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UNITED STATES OF AMERICA
Restoring the rule of law
The right of Guantánamo detainees to judicial review of the lawfulness of their detention

Introduction

On 10 November 2003, the United States (US) Supreme Court agreed to consider the question of "whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba."[1] The Court heard oral arguments in the case on 20 April 2004, and is expected to announce its decision in late June 2004.

For over two years, the United States of America (USA) has detained hundreds of individuals in a detention camp at Guantánamo Bay Naval Base in Cuba in what has been described as a legal black hole.[2] Many of the detainees were captured during the international armed conflict in Afghanistan, but an unknown number were reportedly taken into custody in a variety of other countries, including Pakistan, Iran, Gambia, Zambia and Bosnia-Herzegovina. As of 14 June 2004, there were approximately 600 detainees of about 40 nationalities reported to remain in detention, all but three without charge. The three who as of that date had been charged will not be given a fair trial in a civilian court – or even in a military court – but will face trial before a military commission, an executive body, without right to appeal to a court. Most of the detainees are held in isolating conditions in small cells, and denied access to counsel, families, or any courts. In Amnesty International's opinion, the totality of the conditions of the detainees amounts to cruel, inhuman or degrading treatment. Released prisoners have also alleged that they were tortured or ill-treated during interrogations and as punishment.

Although some individuals have been released from Guantánamo, the remaining detainees have been given no indication of when, or if, they will ever be released. The US government's position is that it is "at war with *al Qaida* and its affiliates, both in Afghanistan and in operations around the world" and that "[t]he law of armed conflict governs this war between the US and *al Qaida* and establishes the rules for detention of enemy combatants.

[1] *Al Odah v. USA*, 124 S. Ct. 534 (2003).

[2] *See* Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 Int'l & Comp. L.Q. 1 (2004) ("The most powerful democracy is detaining hundreds of suspected foot soldiers of the Taleban in a legal black hole at the USA naval base at Guantanamo Bay, where they await trial on capital charges by military tribunals."); R. on the *Application of Abbasi & Anor. v. Sec'y of State for Foreign & Commonwealth Affairs*, [2002] EWCA Civ 1598, para. 64 (U.K. Sup. Ct. Judicature, (C.A.), 6 November 2002) ("[I]n apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole.'").

These rules permit the US to detain enemy combatants without charges or trial for the duration of hostilities."[3] The global "war on terror" is described as a conflict of indeterminate length. On 4 June 2004, Secretary of Defense Donald Rumsfeld said that "the reality is that we remain closer to the beginning of this struggle than to its end."[4]

The US government has told the United Nations that: "Some have erroneously claimed that the United States is violating domestic and international laws that prohibit the 'indefinite' detention of individuals without trial. There is broad authority under the laws and customs of war to detain enemy combatants, without any requirement to bring criminal charges while hostilities last. The detention of an enemy combatant is not an act of punishment but one of security and military necessity. It serves the important purpose of preventing an enemy combatant from continuing to fight against us. There is no law requiring a detaining power to prosecute enemy combatants or release them prior to the end of hostilities. Likewise, under the laws and customs of war, detained enemy combatants have no right of access to counsel or the courts to challenge their detention."[5]

Amnesty International disagrees. To accept the government's position, one has to accept that there is a global "war on terror" between the USA and *al-Qa'ida* governed by rules selected by the USA irrespective of where such a "war" occurs. Amnesty International believes, instead, that the territories and the concrete circumstances in which the confrontation with *al-Qa'ida* actually takes place determine the applicable legal regime, within the existing framework of international human rights and humanitarian law. Thus international humanitarian law applied to the international conflict in Afghanistan between October 2001 and June 2002, whereas human rights law – specifically law enforcement standards – applies to the pursuit of *al-Qa'ida* suspects in European or Middle Eastern countries or elsewhere where no armed conflict is taking place.

In this alleged "war", the executive has assumed sweeping powers to detain, interrogate, charge or try suspected "terrorists" or associates. Amnesty International believes that the government has arbitrarily framed a major part of the law enforcement effort in terms of war, and circumvented fundamental human rights safeguards in the process. Even in situations of armed conflict, the US government has refused to apply relevant rules of international humanitarian law.

The global "war on terror" does not mandate a new legal framework. Any situation or individual is covered or protected by existing international human rights law or international humanitarian law. Human rights are inherent in the human person, as recognized by the Universal Declaration of Human Rights. Human rights treaty law applies to everyone within

[3] *Guantánamo detainees*. Department of Defense. http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf (last visited 10 June 2004).
[4] Secretary Rumsfeld, excerpts of Town Hall Meeting. Department of Defense News Transcript, 4 June 2004.
[5] Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights. E/CN.4/2003/G/73.

the territory or jurisdiction of the state concerned, except to the extent that treaty provisions have been (permissibly) derogated from or a provision of another body of law, specifically international humanitarian law, justifiably supplants it. Wherever possible, the two bodies of law should be read to be consistent with each other. Since both bodies of law aim at protecting the individual, they should be interpreted in a way that gives the greatest possible protection to the individual.

