymen by words or encouraged them against the enemy in speeches, during expeditions or amid the toils of war, their protected status ceased.⁴⁷ Vattel later saw clergy as persons “who are often ready to fan the flame of discord and to provoke bloody wars”. He gave a positive definition of the group of protected clergy as those “who are engaged in teaching religion, in governing the church and in celebrating public worship.”⁴⁸

The limitation of religious activities by the neutral character thereof is also stressed in Article 4 of the Hague Convention XI of 1907 that grants immunity from capture to naval vessels charged with religious missions. Given the lack of state practice in this regard, the commentators of the San Remo Manual see difficulties in defining a “religious mission”. They presume that it covers voyages undertaken for missionary and “perhaps” humanitarian work organized by religious orders, but exclude *expressis verbis* missions using force or advocating the use of force for religious ends.⁴⁹

Non-combatant character of religious personnel

Under the current legal regime, religious personnel must “abstain from all hostile acts”.⁵⁰ If personnel eligible for protection under the First to Third Geneva Convention participate in combat or engage in conduct incompatible with their status, they lose that protection in combat: a chaplain, for instance, becomes a lawful target if he attacks enemy forces.

Certainly, among religious personnel there are also violators of international humanitarian law. A prominent case is that of a former military chaplain

⁴⁶ See Pictet, *op. cit.* (note 187), pp. 255 ff.

⁴⁷ See Alberico Gentili, *De iure belli libri tres*, Vol. 2, Hein, Buffalo, 1995 (translation of the edition of 1612, repr. of the Oxford 1933 ed.), p. 262.

⁴⁸ Emer de Vattel, *Le droit des gens ou principes de la loi naturelle*, Vol. 3, Hein, Buffalo, 1995 (repr. of the Washington 1916 ed.), Book III, Chapter 2, para. 10, p. 238.

⁴⁹ See *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, International Institute of Humanitarian Law, Cambridge University Press, Cambridge, 1995, p. 133. See also James Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, Vol. 1, Johns Hopkins Press, Baltimore, 1909, p. 618 (for the cessation of immunity in the event of participation in warfare).

⁵⁰ Pictet, *op. cit.* (note 187), p. 157; Hiebel, *op. cit.* (note 42), p. 199.

of the Rwandan Armed Forces, Emmanuel Rukundo, who is awaiting trial at the International Criminal Tribunal for Rwanda. In the indictment he is charged with genocide and crimes against humanity for murder and extermination, for allegedly issuing orders to attack Tutsi refugees who had fled to church facilities.⁵¹

A clear determination of acts that violate the non-combatant status of religious personnel is, however, difficult. As they are supposed to be devoted to ministry, such personnel must not take a direct part in the war effort. Thus they must not operate arms or weapons systems in combat. Furthermore, they are not allowed to engage in back-up military efforts such as carrying or conveying military intelligence, planning military actions, transporting weapons or ammunition, translation and interrogation or the assessment of data for military purposes.

Some commentators go so far as to assert that activities by the chaplain which are solely designed to support the morale of the troops jeopardize his protection under the Geneva Conventions.⁵² An understanding of chaplaincy as a means to reinforce military discipline and the efficiency of the fighting force by strengthening the role of religion in the military still existed in modern western armies in the late 1960s. Making troops “more faithful to the flag” was seen as one of the chaplain’s responsibilities.⁵³ In the meantime, the emphasis on chaplaincy as an institution to maintain freedom of religion has prevailed. However, questions remain: What, then, is direct support for a military operation? What about advocating values that happen to be conducive to soldierly performance and playing down values that are potentially dysfunctional? Where is the dividing line between admissible and inadmissible activities of chaplaincy? When does such an activity become hostile? Does not serving the spiritual needs of soldiers indirectly also serve to uphold their combativity, their capacity to engage in warfare and thus enhance military efficiency? To give a general answer to these questions and draw a clear distinction appears to be no easy matter. Instead, a case-by-case analysis is required. In order to preserve its status, chaplaincy will have to firmly embrace the notion of serving religion as an aspect of human dignity instead

⁵¹ See International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Emmanuel Rukundo* (ICTR-2001-70-I), Indictment, 27 March 2003, available at:

<<http://www.ictr.org/ENGLISH/cases/Rukundo/indictment/rukundo.pdf>>.

