

Selected articles on international humanitarian law

Name, rank, date of birth, serial number and the right to remain silent

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Abstract

This article analyses recurring misconceptions about the questioning of prisoners of war. The author takes a twofold approach, first considering matters relating to the identification of prisoners of war, namely contemporary issues such as the use of modern identification techniques, and then discussing interrogation procedures that go beyond the establishment of a prisoner's identity. In this context particular attention is given to the question whether and, if so, at which point in time a prisoner of war starts to benefit from fair trial rights, namely the right to remain silent, the right not to incriminate oneself and the corresponding right to be informed about these fair trial protections.



Introduction

Time and again there has been confusion as to the subjects on which prisoners of war may be questioned by their captors. A variety of practices, as well as the fact that prisoners of war are indeed obliged to render certain information to their captors and that the wilful omission to do so may be subject to certain pre-defined sanctions, has at times fostered a certain gallimaufry of interpretations of the relevant provisions in humanitarian law. While the respective legal provisions, namely Article 17 of the Third Geneva Convention (GC III), are quite clear, the issue has particularly broad implications today in that the gathering of information about the enemy, their identity and whereabouts has become a

strategic goal of primary importance. Whatever the reason, be it the asymmetric nature of many contemporary conflicts, the relevance of non-State Parties or a choice of policy, in many cases it would seem that prisoners of war, rather than being questioned when taken prisoner, are being captured with the primary aim of questioning them.

Throughout history captors have undoubtedly always taken the opportunity to gather information about the enemy from their captives. But in view of the to some extent unfathomable phenomenon of international terrorism, the frequent tendency of the weaker party in asymmetric conflict to seek to gain a comparative advantage by operating in secrecy, and the fact that for terrorist networks in particular the concealment of their members' identity by use of various aliases is part of their operative strategy, assembling information about this shadowy enemy is indispensable for any effective counter-strategy.¹ At the same time, and arguably because of the aforesaid tendencies, the distinction between matters of warfare and issues mainly concerned with criminal law enforcement is becoming increasingly blurred. Investigatory questioning aiming to establish an individual's criminal responsibility thus may overlap with regular prisoner-of-war interrogation procedures.

From the standpoint of the detaining power this raises two questions: how far does prisoner-of-war status protect the person concerned from these different modes of questioning; and how far and from which point in time does a prisoner of war benefit from established fair trial rights, e.g. the right to remain silent or the right not to incriminate oneself and the corresponding right to be informed about these fair trial protections?² In response to these questions the present article gives a brief analysis of humanitarian law provisions relating to the questioning of prisoners of war, notably Article 17 of the Third Geneva Convention. Besides clarifying recurring misconceptions about this particular provision — misconceptions which may partly explain why State Parties might be tempted to interpret POW status rather restrictively — the analysis also covers the increased demand of captors for information from prisoners of war and the greater likelihood that the latter will be subjected to criminal law proceedings.

1 Examination of the status question, i.e. who is eligible for POW status under GC III, Article 4, would go beyond the scope of this brief analysis. For an overview see Knut Dörmann, "The legal situation of unlawful/unprivileged combatants," *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp. 45–74.

2 Even though the right to notification of fair trial rights is not explicitly mentioned in either international humanitarian law or the International Convention on Civil and Political Rights (ICCPR), it is inherently attached to the substantive fair trial rights, such as the right to remain silent, which would otherwise be rendered meaningless since in order to exercise one's rights one must know of their existence. Consequently the right to be informed of one's fair trial rights prior to questioning is prescribed in Rule 42 of the Rules of Procedure and Evidence of the ad hoc Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as in Principle 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA/RES 43/173 of 9 December 1988, available at: <http://www.unhcr.ch/html/menu3/b/h_comp36.htm> (last visited 26 of July 2005).

Article 17 of the Third Geneva Convention

Article 17 of the Third Geneva Convention, entitled “Questioning of prisoners,” is the key provision in that regard. Although apparently worded rather restrictively, in that it seems to apply merely to prisoners of war *stricto sensu*, the said article is in fact intended to regulate the interrogation procedure whereby a captive’s real identity and status is to be determined. The protective scope of Article 17 consequently also extends to captives whose status has not yet been clarified and who are benefiting from the presumption of POW status set out in GC III, Article 5. For the sake of clarity, Article 17 may be divided into two substantive strands, i.e. identification of captives, and questioning that goes beyond the mere determination of a prisoner’s identity and status.