Part I of this memorandum describes the situation of the Guantánamo detainees, including the legal proceedings filed in US courts on their behalf. Part II illustrates the right under international human rights law of all persons in detention to judicial review of the lawfulness of one's detention and to release if that detention is unlawful, a key component of the right not to be arbitrarily detained. There is a clear and unequivocal right to judicial review for all detainees wherever international human rights law governs.

Amnesty International believes that international human rights law now applies to all the detainees held in Guantánamo because the international armed conflict in Afghanistan ended two years ago and the government's treatment of them has remained unchanged by that fact. When that international armed conflict ended, those detained while participating in hostilities were required to be released or charged with criminal offences. Failure to do either is a serious breach of international law. Those persons detained in that conflict who were not entitled to prisoner of war status were civilians entitled to review of their detention from the beginning of their detention. Those detained in countries outside of the zones of international armed conflict and transferred to Guantánamo were always subject to international human rights law. No detainee is known to have been taken to Guantánamo from the international armed conflict in Iraq that was still ongoing at the time of writing. Accordingly, all those held in Guantánamo have the right under international law to judicial review of the lawfulness of their detention and to release if that detention is deemed unlawful.

Part III analyzes the scope for judicial review of the lawfulness of one's detention within international humanitarian law. While prisoners of war to not have recourse to judicial review under international humanitarian law for the duration of the armed conflict because their status is clear, they would have the right to challenge the lawfulness of their detention once the conflict in which they were captured has come to an end and they become entitled to repatriation. Those captured in the armed conflict in Afghanistan prior to June 2002, when the international armed conflict between the USA and Afghanistan is generally considered to have ended, should have been presumed to be prisoners of war unless and until a "competent tribunal" determined otherwise, as required by the Third Geneva Convention. As detailed in the memorandum, Amnesty International believes that such a tribunal should be a judicial body.

Any individual whom a competent tribunal determines is not eligible for prisoner of war status is not without rights. With a few minor exceptions explained below they become "civilians" fully protected under the Fourth Geneva Convention. These individuals had and continue to have the right to review of their detention. This paper cites arguments why this review should be judicial rather than administrative and describes how anyone who does not

enjoy the full panoply of rights under international humanitarian law remains protected under international human rights law.

In any event, the US government, despite speaking in broad terms about applying the laws and customs of war (laws of armed conflict), has refused to grant anyone in Guantánamo prisoner of war status, and, in marked contrast to other international armed conflicts since the Second World War, including the Korean War, the Viet Nam War and the first Gulf War of 1991, has failed to convene any hearings by competent tribunals to determine status. It has also refused to apply the provisions of international humanitarian law relating to the detention of civilians, as well as implementing any of the legal safeguards provided for in international human rights law.

In addition, despite public commitments to the humane treatment of detainees, it has recently been revealed that the US administration's decision not to apply provisions of the Geneva Conventions to those held in Guantánamo may have been motivated by a desire to apply harsher interrogation techniques than it perceived would be allowed under the Geneva Conventions and in order to "reduce the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)".[6] Such revelations, including growing evidence that the US is responsible for acts of torture or other cruel, inhuman or degrading treatment against "war on terror" detainees, bring into even sharper relief the need for judicial review to be granted to the Guantánamo detainees.

In Parts IV and V of this memorandum, Amnesty International shows that, contrary to US government assertions, under international human rights law the right to judicial review of the lawfulness of detention is not restricted to the territory of the state or to peacetime. Part IV shows that states are required to guarantee the right to judicial review to any person under their jurisdiction or control, *even outside the national territory*, and Part V makes clear that the obligation to honour this right is non-derogable and applies *at all times*, including armed conflict or public emergency.

All persons under any form of detention, including individuals detained in law enforcement operations against persons suspected of "terrorist" offences or detained in connection with an armed conflict, are entitled to respect for and protection of their fundamental rights. These rights include, but are not limited to, the right to life, the right to be free from torture and other cruel, inhuman or degrading treatment or punishment, the right not to be arbitrarily detained and the right to a fair trial. These rights cannot be defeated through extradition or transfer, or through any other mechanism that seeks to undermine the fundamental protections accorded to all individuals under international law.

Amnesty International hopes that the US Supreme Court will restore the rule of law by finding that US courts have jurisdiction to consider appeals from the detainees held in Guantánamo. The organization strongly believes that to decide otherwise would be a travesty of justice and confirm Guantánamo Bay as lawless US territory.

[6] Memorandum for the President. From: Alberto R. Gonzales. Subject: Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban. 25 January 2002, Draft, 3.30 pm.