⁵² See Nicolas, *op. cit.* (note 5), p. 309.

⁵³ See Paul J. Weber, “The first amendment and the military chaplaincy”, *Journal of Church and State*, Vol. 22, 1980, p. 465.

of serving the military effort. Defining the nature of military chaplaincy as presence and aid⁵⁴ may be a useful guideline, but must be seen in the context of being present for and aiding the individual, not the common military endeavour. An example of strong dedication to clearly abstaining from incompatible activities that may be interpreted as hostile is given by the US Navy: a policy letter addressed to all its chaplains shortly after the incidents of 11 September 2001 set out the restrictions on chaplains' conduct and demanded "a non-combatant state-of-mind".⁵⁵ Such a policy would seem to reflect a correct interpretation of the norms of international law.

In particular during peacekeeping and humanitarian operations, military chaplaincy as the service with expertise in religious matters can serve as a liaison with local religious institutions. Attempts to turn such contacts between religious personnel and civilian ministers to military account, for instance for purposes of intelligence assessment in a conflict with ethno-religious components, must be met with restraint. There are historical examples of chaplains who used their chaplain status as a cover to gather military information. Buying bibles was literally used as a pretext for spying and running contraband goods.⁵⁶ Nonetheless, chaplains may engage in activities that do not derive exclusively from their spiritual mission as long as they are not harmful to the enemy.⁵⁷ They may for instance, without prejudicing their special protection, engage in social service activities to help combatants and their families and could also be involved in organizing recreational activities.⁵⁸

An urgent challenge: Guantánamo

A situation challenging the neutrality of religious personnel has arisen with the detention of persons termed "illegal combatants" by US authorities at the Guantánamo Bay naval station on the island of Cuba. The presidential military order on which their detention is based guarantees for the detainees "the free exercise of religion consistent with the requirements of

⁵⁴ See Hiebel, *op. cit.* (note 6), p. 540.

⁵⁵ See *Policy Letter*, US Department of the Navy, Office of Chief of Naval Operations, Chief of Chaplains, Chaplain of the Marine Corps and Deputy Chief of Chaplains for Total Force, 1730 Ser N097/01301, 8 November 2001, cited in Jonathan G. Odom, "Beyond arm bands and arms banned: Chaplains, armed conflict, and the law", *Naval Law Review*, Vol. 49, 2002, pp. 20 ff.

⁵⁶ See Richard M. Budd, *Serving Two Masters*, University of Nebraska Press, Lincoln, 2002, pp. 54-55 (for examples of the American Civil War).

⁵⁷ See Hiebel, *op. cit.* (note 40), p. 25.

⁵⁸ *Ibidem.*

such detention”.⁵⁹ The detention facility had a Muslim US military chaplain from January 2002 to September 2003. His role was described as twofold: firstly, he acted as an advisor on matters of religion to the commander of the detaining unit, while his second task was to minister to the detainees.⁶⁰ He could visit them individually and lead them in prayer. As the media considered him to be in touch with the detainees, he also gave press briefings about his work with the detainees. The chaplain’s dual role as minister to the detainees and advisor to the commander of the detaining forces carried a high potential for conflicting interests. On one instance a number of detainees went on hunger strike after an inmate had been barred from wrapping his head while praying; the chaplain convinced them with arguments based on Islamic scripture to resume taking meals. In addition, with the limited social contacts detainees have in the course of their captivity, it is of the utmost importance that the relationship between chaplain and detainee should remain one of spiritual assistance and not be used for intelligence purposes. The fact that communications between chaplains and detainees are not confidential, but that instead the content of such communications is admissible during military commission trials which some of the detainees are expected to be facing, therefore seems very problematic.⁶¹ A duty of chaplains to refrain from disclosing the content of communications with detainees could be drawn from the non-combatant character of chaplains. It should, however, be recognized that in the actual circumstances, pressure on a chaplain to disclose the content of communications either for formal proceedings or for intelligence gathering may be significant.