Identification

The identification of combatants and civilians in times of war has been a predominant humanitarian concern ever since the second half of the nineteenth century, when Prince Anatole Demidoff opened the first information bureau during the Crimean War (1854-1856) in order to centralize and exchange lists of prisoners of war,³ thus ending the isolation of POWs whose existence was virtually forgotten in the great wars before 1815.⁴ Only a few years later, in the Franco-Prussian War, the Prussian Army for the first time issued identification disks and required each Prussian soldier to carry an identification card, referred to at that time as his *Grabstein* (tombstone).⁵ During the two world wars of the 20th century, the Basel Agency and the International Prisoners of War Agency served those same purposes,⁶ but despite all the efforts made, identification in the chaos and anarchy of war has remained problematic. The Tomb of the Unknowns at Arlington National Cemetery and the Tomb of the Unknown Soldier beneath the Arc de Triomphe in Paris are timeless reminders of the many unidentified soldiers who have died in action.⁷

3 Francois Bugnion, *The ICRC and the Protection of War Victims*, Macmillan Publishers, 2003, p. 556.

4 Prince Anatole Demidoff in a letter read out by Henry Dunant to the Constituent Conference of October 1863, See *Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863 pour étudier les moyens de pourvoir à l'insuffisance du service sanitaire dans les armées en campagne*, Imprimerie Fick, Geneva, 1863, p. 28.

5 See H. W. Elliott, *Identification*, available at: <<http://www.crimesofwar.org/thebook/identification.html>> (last visited 26 July 2005).

6 For a general account see Gradimir Djurovic, *The Central Tracing Agency of the ICRC*, Henry Dunant Institute, Geneva, 1986.

7 Today Article 33.4 of 1977 Protocol I additional to the Geneva Conventions (hereinafter AP I) stipulates: “The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.”

In the aftermath of World War II the Geneva Conventions established a well-organized system for the identification of soldiers in general; for example, Articles 16 and 17 of the First Geneva Convention provide for identity discs to be worn by members of the armed forces to facilitate their identification in case they are killed or wounded⁸ and for the centralization, at national level, of information on POWs and civilian prisoners. Provision was also made for a Central Prisoners of War Information Agency responsible for the transmission of such information (GC III, Art. 123 GC III; GC IV, Art. 140).

Another crucial aspect of the identification of combatants is the identification of captured combatants, i.e. prisoners of war.⁹ Apart from its implications in personal terms, i.e. the possibility of informing family members and the power of origin about a person's captivity and establishing regular contact, the identification of prisoners of war serves an important legal purpose, namely the establishment of combatant status. While a uniform may serve as circumstantial evidence of the wearer's status as a combatant in the legal sense,¹⁰ it is not accepted as absolute proof that he or she is indeed a member of the armed forces. Therefore Article 17 of the Third Geneva Convention specifies additional information that a captive is obliged to provide.

By virtue of Article 17.3, each party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war with an identity card containing at least the bearer's surname, first names, rank, army, regimental, personal or serial number and date of birth, or failing this, equivalent information. Further information may be added to the card at each party's discretion. As a corollary and to ensure that this identification system runs smoothly, each prisoner of war, according to Article 17.1, "is either bound to give (...) his surname, first names and rank, date of birth, and army regimental, personal or serial number, or failing this, equivalent information" when questioned, or to show his identity card upon demand (Article 17.3).

This form of identification is intended to enable the detaining power to determine whether the captive is eligible for prisoner-of-war status in the first place and to accord the respective prisoner the treatment to which he or she is entitled, given that under GC III, Articles 44 and 45, all prisoners of war must be treated with the regard due to their rank and status.

8 See Resolution I, 24th International Conference of the Red Cross, Manila, 1981, reprinted in: *Handbook of the International Red Cross and Red Crescent Movement*, 1994, p. 788.

9 Similarly, but in more general terms, any person interned/administratively detained must be registered and held in an officially recognized place of internment/administrative detention. Information that a person has been taken into such custody and on any transfers between places of detention must be available to that person's family within a reasonable time; see GC IV, Arts. 106 and 138. "The entire system of detention laid down by the Conventions, and in which the ICRC plays a supervisory role, is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to the ICRC." See Jelena Pejic, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence," *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, p. 385.

10 See Toni Pfanner, "Military uniforms and the law of war," *International Review of the Red Cross*, Vol. 86, No. 853, March 2004, pp. 93–130.

In view of these provisions, the establishment of identity has always been thought to be in the interest of the person concerned, which is why a captive's failure to comply with the relevant obligation is sanctioned by a restriction of the privileges accorded under Article 17.2 to his or her rank or status.¹¹ It must be stressed that this entails merely the withdrawal of privileges to be accorded to officers, non-commissioned officers or persons of similar status;¹² it does not in any way entail the withdrawal of other benefits accorded to prisoners under the Convention.¹³ Today, however, the shift from classic inter-State warfare to global operations and asymmetric forms of conflict has somewhat altered, at least in certain cases, the interests on which Article 17 was based at the time of its adoption. In times when lists of names of terrorist suspects are circulated and when anyone whose name appears in official or secret service listings may face disadvantages, as the questioning and subsequent refusal of entry to the US of Yusuf Islam, alias Cat Stevens, has shown, it can hardly be said that identification in prisoner-of-war camps is always in the captives' interest. It would seem unrealistic to believe that the primary purpose of identifying the prisoners at Guantanamo Bay would be to accord them the privileges which are due to their rank and age, even if they were accorded the POW status to which they are entitled. On the basis of such perceptions and to evade criminal prosecution, many prisoners of war today may be inclined to conceal their real identity from their captors. This raises the question as to which measures a detaining power may employ to establish the identity of prisoners who withhold the information they are required to give under GC III, Article 17.1.