I. The situation of the Guantánamo detainees and the pending US court proceedings

Following the attacks of 11 September 2001, the USA engaged in an international armed conflict when it commenced military operations against the armed forces of the Taleban dominated Afghanistan government and militia forces largely composed of *al-Qa'ida* members. According to US President George W. Bush, the US military operations in Afghanistan were "a part of our campaign against terrorism, another front in a war".[7] On 13 November 2001, President Bush signed a Military Order providing for the detention without trial at an appropriate location and/or trial by military commission of certain individuals who were members of *al-Qa'ida* or who had engaged in, aided or abetted, or conspired to commit, acts of international terrorism.[8] In early January 2002, the USA began transferring individuals captured in Afghanistan to a detention camp at Guantánamo. It subsequently began transferring persons detained in other countries not connected to the armed conflict in Afghanistan to Guantánamo.[9] The vast majority of those who have been or are still held at Guantánamo are not detained under the provisions of the Military Order. Instead, it is asserted that they are held "under the President's authority as Commander in Chief and under the laws and usages of war".[10]

The current US government continues to assert that it may detain foreign nationals indefinitely in the detention camp at Guantánamo pursuant to the laws of armed conflict.[11] It has also, however, stated that its position – that the US courts do not have jurisdiction over the detainees – "does not depend on the existence of a war".[12] According to the US government, their designation by US authorities as "unlawful combatants" strips the detainees of any rights they have under the Geneva Conventions of 1949, whether as prisoners of war or otherwise. Thus, these individuals may be detained indefinitely – potentially for the rest of their lives – pending resolution of the "war on terrorism". Recently, the US government announced that each detainee will have his case administratively reviewed annually to

[7] *See* Presidential Address to the Nation, 7 October 2001, available at: http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html.

[8] Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in The War Against Terrorism, 13 November 2001.

[9] The US presence at Guantánamo is based on the 1903 Lease Agreement between the USA and Cuba and the 1934 Treaty Defining Relations with Cuba. *See* Agreement Between the USA and Cuba for the Lease of Lands for Coaling and Naval Stations, 16-23 February 1903, US-Cuba, T.S. 418; Treaty Defining Relations with Cuba, 29 May 1934, US-Cuba, T.S. 866.

[10] *Rasul v Bush*. US District Court, District of Columbia. Respondents' motion to dismiss petitioners' first amended petition for writ of *habeas corpus*, 18 March 2002.

[11] *See generally* US Department of Defense, Briefing on Detainee Operations at Guantánamo Bay, 13 February 2004.

[12] *Al-Odah v USA*. Oral arguments, US Supreme Court, 20 April 2004. Justice Stevens: "…supposing the war had ended, could you continue to detain these people on Guantánamo? Would there be jurisdiction? Government: "We believe that there would not be jurisdiction…"…. Justice Stevens: "…your position does not depend on the existence of a war?" Government: "It doesn't depend on that, Justice Stevens, but it's even more forceful. And more compelling."

determine if he continues to pose a threat to the USA, but there still will be no judicial review of any detainee's detention.[13] In addition, the US government contends that certain detainees may be prosecuted before military commissions for violating the laws of war. The US government has declined to recognize the status of any of the detainees as prisoners of war or to recognize any other rights that they have under international humanitarian law or under international human rights law. In particular, it has refused to respect the right of persons whose status as prisoners of war is in doubt to a determination of that status by a competent tribunal. The US authorities have repeatedly claimed that the detainees are being treated humanely, despite emerging evidence to the contrary, including allegations by released detainees.

A. Detention at Guantánamo

As of 14 June 2004, approximately 600 individuals were reported to be held in the detention camp at Guantánamo, although the government has never given precise figures or provided the identities of those held since the first detainees arrived on 11 January 2002.[14] The number of detainees varies due to the continuing transfer of individuals to Guantánamo and the occasional release of some detainees to their home countries or transfer to continued detention there. The detainees have included individuals from approximately 40 countries.[15] Although most of the detainees are adults, some of them elderly, children as young as 13 years old have been among the detainees. Three children who were under the age of 16 when they were taken into US custody were released back to their home country, believed to be Afghanistan, on 29 January 2004 after more than a year in detention.[16] At least two children under the age of 18 are reported to be still held in the base.[17]

Many of the Guantánamo detainees were captured in Afghanistan.[18] Many of these detainees are alleged by the government to be members of the armed forces of the Taleban

[13] Administrative review procedures for enemy combatants in the control of the Department of Defense at Guantánamo Bay Naval Base, Cuba, 11 May 2004.

[14] At the time of writing, the most recent statement of the numbers held at the base had been given on 2 April 2004, when the Department of Defense stated that there were "approximately 595" detainees still held. Department of Defense news release, *Detainee transfer completed*, 2 April 2004.

[15] These countries are reported to include: Afghanistan, Algeria, Australia, Bahrain, Bangladesh, Belgium, Canada, China, Denmark, Egypt, France, Georgia, Germany, Iran, Iraq, Kazakhstan, Kenya, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Qatar, Russia, Saudi Arabia, Spain, Sudan, Sweden, Syria, Tajikistan, Tunisia, Turkey, Uganda, United Kingdom, and Yemen. *See generally* Amnesty International, *USA: The Threat of a Bad Example - Undermining International Standards as "War on Terror" Detentions Continue*, AI Index: AMR/51/114/2003, August 2003.