Developments regarding spiritual assistance to Guantánamo detainees took an unexpected turn when the Muslim military chaplain Captain James J. Yee was arrested in early September 2003 and accused of smuggling classified materials out of Cuba. Especially during the first weeks of the investigation prior to any formal charges, speculations about possible espionage by Yee circulated in the media, together with references to unnamed military officials.⁶² The charges actually filed against Yee turned out to be relatively minor compared to those early allegations and included disobedience of orders about handling classified materials, as well as — astonishingly —

⁵⁹ See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, Military Order of 13 November 2001, 66 U.S. Federal Register 57.833, Art. 3(d).

⁶⁰ See Odom, *op. cit.* (note 55), p. 50.

⁶¹ *Ibid*, pp. 60, 63 and 65.

⁶² See John Mintz and Susan Schmidt, “Muslim army chaplain is held in investigation”, *The Washington Post*, 21 September 2003, p. A16.

adultery which was discovered in the course of the inquiries. A preliminary legal investigation whose outcome will determine whether Yee has to face a court-martial, began on 8 December 2003 and has been pending since then.

The media have so far only blamed inexperienced reservist counter-intelligence officers for having handled the Yee case unprofessionally. The considerable public attention aroused by the case — hearings on it were even held by a subcommittee of the US Senate Judiciary Committee — not only fuelled the tense attitude towards Muslim organizations in the USA but also prevented the imposition of administrative disciplinary measures that is usual in cases like Yee's. A general distrust of the detainees' main religion or Yee's personal understanding of his spiritual role that proved obstructive to the detaining authorities' goals might well have been additional motives, but final conclusions at this point would certainly be premature and even speculative. The case, which started off as a matter of national security, now appears to be more a matter of personal misconduct by a chaplain.

At the time of completing this article, the situation is as follows. Proceedings against Chaplain Yee are still under way and the presumption of his innocence as regards the allegations prevails. But one thing is already clear: the detainees at Guantánamo are on the losing side. In their unresolved situation, which is particularly hard to bear because no end is in sight, they do not have the assistance of religious personnel of their own faith. Since Chaplain Yee's arrest, no Muslim imam has been allowed to minister to the detainees and the media have learnt that there are no plans to provide a new chaplain in the future. The Muslim army chaplain who was assigned in December 2003 to Guantánamo only serves as religious advisor to the commander and ministers to Muslims among the service personnel. This reduction of the chaplain's role certainly solves the conflict of interests, mentioned above, that arose from the dual role of advisor to the commander and spiritual assistant to the detainees. Notwithstanding the dispute on the legal status of the detainees, the lack of any qualified spiritual assistance to the detainees manifestly affects their spiritual well-being. Infringing as it does the requirements of the presidential order, Guantánamo is far from being a place of humane treatment and free exercise of religion. The detainees' dignity and the religious aspect thereof are disregarded.

Recent developments in the protection of religious personnel

Many conflicts today have religious aspects. Claims are voiced in radical religious terms, parties to conflict are defined by their religious identity

and players stress their religious affiliation. A more detailed analysis of these conflicts, however, often reveals other causes, such as disputes over resources and spheres of influence, socio-economic injustice, cultural dominance or intolerance and mutual alienation. In these cases, the real agenda manipulates religious identity in order to accentuate the original motives and justify the use of force. Against this background, religious personnel fulfil a specific function that at times resembles ministry in a civilian context. This role is also reflected by their special position within the defence community. Its neutral character in some cases is seriously challenged as for instance the genocide in Rwanda has shown, where religious personnel took part in mass hatred instead of staying neutral and not taking part in hostilities.