It is fairly common to most national jurisdictions for a person to be subject to, and *ultima ratio* forced to accept, identification measures such as fingerprinting, photographing or DNA swabs for purposes of criminal law enforcement,¹⁴ if those measures are taken in accordance with applicable human rights law. Given the increased strategic value of identification of prisoners of war, the question arises whether similar measures would be permissible in their case as well. At face value, Article 17 of the Third Geneva Convention seems to prohibit any form of coercion and hence the employment of any such identification measures without the captive's consent. Even though the provisions of Article 17 oblige POWs to provide information relevant for their identification, as worded, they leave them some leeway either to abide by the rule or to jeopardize the privileges accorded to their rank and status. This could be interpreted as an indication that the captive concerned must be left with some degree of choice whether or not to disclose his or her identity.

11 This is a well-established rule, laid down already in Art. 29 of the 1874 Brussels Declaration; Art. 65 of the 1880 Oxford Manual; Art. 9 of the 1899 and 1907 Hague Regulations and Art. 5, para. 2, of the 1929 Convention relative to the Treatment of Prisoners of War.

12 These privileges are laid down in GC III, Arts. 16 and 39 para. 3; Art. 40; Art. 44 and 45; Art. 49 paras. 1,2,3; Art. 60; Art. 79 paras. 2,3; Art. 87 para. 4; Art. 97 para. 3; Art. 104 para 2; Art. 122 para. 4. See *Commentary on the Geneva Conventions of 12 August 1949*, Vol. III, *Geneva Convention relative to the Treatment of Prisoners of War*, Jean Pictet (ed.), ICRC, Geneva; 1960, pp. 159 f.

13 See draft text approved by the Conference of Government Experts: "Should the prisoner of war deliberately infringe this rule, he may be liable to restriction of the privileges granted to prisoners of war of his rank or status, over and beyond the rights conferred by the Convention on prisoners of war in general," Report on the Work of the Conference of Government Experts, p. 123.

14 With regard to the respective anti-terror legislation in Italy, see *Neue Zürcher Zeitung*, 2 August 2005.

Moreover, stronger indications are given in the said article's fourth paragraph, the first sentence of which stipulates that neither physical nor mental torture "nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever." The following sentence is an even more general stipulation that "[p]risoners of war who refuse to answer may not be exposed to any unpleasant or disadvantageous treatment of any kind." "Information of any kind whatever" comprises information relating to a person's identity, and determination of the identity of a prisoner who refuses to abide by the obligation laid down in Article 17.1 could potentially be highly "disadvantageous." The logic and wording of GC III, Article 17, consequently seem to imply that POWs may not be compelled to reveal their identity and that no coercive measures whatsoever may be taken to that effect on behalf of the captors. Thus, if this line of argumentation is pursued, it would follow that even though a POW is under an obligation to provide information leading to his identification, he may not be compelled to do so, i.e. he cannot be forced to give his fingerprints or a DNA sample.

However, the question remains whether in certain instances a somewhat more liberal approach, exceptionally allowing coercive identification measures, would be justified by virtue of the very *telos* of the Third Geneva Convention to establish legal clarity with regard to a prisoner's identity and status.

The absolute prohibition of any coercive identification measures could lead to a *non-liquet* constellation, i.e. a situation in which a person's identity and status as a combatant could not be established at all. It could be argued that such a scenario would contradict the presumption underlying the Third Geneva Convention, particularly evident in Article 5.2, that every captive's status as a combatant and hence that the captive's identity, inasmuch as this constitutes a prerequisite to the confirmation of status, is to be determined at some point. Secondly, Article 85 of the Third Geneva Convention presupposes the possibility to prosecute prisoners of war for acts committed before capture. Again, this presumption would be rendered void if a captive's identity could not be established, i.e. if prisoner-of-war status served as a protective veil against identification, and if persons who "unlawfully" participated in hostilities would thus be able to evade their criminal responsibility under domestic law — as would the perpetrators of war crimes.