[16] Department of Defense news release, *Transfer of juvenile detainees completed*. 29 January 2004.

[17] International Committee of the Red Cross. *US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC*, 14 May 2004 Operation update.

[18] *See generally* Amnesty International, *USA: Who are the Guantánamo Detainees? Case Sheet-1 Kuwaiti Detainees*, AI Index: AMR/51/017/2004; Amnesty International, *USA: Who are the Guantánamo Detainees? Case Sheet-2 Bahraini Detainees*, AI Index: AMR/51/033/2004.

dominated government or *al-Qa'ida* members of the militia.[19] Many persons detained in Afghanistan and transferred allegedly had no connection with the armed conflict or to *al-Qa'ida*. In addition, the USA has transferred an unknown number of individuals – who are alleged to be members of *al-Qa'ida* or to have conspired with *al-Qa'ida* – to Guantánamo from other countries. For example, six individuals seized in Bosnia-Herzegovina were transferred to Guantánamo in January 2002 in violation of a Bosnian court order.[20] Reports indicate that individuals originally arrested in Gambia, Iran, Mauritania, Pakistan and Zambia have also been transferred to Guantánamo.[21] Detainees may also have been transferred to Guantánamo via other countries. For example, a Yemeni detainee was reportedly arrested in Pakistan by US agents and held in Jordan for several weeks or months before transfer to the Naval Base.[22] Similarly, an Australian detainee, arrested in Pakistan, was transferred to Guantánamo via Egypt and Afghanistan.[23] He was allegedly subjected to torture in Egypt.[24]

Agents of other countries are reported to have been involved in the interrogation of detainees in Guantánamo. The Department of Defense has acknowledged that various government delegations "have come and they have talked to their detainees", but stated that "we don't talk about what countries come" to Guantánamo.[25] It has been alleged, for example, that members of a Chinese delegation participated in the interrogation of Chinese nationals in Guantánamo, during which cruel, inhuman or degrading treatment allegedly took place.[26]

Originally, the Guantánamo detainees were held at Camp X-Ray, which consisted of hastily constructed steel cages.[27] New detention facilities were constructed at Camp Delta and detainees were transferred there from 28 April 2002. Most of the detainees are now held in maximum security cells approximately 54 square feet in size (5.02 square meters) constructed with metal mesh material on a solid steel frame. Each cell has a metal bed raised off the floor, sink with running water, and a floor toilet. In April 2003 a 160-bed medium

[19] "Guantanamo detainees include many rank-and- file jihadists who took up arms against the U.S., as well as senior al Qaida operatives and leaders, and Taliban leaders." Department of Defense. Guantanamo detainees, http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf.

[20] *See* Amnesty International, *Bosnia-Herzegovina: Letter to the US Ambassador Regarding Six Algerian Men*, AI Index: EUR 63/001/2002, 18 January 2002.

[21] See David Rose, *Guantanamo Bay on Trial*, Vanity Fair 88, January 2004, and generally, Amnesty International: *USA: The threat of a bad example: Undermining international standards as 'war on terror' detentions continue,* AI Index: AMR 51/114/2003, August 2003, http://web.amnesty.org/library/Index/ENGAMR511142003.

[22] Affidavit of Nabil Mohamed Mar'i, 10 April 2004, Sana'a, Yemen.

[23] *Habib v Bush*, Brief for Appellants (consolidated cases). United States Court of Appeals for the District of Columbia Court. Appeals from the United States District Court for the District of Columbia, 24 September 2002.

[24] For example, *Downer rejects medic call on US detainees*. The (Melbourne) Age, 24 May 2004.

[25] Media availability with Commander, US Southern Comman General James T. Hill. Department of Defense news transcript, 3 June 2004.

[26] Amnesty International Urgent Action. Further information on UA 356/03. AI Index: AMR 51/090/2004, 25 May 2004. http://web.amnesty.org/library/Index/ENGAMR510902004.