Common grounds with civilian ministry

Although the term “religious personnel” lacks a specific military connotation, special legal protection is granted only to religious ministers who perform their duties in a military setting. The international legislator took refuge in the institution of military chaplaincy as a “stable nucleus”⁶³ of spiritual assistance to service personnel. Considerations of practicability and feasibility, as well as the special exposure of religious personnel in the military, might have played a part in this.

But the reality of religious activities goes beyond this core of protected military chaplaincy. Religious congregations as a reference point of civil society can significantly contribute to relief in times of war and to reconciliation thereafter. When other forces fail, religion can also provide order, especially in times of transition from a defeated to a victorious power. There have, for instance, been media reports about Muslim ministers trying to curb looting masses after the defeat of Iraq in the latest Gulf War. Spiritual assistance in a civilian environment is protected by its civilian character and supported by stipulations on freedom of religion in a number of international human rights instruments.

As the activities — including religious pursuits — of a civilian society are manifold even under occupation, the Fourth Geneva Convention applies a different method of protection. In its stipulations on the exercise of religion it changes perspective and, instead of guaranteeing respect and protection for ministers, focuses on the beneficiaries of spiritual assistance: protected persons. It calls for their religious convictions and practices to be respected.⁶⁴ Terms

⁶³ See Nicolas, *op. cit.* (note 5), p. 311.

⁶⁴ See Art. 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter “GC IV” or “Fourth Geneva Convention”).

such as “chaplains” and “religious personnel” do not appear; reference is made instead to ministers of religion.⁶⁵ A respect-and-protection clause such as that included for religious personnel in the First and Second Geneva Conventions does not exist in the Fourth Geneva Convention for civilian religious ministers; an Occupying Power has to permit these ministers to give spiritual assistance to the members of their religious communities.⁶⁶ If this provision is compared with the parallel provision on medical assistance that speaks of “the duty of ensuring and maintaining”⁶⁷ medical services, the less peremptory and therefore more equivocal character of norms on spiritual assistance becomes evident.

Places of worship are protected under international humanitarian law not as traditional shelters but only if they also form part of a people’s cultural or spiritual heritage.⁶⁸ “Ordinary” religious buildings are protected by their civilian nature and, in case of doubt, are presumed not to be used for military purposes.⁶⁹

The comparison with the comprehensive protection accorded to all those “carrying out medical activities”⁷⁰ has often resulted in wishes for a similarly far-reaching protection of civilian ministers of religion. If the fact that the presence of religious ministers in armed conflict is a demand of «the most elementary sentiments of humanity and respect for the individual”⁷¹ were taken into account, military chaplaincy and civilian ministry would merge and spiritual assistance could be provided in a joint endeavour to both civilians and military personnel. The distinction between religious personnel and civilian ministers of religion with their different levels of protection would cease and an integrated approach would follow instead. Difficulties in the attachment of religious personnel by certain groups of combatants support the call for an integrated approach. Incidents involving weapons of mass

⁶⁵ See GC IV, Artt. 17, 38 (3), 58 and 91 (2) and (3).

⁶⁶ See GC IV, Art. 58 (1).

⁶⁷ GC IV, Art. 56.

⁶⁸ See Art. 27 of the 1907 Hague Regulations, Art. 5 of the Convention (IX) concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907; Art. 1(a) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; AP I, Art. 53; AP II, Art. 16.

⁶⁹ See AP I, Art. 52.

⁷⁰ AP I, Art. 16 (1); AP II, Art. 10. See also Anton Schlögel, “Schutz der Seelsorge im humanitären Völkerrecht” in Yvo Hangartner (ed.), *Völkerrecht im Dienste des Menschen*, Haupt, Bern, 1996, p. 278 (on the desire for a similar status for religious personnel).