In order to determine which of the foregoing considerations could suffice to justify coercive identification measures that interfere with individual rights to dignity, privacy and physical integrity and contravene the prohibition of coercion in the first sentence of GC III, Article 17.4, recourse must be had to the principle of proportionality.¹⁵ This principle can be described as twofold in that it demands

15 See ICCPR, Art. 17. It should be noted that the derogable rights laid down in Art. 17 are not absolute (see ICCPR, Art. 4, para. 2). The ICCPR's Article 17, as worded, merely protects from arbitrary and unlawful interference. In general, the protection of personal data raises numerous questions under human rights law with regard to procedures, consent, processing, storage, use and deletion. Consideration of these highly topical questions would clearly go beyond the scope of the present analysis. As a starting point for information about them, see the Universal Declaration on the Human Genome and Human Rights, UN Doc. A/RES/53/152 (1999); International Declaration on Human Genetic Data, 16 October 2003, 32nd session of the General Conference of UNESCO, available at: <http://portal.unesco.org/shs/en/file_download.php/6016a4bea4c293a23e913de638045ea9Declaration_en.pdf> (last visited 26 July 2005).

that the measure in question must be necessary and must constitute an adequate response in relation to the disadvantages it causes.

So first a measure must be necessary, i.e. it must be designed in such a way that it can reasonably be expected to achieve its desired/legal objective. It should be noted that both fingerprints and DNA samples are in fact worthless for purposes of identification if they cannot be cross-matched with a counter-sample. However, Article 17 of the Third Geneva Convention does not, for instance, authorize the setting up of a comprehensive DNA database for preventive screening, i.e. a collection of samples that could help to identify persons in the future. Thus only measures suitable to ascertain or confirm a person's identity right away would meet the aforesaid reasonable expectation requirement. Moreover, if legal clarity as to the precise status and identity of a person can be established merely by reference for instance to a prisoner's serial number, the identification objectives of Article 17 could be fulfilled without recourse to any further identification measures. If after such a form of preliminary identification the suspicion remains that the person might have been involved in criminal activities, the gravity of which warrants additional measures, further identification procedures subject to the criterion of adequacy could be justified.¹⁶

Second, the proportionality principle demands that a measure be adequate, i.e. that the advantages associated with it prevail over its disadvantages. There can be little doubt that the interest of the international community in the prosecution of war crimes would prevail over a captive's interest to keep his identity concealed. In this regard the presumption in GC III, Article 85, namely that the capacity to prosecute prisoners for actions committed before capture is maintained, overrides the individual captive's interests. But it seems rather doubtful whether the general suspicion of having "unlawfully" participated in hostilities and thus being liable under domestic criminal law would likewise suffice to justify coercive measures. With respect to relatively minor measures such as fingerprinting and the taking of DNA mouth swabs, it could be argued *a majore ad minus* that if persons suspected of criminal behaviour may be compelled to undergo identification measures in peacetime, the same should apply in wartime.¹⁷ However, even though the Third Geneva Convention generally aims to establish legal clarity with regard to a person's identity and status, Article 17 itself is evidence that in times of international armed conflict this rather general aim *ab initio* is normally outweighed by individual interests in not being compelled to render "information of any kind whatever." The fact that Article 17 merely provides for the withdrawal of certain privileges if a person refuses to render the information necessary to establish his identity indicates the inherent presumption

16 With regard to the criterion of adequacy, see pp. 7-8 below.

17 Even in peacetime it is accepted that limitations on the principle of consent to such identification measures can be prescribed for compelling reasons, see e.g. International Declaration on Human Genetic Data, Article 8(a), second sentence, *op. cit.* (note 15). However, the mere suspicion alone of having "unlawfully" participated in hostilities would not necessarily amount to the gravity necessary to justify coercive identification measures in peacetime, unless the person who has allegedly "unlawfully" participated in hostilities is, by virtue of having done so, simultaneously suspected of having committed crimes such as murder or attempted murder.

that in certain cases a person's identity may remain unclear. It follows that the mere aim to identify a prisoner's correct military rank and status by virtue of the system laid down in Article 17 could not justify coercive identification measures. Similarly, given that coercive identification measures constitute an infringement of a person's right to dignity, privacy and physical integrity — rights that are inherently protected by that same article — the suspicion of “unlawful” participation in hostilities in and of itself would not suffice to legitimize such measures. Thus only in the case of suspected criminal behavior tantamount to a war crime would coercive identification measures vis-à-vis prisoners of war meet the requirement of adequacy and thus be proportional.