[27] *See* James Meek, *Welcome to Guantanamo*, The Guardian, 3 December 2003; Ted Conover, *In the Land of Guantanamo*, N.Y. Times Mag., 29 June 2003, at 40.

security facility, Camp 4, was opened and began housing some detainees in communal quarters. According to the military authorities, this facility is "used for detaining enemy combatants who are considered less of a security risk to guards and other detainees, and who have been cooperative in the interrogation process". [28] Another facility, Camp Echo, has been established to hold detainees who are to face executive trials before military commissions. Such detainees are held in solitary confinement. Six detainees, identified by President Bush in July 2003 as eligible for trial by military commission, are believed to have been held in Camp Echo for many months, raising serious concern for their physical and psychological well-being.[29]

As of 14 June 2004, the Department of Defense reported that 146 detainees had "departed" Guantánamo – 134 for release and 12 for continued detention in their home countries.[30] In addition, one individual was transferred to continued military detention on the US mainland in April 2002 after it was revealed that he had US citizenship.[31] Amnesty International fears that some of these transferred detainees may face unfair trial, execution, torture or other ill-treatment in their home countries.[32] According to the Pentagon, "[t]he decision to transfer or release a detainee is based on many factors, including whether the detainee is of further intelligence value to the United States and whether he is believed to pose a threat to the United States."[33]

Some of the released detainees have stated that they have been subjected to conduct amounting to torture or other cruel, inhuman or degrading treatment, including during their time in US custody in Afghanistan prior to their transfer to Guantánamo.[34] These detainees have reported that they were subjected to forced standing and kneeling for extended periods

[28] Joint Task Force Guantanamo. http://www.nsgtmo.navy.mil/jtfgtmo/mission.html.
[29] Amnesty International Urgent Action. Further information on UA 199/03, AMR 51/066/2004 22 April 2004 http://web.amnesty.org/library/Index/ENGAMR510662004.
[30] *Detainee transfer completed*. Department of Defense news release, 2 April 2004. Detainees have been released to several countries, including Afghanistan, Denmark, Iraq, Jordan, Sudan, Tajikistan, Turkey and Yemen, and have been transferred for continued detention to several countries, including Saudi Arabia, Spain and Russia.
[31] DOD transfers Yaser Esam Hamdi. Department of Defense news release, 5 April 2002.
[32] Amnesty International Urgent Action. Further information on UA 356/03. AI Index: AMR 51/090/2004, 25 May 2004. http://web.amnesty.org/library/Index/ENGAMR510902004.
[33] *Detainee transfer completed.* Department of Defense news release, 2 April 2004.
[34] *USA: The threat of a bad example: Undermining international standards as 'war on terror' detentions continue,* AI Index: AMR 51/114/2003, August 2003, http://web.amnesty.org/library/Index/ENGAMR511142003. *An open letter to President George W. Bush on the question of torture and cruel, inhuman or degrading treatment*, AI Index: AMR 51/078/2004, 7 May 2004, http://web.amnesty.org/library/Index/ENGAMR510782004. *See generally* Amy Waldman, *US Military Releases 23 Afghan Detainees*; *2-Tier System at Guantánamo Emerges*, Int'l Herald Trib., 19 March 2004, at 8; Patrick E. Tyler, *Ex-Guantánamo Detainee Charges Beatings*, New York Times, 12 March 2004, at A10; *Ex-Prisoners Claim Abuse by Guards at Guantánamo*, Seattle Times, 20 July 2003; "*They tied me up like a beast and began kicking me*". The Observer (UK), 16 May 2004; Letter to the US Senate Armed Services Committee from Shafiq Rasul and Asif Iqbal, 13 May 2004.

of time, sensory deprivation, sleep deprivation, blindfolding, hooding, cruel use of restraints, sexual humiliation and other forms of physical and mental abuse.[35] The Committee against Torture has expressly held that restraining detainees in very painful positions, hooding, threats, and prolonged sleep deprivation are methods of interrogation which violate the prohibition on torture and cruel, inhuman or degrading treatment.[36] A list of interrogation techniques allegedly approved by the US Secretary of Defense in December 2002 reportedly included "stress positions", hooding, "fear of dogs" and "mild non-injurious physical contact".[37] This list was reportedly revised after being in effect for approximately a month.[38] In early June 2004, a reported subsequent list of 24 interrogation methods approved for use at Guantánamo remained classified.[39] There is additional concern that interrogators at the facility have been given access to detainees' medical records.[40]

The International Committee of the Red Cross (ICRC), an international humanitarian organization, has been granted access to the detainees since January 2002. As of March 2004, the ICRC had facilitated the exchange of around 8,500 Red Cross messages between the detainees and their families.[41] Based on its visits, the organization "has felt compelled to make some of its concerns public, notably regarding the legal status of the detainees" and it has revealed that it has "observed a worrying deterioration in the psychological health of a

[35] In certain circumstances, such conduct amounts to cruel, inhuman or degrading treatment. *See, for example, Ireland v. United Kingdom*, Judgment, Eur. Ct. Hum. Rts., Ser. A, Vol. 25, 13 December 1977 (the use of wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink "constituted a practice of inhuman and degrading treatment"). Reportedly on the advice of Department of Defense lawyers, the USA recently decided to abandon use in prisons in Iraq of hooding detainees, forcing them into stress positions and depriving them of sleep. Julian Coman & Philip Sherwell, *Pentagon forced to drop 'extreme interrogation'*, Daily Telegraph, 16 May 2004.

[36] Among methods of interrogation cited in UN Doc. CAT/C/SR.297, reporting on Israel's compliance with the Convention against Torture; the committee recommended that interrogation by Israeli security officers applying these methods "cease immediately".