⁷¹ Pictet, *op. cit.* (note 17), p. 157; Pictet, *op. cit.* (note 38), p. 140.

destruction with indiscriminate effects would in actual fact bring about the integration of assistance to civilians and to military personnel.⁷²

Protection in humanitarian law focuses on religious personnel who can easily be distinguished and whose range of activities is confined to the defence community. This protection with its respect-and-protection clauses cannot simply be transposed to religious activities in a civilian environment, as needs and interests there differ considerably. At the moment, it seems more constructive to discuss specific consequences of the relevant stipulations on freedom of religion as protected by human rights instruments in situations of armed conflict, rather than merely calling for an application to civilian religious activities of humanitarian law norms protecting military chaplaincy. It is certainly not excluded that such an approach will result in similarly developed levels of protection — of religious personnel under humanitarian law, and of civilian ministry under human rights law.

The religious character of religious personnel

The term used to denote the protected category of spiritual assistants was changed with the Additional Protocols to the generic name “religious personnel”. The term “chaplains” that had been used earlier in the Geneva Conventions was only used by way of example because of its Christian connotation.⁷³ The underlying concept, however, did not change: the current legal set-up is based on a vertical understanding of religion, thus on a hierarchical structure of religion. It presupposed a class of priests or clergy who are indispensable for the religious practice of the faithful serving in the military. The right of retained religious personnel to directly address the authorities of the Detaining Power⁷⁴ underscores that even the Geneva Conventions attribute a leadership function to them. As the etymological origin of the term “hierarchy” implies a religious context this notion is not unfamiliar to many religions, some of which, also for reasons of security for their personnel, gave input to the drafting process of both the Geneva Conventions and the Additional Protocols.⁷⁵

⁷² See Karen H. Stocks, “Understanding the chaplain’s role in an age of weapons of mass destruction”, *Military Medicine*, Vol. 166, 2001, Suppl. 2, p. 55 (calling for an intervention strategy on the part of both religious personnel and civilian ministers); see also Nicolas, *op. cit.* (note 5), p. 311 (on the stimulation of “indiscriminate” spiritual assistance by modern means of warfare).

⁷³ See Sandoz, Swinarski and Zimmerman (eds.), *op. cit.* (note 20).

⁷⁴ See GC III, Art. 33 (2)(b).

⁷⁵ For a complete list of participating religious organizations, see Hiebel, *op. cit.* (note 42), p. 118. Muslim representatives also joined in the drafting process of the 1977 Additional Protocols.

However, there are a number of religious communities with a horizontal structure and the concept of an evenly ranked membership, as is the case for many of the so-called new religious movements such as Rastafarianism and some groups of evangelical Christianity. The understanding these communities have of themselves not only challenges national constitutional law in many countries to revise its definition of religion from either a subjective or objective point of view, but also questions the privileged position religious ministers have acquired in some countries over time. Moreover, the domain of spiritual assistance is no longer exclusively reserved for religious groups; the constitutional set-up of some countries guarantees the equality of religions and philosophical convictions, thus equality also in terms of access to the military. The armed forces of the Netherlands, for instance, attach a group of humanist counsellors to their ranks. Naturally, these counsellors do not play a vital role in the practice of a philosophical conviction. Their function is limited to providing, from a humanist perspective, assistance and guidance in matters of existential importance. Their services are optional and can be freely accepted or declined by the individual members of the armed forces.

The international community has been reluctant to adapt its conceptual understanding of spiritual assistance to the emergence of new phenomena such as those mentioned above. Questions of definition and recognition of religions — issues known to be controversial in national constitutional law — have also been raised in the context of humanitarian law, particularly when arguing what makes religious personnel religious. During the Cold War, this debate focused on political officers who — despite significant differences — performed functions (particularly in their concern for morale, families, free time and personal counsel) that in another societies were carried out by chaplains. The Humanitarian Law Manual of the German Ministry of Defence, for instance, interprets the “religious” restrictively and only sees “genuine” religious personnel covered.⁷⁶

Protection for personnel involved in spiritual assistance without a reference to a religion was a matter of argument in 1975 during the Geneva Diplomatic Conference that ultimately rejected a Dutch proposal to protect personnel carrying out a function similar to that of religious personnel.⁷⁷ Nonetheless, Additional Protocol II changed the protection of “religious convictions and practices” to a protection of “convictions and religious

⁷⁶ See Rabus, *op. cit.* (note 28), p. 369.