Finally, it should be noted with regard to the methods commonly employed for such identification that the use of measures such as fingerprinting or the taking of DNA swabs, thus methods other than questioning or having recourse to an identity card, is not entirely incompatible with Article 17 of the Third Geneva Convention. According to Article 17.5, the identity of (such) prisoners “who owing to their physical or mental condition are unable to state their identity (...) shall be established by *all possible means*, subject to the provisions of the preceding paragraph” (emphasis added). In those cases fingerprinting would seem to be the means of choice. Furthermore, identification measures such as fingerprinting or the taking of DNA swabs, even if carried out against the will of a captive, would not normally violate the obligations laid down in GC III, Articles 13 and 14, i.e. that prisoners of war must be treated humanely at all times and that their persons and honour must be respected.¹⁸ Insofar as the physical integrity of POWs is protected under Article 14, this is usually understood as a prohibition on killing or wounding a prisoner or otherwise endangering his/her health and physical well-being.¹⁹ Minor measures such as fingerprinting or the taking of DNA swabs usually remain below the threshold of this prohibition.²⁰ The classification of more intrusive methods,²¹ especially the taking of blood samples, seems far more problematic, given that Article 11 of 1977 Additional Protocol I prohibits the extraction of blood samples unless they are intended for therapeutic purposes.²²

18 GC III, Art. 13, stipulates that “no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.”

19 *Commentary on the Third Geneva Convention*, *op. cit.* (note 12), p. 143.

20 In addition, the procedure would not amount to a medical or scientific experiment prohibited under GC III, Art. 13.

21 For a definition of and differentiation between invasive and non-invasive procedures, see International Declaration on Human Genetic Data, Art. 2 (vii), (viii), *op. cit.* (note 15).

22 AP I, Art. 11, bans “any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.” Art. 11, para. 2(c) stipulates that “the removal of tissue or organs for transplantation” is prohibited without the consent of the person concerned, and Article 11 para. 3 provides that “[e]xceptions to the prohibition in paragraph 2(c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.”

So despite the rather restrictive wording of GC III, Article 17.4, which seems to imply that the use of identification measures such as fingerprinting and DNA swabs against a POW's will would be prohibited under all circumstances, in light of the overall *telos* of the Third Geneva Convention and especially the inherent presumption that criminals must be brought to justice, such identification measures may be employed — though *ultima ratio* and subject to the principle of proportionality — even against the will of the captive.

Information beyond that required to establish a prisoner's identity

The second component of Article 17 relates to questioning for purposes other than, or more precisely that go beyond, POW identification. First of all, in view of the continuous misconceptions in that regard, it should be noted that the Third Geneva Convention contains no prohibition whatsoever on questioning that goes beyond the establishment of a prisoner's identity. Thus, a prisoner of war may be questioned on any subject; merely with regard to the methods used, Article 17.4 complements the general obligation in GC III, Article 13, to treat prisoners of war humanely and spells out the prohibition of coercion.

With regard to subject matter, two main lines of questioning seem likely.

Traditionally, it is an accepted fact that parties to a conflict will always try to obtain strategic and tactical military information from their prisoners.²³ Obviously, the higher the rank of a combatant prior to capture, the more important he will be as a source of potential information for his captors. In this sense, too, the precise identification of a prisoner of war is clearly in the interest of the detaining power. However, even lower-ranking soldiers may carry valuable information about the enemy's position, numbers, movements and routes, whereas higher-ranking prisoners may have more information about actual tactics and future strategies. Either way, such questioning is designed to gather general military information, irrespective of a prisoner's individual involvement and responsibility, and is in no way related to any criminal charges. A prisoner of war would therefore not normally benefit from fair trial rights at this stage. Nevertheless, prisoners of war are under no obligation whatsoever to answer any questions that go beyond the determination of their identity. Indeed, combatants are commonly instructed by their superiors to remain silent during such questioning procedures.

Secondly, prisoners of war may be questioned so as to establish their personal involvement in certain acts committed before capture, with a view to potentially prosecuting them for unlawful behaviour. With the evolution of international criminal law, the proliferation of international and internationalized criminal tribunals and an increasing incorporation of the respective international crimes into national jurisdictions, the likelihood of investigation of prisoners of war to determine their possible involvement in criminal activities has become much greater. In

23 See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 251.

this connection it should be noted that certain fair trial rights may come into play long before the actual trial commences, for instance the right to be informed of the charges, the right to remain silent or the right not to incriminate oneself. This raises the question as to the point in time at which a prisoner of war suspected of having committed a crime would start to benefit from these fair trial provisions.

While each of these two sets of issues during the interrogation phase may raise questions of its own, the situation becomes problematic when the two lines of questioning coincide. General Manuel Antonio Noriega and more recently Saddam Hussein are each a case in point. Noriega was accorded POW status and was subsequently tried in the US on eight counts for drug trafficking, racketeering and money laundering in 1992. As he had held the rank of general in Panama and had been the *de facto* military leader of Panama from 1983 to 1989, he was a valuable source for military information as well as being a criminal suspect. Even more striking is the case of Saddam Hussein who, after having been captured on 13 December 2003, was officially declared by the United States on 9 January 2004 to be a prisoner of war in accordance with Article 4 of the Third Geneva Convention. As former president and commander-in-chief of the Iraqi armed forces, Saddam Hussein was in possession of vast amounts of information strategically interesting for his captors, especially with regard to the question, then still unresolved, of possible weapons of mass destruction in Iraq. In addition, since except for the so-called combatant's privilege POW status does not prevent a prisoner from being tried for crimes committed before capture, he will be questioned on his involvement in and individual responsibility for alleged war crimes committed during the 1980-88 Iran-Iraq war and the 1991 Gulf War, and alleged crimes against humanity and genocide in the course of the 1988 Anfal campaign against Iraqi Kurds, the large-scale killings that followed the failed 1991 uprisings in the north and south of Iraq and the brutal repression of the Marsh Arabs.