[37] *Rumsfeld approved methods for Guantánamo interrogations.* Wall Street Journal, 10 June 2004.

[38] *Id.*

[39] *Guantánamo list details approved interrogation methods*. Washington Post, 10 June 2004. See generally US Department of Defense news transcript of *Media availability with Commander, US Southern Command General James T. Hill.* 3 June 2004. "…And he [Secretary of Defense] approved additional techniques, which I would not describe as harsh, but additional techniques and gave them to me the first part of December [2002]. And we began to use a few of those techniques, a few of these techniques on this individual. We did so for a period of about four to six weeks. Before then and during then, there is discussion, a consternation of were, in fact, we doing the right thing. And the Secretary called me and we talked. And he directed me to stop using those techniques and I agreed."

[40] *Detainees' medical files shared.* Washington Post, 10 June 2004.

[41] ICRC Operational update, 14 May 2004. According to the military authorities, the Guantánamo detainees "do not get newspapers, radio or television. They get mail. It is, in fact read. And if anything that comes in that's censorable, we censor it." Commander, US Southern Command General James T. Hill, Department of Defense News Transcript, 3 June 2004.

large number of [the detainees]."[42] As a result of their continued detention, many detainees now reportedly suffer from psychological problems.[43] The Department of Defense has disclosed that there have been over 30 suicide attempts at Guantánamo. It is reported that a recent decrease in the rate of suicide attempts is the result of the military authorities reclassifying such attempts as "manipulative self-injurious behaviour", and that the total of suicide attempts under the old classification is now over 70.[44]

In July 2003, the Department of Defense announced that six detainees had been made subject to the Military Order of 13 November 2001, and as such were eligible for prosecution before executive bodies (military commissions).[45] It asserted that there was reason to believe that each of the six detainees was a member of *al-Qa'ida* or was otherwise involved in "terrorism" directed against the USA. In February 2004, the USA announced that two of these detainees would be charged with conspiracy to commit war crimes.[46] In June 2004, a third from among the six was charged. Specifically, the three detainees were charged with "willfully and knowingly joining an enterprise of persons who shared a common criminal purpose and conspired and agreed . . . to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism, said conduct being in the context of and associated with armed conflict."[47] No trial date has been set. It was recently reported that the third of the six detainees to be charged, an Australian national, could face a military commission in August 2004.[48] Acquittal by military commission does not guarantee release for a detainee.[49]

Amnesty International has expressed its deep concern about the detention and treatment of foreign nationals at Guantánamo on numerous occasions.[50] Amnesty

[42] International Committee of the Red Cross, Guantánamo Bay: Overview of the ICRC's Work for Internees, 30 January 2004. and operational update 14 May 2004. *See* also Gabor Rona, *"War" Doesn't Justify Guantanamo*, Financial Times, 1 March 2004.
[43] Michael Kirkland, *On Law: Justice in the Face of Terror*, United Press International, 14 November 2003.
[44] David Rose, Vanity Fair, January 2004.
[45] *President Determines Enemy Combatants Subject to His Military Order*, Department of Defense, News Release, 3 July 2003.
[46] *Two Guantanamo Detainees Charged*. Department of Defense, News Release, 24 February 2004.
[47] *USA v. Al Qosi*, Charging Document, 24 February 2004, at 3.
[48] *Australian May Face U.S. Tribunal*. New York Times, 1 June 2004.
[49] Department of Defense news briefing on military commissions, 21 March 2002.
[50] See, for example, *Memorandum to the US Government on the Rights of people in US Custody in Afghanistan and Guantanamo Bay*, AI Index: AMR 51/053/2002, April 2002; http://web.amnesty.org/library/Index/ENGAMR510532002. *Beyond the Law: Update to Amnesty International's April Memorandum to the US Government on the Rights of Detainees Held in US Custody in Guantanamo Bay and Other Locations*, AI Index: AMR 51/184/2002, December 2002. http://web.amnesty.org/library/Index/ENGAMR511842002. *USA: The threat of a bad example: Undermining international standards as 'war on terror' detentions continue,* AI Index: AMR 51/114/2003, August 2003, http://web.amnesty.org/library/Index/ENGAMR511142003.

International continues to consider that the conditions in the detention camp at Guantánamo are contrary to the USA's obligations under international law.[51]

B. The Guantánamo litigation

Three cases have been filed in the USA challenging the Guantánamo detentions.[52] In *Coalition of Clergy v. Bush*, a group of clergy, lawyers, and law professors filed a petition for writ of *habeas corpus* in federal district court on behalf of persons captured in Afghanistan and who were being held at Guantánamo.[53] The petition alleged that the detainees were held in violation of federal law, including treaties of the USA. It, therefore, sought the detainees' release.[54] However, the lawsuit was dismissed by the district court and the Ninth Circuit Court of Appeals, both courts holding that the plaintiffs did not have standing to bring the petition.[55]

In *Gherebi v. Bush*, the brother of one of the Guantánamo detainees filed a petition for writ of *habeas corpus* on behalf of his brother. The district court dismissed the petition, holding that it had no jurisdiction over the case because Guantánamo was "not within the sovereign US territory".[56] However, the court described its ruling as "reluctant" and expressed hope that "a higher court would find a principled way" to provide the remedy of *habeas corpus*.[57] On appeal, the Ninth Circuit reversed the dismissal.[58] The court held that

[51] *Despite Releases, Guantánamo Remains an Affront to the Rule of Law*, AI Index: AMR/51/041/2004, 17 February 2004.