⁷⁷ See Hiebel, *op. cit.* (note 42), pp. 359-361.

practices”⁷⁸ in order to ensure respect for philosophical and political convictions as well. And opinion within the international community meanwhile seems to have shifted: the Elements of Crime of the International Criminal Court apply the protection of religious personnel likewise to «those non-confessional non-combatant military personnel carrying out a similar function”.⁷⁹

Conclusion

Although the national institutional frameworks for religious personnel vary, they provide spiritual assistance to troops in the field and focus their attention on the often existential spiritual needs of individual members of the armed forces. Attached as they are to a military environment but remaining non-combatants, they are exposed to danger. In response, international humanitarian law has drawn up an adequate legal regime of protection, which stands almost entirely undisputed with only a few minor exceptions. A similar level of protection for the domain of civilian ministry will most likely only be reached by strengthening the human rights safeguards for freedom of religion in armed conflict as well.

Issues concerning the exercise of religion and conviction in a military environment and the equal access of different religious communities to the armed forces are primarily dealt with in national constitutional and public law. With the increasing international recognition of religious freedom in recent decades, a development towards religious pluralism can be observed worldwide. The momentum of this development affected the concept of spiritual assistance in international humanitarian law only marginally, but when it did, humanitarian law proved its ability to respond dynamically to ongoing processes, as the example of a protection for non-confessional spiritual assistants has shown.

An issue that remains problematic is the implementation of a neutral attitude of religious personnel consistent with their non-combatant status. A helpful guideline in this regard is that the focus should be placed on the spiritual necessities of members of the armed forces rather than on military necessities. Guantánamo is evidence that religious activities still play an

⁷⁸ GC IV, Art. 27, and API, Art. 4 (1). See also Sandoz, Swinarski and Zimmerman (eds.), *op. cit.* (note 20), p. 1370, para. 4522; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 213.

⁷⁹ Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002, Official Records, UN Doc. ICC-ASP/1/3, Part. II B, p. 145, note 56.

important part in the lives of persons who have lost their freedom and whose “inner life tends to grow in importance”.⁸⁰ The camp on the island of Cuba has been a place of ministry across front lines — a concept not unfamiliar to international humanitarian law. This service and its neutral character must be maintained and any ambivalence in the function of religious personnel must be avoided.

⁸⁰ Jean Pictet, *The Geneva Conventions of 12 August 1949, Commentary*, Vol. 3, International Committee of the Red Cross, Geneva, 1960, p. 225.

Résumé

Servir Dieu et César: le personnel religieux et sa protection en cas de conflit armé

Stefan Lunze

Les ministres du culte remplissent, dans les situations de conflit armé, une fonction particulière qui leur a valu non seulement de la reconnaissance, mais aussi une protection juridique. Cette protection, qui trouve son origine dans le droit religieux, est maintenant consacrée par le droit international séculier. Le personnel religieux attaché aux forces armées et exclusivement voué à son ministère doit être respecté et se voit accorder une protection spéciale en cas de conflit armé. Cet article examine le statut juridique actuel des aumôniers lorsqu'ils apportent une aide spirituelle aux combattants et aux prisonniers de guerre. L'auteur compare la protection dont ils jouissent à celle dont bénéficient les ministres du culte dans la société civile et évoque la possibilité de fusionner l'exercice du culte dans un contexte militaire avec celui du culte civil pour que les uns et les autres bénéficient d'une protection équivalente. Il analyse par ailleurs la fonction spécifique qu'exerce le personnel religieux dans les situations de conflit armé, son caractère religieux ainsi que les développements récents en matière d'aide spirituelle non confessionnelle. Il traite enfin des limites que le personnel religieux doit respecter pour préserver sa neutralité et de la situation particulière du personnel religieux exerçant son ministère auprès des personnes détenues à Guantánamo.