The case of Saddam Hussein seems relatively straightforward in that, on the basis of various well documented instances, his status as a criminal suspect actually preceded his status as a prisoner of war. However, the situation becomes more difficult when a general interrogation of a prisoner of war gives rise to suspicion that he may have been involved in criminal activities prior to his capture. In this case the objective of the interrogation may, without the captive's knowledge, shift from extracting general strategic and tactical information to determining his personal involvement. Obviously, at this stage of the interrogation the prisoner is not yet an accused and may not even be "a suspect," at least *stricto sensu*. Nevertheless, since POWs are held in continuous captivity they may be particularly vulnerable to unfair forms of interrogation, especially because they may not be aware of the actual purpose of their interrogation and thus be prone to potential self-incrimination.

The prohibition of self-incrimination, which follows from the presumption of innocence, as well as the more general right to remain silent, belongs to the essence of fair trial rights.²⁴ Fair trial rights are safeguarded not only under

24 See ICCPR, Art. 14.

human rights law but also under international humanitarian law.²⁵ Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial constitutes a grave breach under the Third and Fourth Geneva Convention (Articles 130 and 147) and Additional Protocol I (Article 85.4(e), and is a war crime under Article 8.2(a)(vi) of the Rome Statute.²⁶ During the negotiations leading to the adoption of the Rome Statute, an overwhelming majority of States supported the view that the crime may also be deemed to be committed if judicial guarantees other than those explicitly mentioned in the Third and Fourth Geneva Convention, especially the presumption of innocence and other guarantees contained only in the 1977 Additional Protocols, are denied.²⁷ While today there can be no doubt that prisoners of war benefit from the entire panoply of fair trial rights,²⁸ the question remains as to the point in time at which they start to be under the protection of these rights, namely the right to remain silent, the right not to incriminate themselves and to be informed of the criminal charges against them.

The terminology used throughout the framework of international humanitarian law in this regard is not always consistent. Article 104 of the Third Geneva Convention, for example, stipulates that the POW representative concerned is to be informed at the point in time “in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war” of the charges against that prisoner. Article 75(4) (a) of Additional Protocol I, on the other hand, speaks of the “accused” who is to be informed without delay of the particulars of the offence alleged against him. The status of “accused” is a far more specific position than that resulting from the mere decision of the detaining power to institute the proceedings referred to in GC III, Article 104.²⁹ In both the ICC system and that of the ad hoc Tribunals this particular status is

25 GC I, Art. 49, para. 4; GC II, Art. 50, para. 4; GC III, Arts. 102-108; GC IV, Arts. 5, 66-75; AP I, Arts. 71, para. 1, and 75, para. 4; AP II, Art. 6(2). The principle of the right to fair trial is likewise provided for in Art. 17, para. 2, of the Second Protocol to the Hague Convention for the Protection of Cultural Property.

26 With regard to human rights see e.g. ECHR, Arts. 5, 6, 7; ACHR, Arts. 7, 8, 9; ICCPR, Arts. 9, 14, 15, 16; CRC, Art. 40(2) (b) (iii). The UN Human Rights Committee in its General Comment No. 29 on Article 4 of the ICCPR stated that “fundamental principles of fair trial” may never be derogated from. With regard to post-WW II case law see e.g. *Sawada and Three Others*, in UNWCC, LRTWC, Vol. V, pp. 1 ff.; 13 AD 302 at 303-304; *J. Altstötter and Others*, UNWCC, LRTWC, Vol. VI, pp. 1 ff.; 14 AD 278. Common Article 3 of the Geneva Conventions prohibits the sentencing of persons or the carrying out of executions without previous judgment pronounced by a regularly constituted court. The deprivation of fair trial rights also constitutes a war crime under Art. 2(f) of the ICTY Statute, Art. 4(g) of the ICTR Statute and Art. 3(g) of the Statute of the Special Court for Sierra Leone.

27 Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, p. 100. With regard to the customary law status of these fair trial rights see Jean-Marie Henckaerts, *Customary International Humanitarian Law*, Vol. I: Rules, pp. 354 ff.