[52] The Guantánamo detentions have been challenged in other forums, including the Inter-American Commission on Human Rights and in British courts. *See Decision of the Inter-American Commission on Human Rights To Adopt Precautionary Measures In Relation to Detainees In Guantanamo Bay, Cuba*, 13 March 2002 (action filed in the Inter-American Commission on Human Rights on behalf of Guantánamo detainees); *R. on the Application of Abbasi & Anor. v. Sec'y of State for Foreign & Commonwealth Affairs*, [2002] EWCA Civ 1598, para. 64 (U.K. Sup. Ct. Judicature, (C.A.), 6 November 2002) (action filed in United Kingdom on behalf of Guantánamo detainees). A renewed claim ("Abbasi II") has been initiated in the UK courts on the grounds that the situation has further changed since Abbasi I, including the new and "substantial grounds to fear a real risk that the Claimants have been and will continue to be subject to abuse amounting to torture and/or inhuman or degrading treatment, as well as that of indefinite and arbitrary detention." Statement of grounds of claimants Feroz Abbasi and Martin Mubanga. In High Court of Justice, Queen's Bench Division in the Administrative Court in the matter of a claim for judicial review, 2 June 2004.

[53] A petition for writ of *habeas corpus* challenges the legality of an individual's detention. If successful, the detainee must be released.

[54] Pursuant to federal law, a *habeas corpus* petition may be filed by someone in detention or by someone acting on the detainee's behalf. This can include family members or agents. This is known as "next-friend" standing. To succeed, there must be a "significant relationship" between the purported "next-friend" and the detainee. Otherwise, the petition will be dismissed for lack of standing.

[55] *Coalition of Clergy v. Bush*, 310 F.3d 1153 (9th Cir. 2002). The Ninth Circuit held that the plaintiffs had no significant relationship with any of the Guantánamo detainees. Therefore, they had no right to bring the petition on their behalf.

[56] *Gherebi v. Bush*, 262 F. Supp.2d 1064 (C.D. Cal. 2003).

[57] *Id*. at 1070.

the USA exercises sole territorial jurisdiction over Guantánamo. Indeed, the court held that Guantánamo is part of the sovereign territory of the USA for *habeas corpus* purposes. Accordingly, *habeas* jurisdiction was available.[59] The *Gherebi* decision was stayed, however, pending the Supreme Court's ruling in *Al Odah*.[60]

Al Odah v. USA involves three separate lawsuits.[61] One lawsuit was filed on behalf of two British citizens and an Australian national who were captured in Afghanistan. Another lawsuit was filed on behalf of an Australian citizen who was captured in Pakistan. The third lawsuit was filed on behalf of 12 Kuwaiti nationals who were captured in Afghanistan and Pakistan. Each lawsuit challenged the detention scheme and sought the release of the detainees. The three cases were subsequently consolidated.

On 30 July 2002, the district court dismissed the three cases, holding that it lacked jurisdiction over the detainees.[62] On 11 March 2003, the D.C. Circuit Court of Appeals affirmed the dismissal. The court held that the detainees had no right to seek a writ of *habeas corpus* because they were beyond the sovereign territory of the USA. According to the court, "[w]e cannot see why, or how, the writ may be available to aliens abroad when basic constitutional protections are not"[63] Thus, "no court in this country has jurisdiction to grant *habeas* relief . . . to the Guantánamo detainees, . . ."[64]

On 10 November 2003, the US Supreme Court agreed to review the decision in *Al Odah*.[65] The Court agreed to consider the following question: "Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba".[66]

In its submission to the US Supreme Court, the US Solicitor General claimed that neither the Constitution nor federal statutes confer jurisdiction on US courts to consider the