28 For a listing of the main judicial guarantees laid down in the Geneva Conventions and the 1977 Additional Protocols, see Dörmann, *ibid.*, p. 101. Judicial guarantees entail, *inter alia*, the right of the accused to be judged by an independent and impartial court (GC III, Art. 84(2); AP I, Art. 75(4); AP II, Art. 6(2)); the right of the accused to be promptly informed of the offences with which he/she is charged (GC III, Art. 104; GC IV, Art. 71(2); AP I, Art. 75(4)(a); AP II, Art. 6(2)(a)); and the right of the accused not to testify against himself/herself or to confess guilt (AP I, Art. 75(4)(f); AP II, Art. 6(2)(f)).

29 Rule 2 of the ICTY Rules of Evidence and Procedure defines an accused as “a person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.”

triggered only when a judge has confirmed the Prosecutor's case. Consequently, the status of an accused is normally acquired significantly later than the decision is taken by the detaining power to institute proceedings.³⁰ Remarkably, even within Article 75(4) (a) of Protocol I, i.e. within the specifications of the various sub-paragraphs, the terminology is not utilized in a coherent manner. Sub-paragraph (f), for example, contains no reference to the status of "accused" and thus stipulates without any implied temporal limitation that "no one shall be compelled to testify against himself or to confess guilt." Irrespective of these differences and the implication that some of the fair trial rights would be accorded only to a person who has acquired the formal status of "accused," it has been argued *a majore ad minus* that it would be logical to assume that protection for those who have not yet been accused should be wider rather than narrower.³¹

However, even if this is accepted, the humanitarian legal framework does not specify the particular point in time at which a POW starts to benefit from certain fair trial rights. A more conclusive indication may be derived from the Statutes of the ad hoc Tribunals (ICTY, Article 18; ICTR, Article 17) and their rules of evidence and procedure, which explicitly refer to the status of "suspect"³² Article 42 of the Rules of Procedure and Evidence of the ICTY, under the heading "Rights of Suspects during Investigation," provides *inter alia* that a suspect who is to be questioned by the Prosecutor shall have the right to be assisted by counsel of the suspect's choice, to have free assistance of an interpreter, to remain silent and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence, and, prior to questioning, to be informed by the Prosecutor of all of these rights in a language the suspect speaks and understands. Nevertheless, even though the Rules of Procedure and Evidence thus provide some guidance as to when the rights granted to the suspect must be put into effect, the matter is largely left to prosecutorial discretion, not least because the definition of the status of "suspect" in Article 2 thereof, according to which a suspect is "a person concerning whom the Prosecutor possesses reliable information, which tends to show that he may have committed a crime over which the Tribunal has jurisdiction," remains rather vague.³³

Naturally, it would be good if the rights applicable during the investigatory phase could be triggered at a more precise moment. In the case of prisoners of war, who are regularly questioned from their capture onwards, a suitable time would seem to be when any form of questioning as to their individual involvement in potentially

30 Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, p. 49.

31 *Ibid.*, p. 50. In the context of Art. 10(2) of the ICCPR see also Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd ed., Kehl (2005), pp. 251 f.

32 It is noteworthy that the status of "suspect" was deliberately omitted from the Rome Statute, since the drafters intended to avoid premature criminalization and its omission avoids various problems concerning determination of the moment when a person becomes a suspect. Critics have claimed that rather than solving possible problems, this omission may have created more uncertainty. S. De Gurmendi, "International criminal law procedures – The process of negotiations," pp. 217 ff. See also H. Friman, "Rights of persons suspected or accused of a crime," 247–262, both in R. Lee (ed.), *The International Criminal Court — The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, 1999.

33 Salvatore Zappalà, *op. cit.* (note 30), p. 50.

criminal activities begins. This conclusion is corroborated by the very *telos* of the various fair trial rights which, in order to give meaningful protection, must apply from so relatively early on. It is moreover endorsed by the consideration that a person under suspicion but not yet accused should generally benefit from even greater protection than the accused. Furthermore, the absence of any such fair trial protections during the investigatory phases at the Nuremberg and Tokyo trials probably added to their perception as unfair proceedings.³⁴ Finally, it should be borne in mind that POWs are particularly prone to unfair interrogation, as they may not be able to differentiate between general interrogation and interrogation that is intended to establish their individual responsibility.

Nevertheless, it may not be entirely realistic — at least in certain instances on the battlefield, instances that might differ significantly from such prominent cases as those of General Noriega and Saddam Hussein — to expect that these basic fair trial rights, namely the right not to incriminate oneself and especially to be informed of that right and about the respective charges, will be observed from such an early point in time. This may simply be due to the fact that the captors commence with the interrogation possibly unaware and therefore regardless of criminal charges against their captive. Moreover, unlike police officers, who are trained to follow standardized procedures that provide for the reading to a suspect of his/her rights prior to interrogation — a procedure with which television has familiarized even lay people — military personnel who have captured an enemy combatant are likely to follow far less formalistic procedures geared to the demands of the situation, e.g. a great number of prisoners or the havoc of combat.³⁵

This raises the question as to the consequences of a violation of fair trial rights and the potentially illegal obtainment of evidence. Depending on the circumstances, it may have to be answered with reference to the respective national laws of the detaining power. In this connection the ICTY Trial Chamber in the *Brdjanin* case identified three main approaches which the law might adopt when determining whether evidence obtained by illegal, unlawful or sometimes questionable methods should be admitted in criminal proceedings.³⁶ At the international level some guidance is provided by Rule 89(D) of the ICTY Rules of

34 *Ibid.*, p. 45.

35 While such constellations demand attention, especially in the context of traditional war, the other end of the spectrum, i.e. contemporary asymmetric conflicts between States and non-State Parties, cannot be ignored. Inasmuch as the detention of prisoners of war is akin to that of criminal suspects — an evident feature of asymmetric conflict and especially current endeavours to combat terrorism — the applicable standard of fair trial rights should resemble the full panoply of fair trial rights applicable in peacetime criminal law enforcement.

36 *Prosecutor v. Radoslav Brdjanin*, TC II, Case No. IT-99-36-T, Decision of 3 October 2003, para. 33. The Chamber held that: "Firstly, the law itself may specifically provide for the automatic exclusion of any evidence which has been illegally or otherwise inappropriately obtained; 2. Secondly, the issue of exclusion or admission of such evidence may be left as a matter for the discretion of the judge who has the judicial duty to ensure fairness to the accused; 3. Thirdly, the courts might concern themselves only with the quality of the evidence and not consider its provenance at all; in other words the courts would only seek to find out if the evidence is relevant, reliable and having probative value irrespective of questions whether that evidence was obtained lawfully or unlawfully."

Evidence and Procedure, in combination with Rule 95 thereof, and by Article 69(7) of the Rome Statute of the ICC. According to the said Rule 95, “[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.” Similarly, Article 69(7) of the Rome Statute stipulates that “[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”

Thus, without going into further detail it follows that the violation of fair trial rights does not necessitate the automatic exclusion of evidence or testimonies obtained. Rather, this matter is left to judicial discretion. However, at least the fundamental right not to incriminate oneself, which is arguably most at risk during interrogations of prisoners of war, should be accorded particular weight when balancing fundamental rights of the accused against the essential interests of the international community in prosecuting certain individuals.

Conclusion

The increased strategic importance of identification in contemporary conflicts may induce State Parties to conduct large-scale DNA screening of prisoners of war and to establish comprehensive DNA databases for preventive purposes. Yet even though international humanitarian law does not bar the use of identification techniques such as fingerprinting or the taking of DNA mouth swabs *per se*, in light of Article 17 of the Third Geneva Convention recourse may be had to such measures only *ultima ratio* and only in accordance with the principle of proportionality. Here it seems particularly important to bear in mind that a DNA sample serves as a suitable means of identification for the purposes of that Convention, namely under Article 17 thereof, only if a second sample is readily available for cross-matching and direct identification. No provision is made in international humanitarian law for the collection of personal identity data for purely preventive purposes. Rather, such action would be a violation of Article 17.4, which lays down the general rule that a prisoner of war cannot be coerced into rendering “information of any kind whatever,” and would thus constitute a disproportionate intrusion into the captive’s rights. Even though these limitations could be circumvented by arguing that every unidentified person captured in a combat situation is suspected of having unlawfully participated in hostilities and is therefore a criminal suspect subject to comprehensive identification, recourse must first be had to less invasive measures. The status question can moreover often be solved by reference to other evidence.

Only the well-founded suspicion that a prisoner has committed war crimes or crimes of similar gravity before capture could justify coercive identification measures. In that case such measures appear to be proportional, as

the interest of the international community in the prosecution of such crimes would outweigh a prisoner's interests in keeping his identity concealed, as well as his right under Article 17.4 not to be compelled to render "information of any kind whatever." Otherwise, there is no indication in the humanitarian legal framework that the mere strategic interest of the detaining power in such personal data — however great that interest may be — could justify coercive identification measures vis-à-vis prisoners of war. As for the methods used to compile such data, relevant guidance can be derived from Article 13 of the Third Geneva Convention and Article 11 of Additional Protocol I. It appears that while the taking of mouth swabs is a sufficiently minor procedure not to violate these provisions, the more invasive measure of taking blood samples would be in violation of the Protocol's Article 11.

The Third Geneva Convention does not impose any limits on the subject matter about which a prisoner of war may be questioned. Inasmuch as interrogation procedures are aimed at establishing a prisoner's involvement in criminal activities, that prisoner benefits from the fair trial rights whose protective scope extends into the investigatory phase, namely the right to remain silent, the right not to incriminate oneself and the corresponding right to be informed about these rights and the respective charges. Observance of the said rights is of particular importance because prisoners of war are in a particularly disadvantageous position in that regard: without prior information, they may not be aware of whether they are being interrogated about general matters in the course of a normal procedure or are under investigation for individual criminal responsibility.