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[58] *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003).
[59] In its opinion, the Ninth Circuit expressed concern with the broad scope of the US government's argument. "[A]t oral argument, the government advised us that its position would be the same even if the claims were that it was engaged in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantánamo, the government had never before asserted such a grave and startling proposition. Accordingly, we view Guantánamo as unique not only because the USA's territorial relationship with the base is without parallel today, but also because it is the first time that the government has announced such an extraordinary set of principles – a position so extreme that it raises the gravest concerns under both American and international law." *Id*. at 1299-1300.
[60] *Gherebi v. Bush*, 124 S. Ct. 1197 (2004).
[61] The three cases are: *Rasul v. Bush*, *Habib v. Bush*, and *Al Odah v. USA*.
[62] *Al Odah v. USA*, 321 F.3d 1134 (D.C. Cir. 2003).
[63] *Id*. at 1141.
[64] *Id*.
[65] *Al Odah v. USA*, 124 S. Ct. 534 (2003).
[66] Most of the briefs submitted by the parties and *amici* in *Al Odah v. USA* are available at http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=ytOOAV96a7&Content=91

habeas corpus petitions filed on behalf of the Guantánamo detainees. The Solicitor General based this contention on the World War II-era case, *Johnson v. Eisentrager*, where the Supreme Court held that US courts lacked jurisdiction to consider a *habeas corpus* petition filed on behalf of German nationals who had been tried and convicted by military commissions abroad.[67] In addition, the US Solicitor General contended that the assertion of federal jurisdiction over Guantánamo would have negative consequences for US foreign policy and the "war on terrorism":

> "Exercising jurisdiction over claims filed on behalf of aliens held at Guantánamo would place the federal courts in the unprecedented position of micro-managing the Executive's handling of captured enemy combatants from a distant combat zone where American troops are still fighting; require US soldiers to divert their attention from the combat operations overseas; and strike a serious blow to the military's intelligence-gathering operations at Guantánamo."[68]

The Solicitor General conceded, however, that the detainees are not without some rights. Nonetheless, he dismissed the relevance of international law obligations of the USA, such as the Geneva Conventions, stating that they were "not privately enforceable in a court and instead are designed for enforcement through political and diplomatic channels.[69] The USA does not recognize the extraterritorial applicability of the International Covenant on Civil and Political Rights.[70]

The Guantánamo detainees have argued that they have a right to seek judicial review under both the Constitution and federal statutes.[71] They distinguished *Johnson v. Eisentrager* and explained that it does not preclude judicial review. In contrast to the detainees in *Eisentrager*, the Guantánamo detainees are neither enemy aliens nor have they ever been tried or convicted for their alleged crimes. In addition, the detainees stated that denying them access to any court is "contrary to the most fundamental principles of the rule of law and the law of nations."[72] The detainees added that "it would place the USA outside the established norms of international law should this Court accede to the executive's contention that detaining petitioners outside the territorial sovereignty of the USA insulates the detention from judicial review and deprives the petitioners of all legal recourse."[73] Finally, the detainees challenged the US government's assertion that judicial review would threaten national security.

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[67] *Johnson v. Eisentrager*, 339 US 763 (1950). In *Johnson v. Eistentrager*, the detainees were 21 German nationals who were tried and convicted by a military commission for violations of the laws of war.
[68] Brief for the Respondents at 16, *Al Odah v. USA*, US Supreme Court, Nos. 03-334 and 03-343, at 16.
[69] *Id.*, at 15 (*citing Johnson v. Eisentrager*, 339 US at 789); *see also id.*, at 48 to 51.
[70] Brief for Respondents, *supra.* ["…the ICCPR is inapplicable to conduct by the United States outside its sovereign territory"].
[71] Brief for Petitioners, *Al Odah v. USA*, 321 F.3d 1134 (D.C. Cir. 2003) (Nos. 03-334 and 03-343). *See also* Brief for Petitioners, *Rasul v. Bush*, 321 F.3d 1134 (D.C. Cir. 2003) (No. 03-334).
[72] Brief for Petitioners, *Al Odah v. USA*, *supra,* at 38.
[73] *Id.* at 41.

> "[J]udicial review under our constitutional structure serves as an indispensable check on the power of the executive, particularly in times of crisis, ensuring that our fundamental values will not needlessly be disregarded through the unrestrained zeal of executive officials focused on doing whatever they think is effective to deal with the dangers of the moment."[74]

A large number of *amicus curiae* briefs, including one filed by Amnesty International jointly with other non-governmental organizations, have been filed with the Supreme Court, urging it to reverse the *Al Odah* decision.[75] Briefs have been submitted by former federal judges, diplomats, and military officers. Submissions have also been filed by former US prisoners of war and other detainees such as Fred Korematsu, a Japanese-American who was detained during the Second World War and whose case led to the *Korematsu v. USA* decision.[76] Several *amicus curiae* briefs were also submitted by foreign and international groups on behalf of the detainees, including a brief filed by 175 members of the British Parliament. Even the military attorneys assigned to defend the Guantánamo detainees before the military commissions have submitted an *amicus curiae* brief urging the Supreme Court to recognize a limited right of review by civilian courts.

II. International human rights law and the right to judicial review of the lawfulness of one's detention

The right to judicial review of the lawfulness of one's detention and to release if that detention is unlawful is a key component of the prohibition of arbitrary detention and an essential safeguard of a wide range of fundamental human rights, including the right not to be subjected to torture or to other cruel, inhuman or degrading treatment or punishment.[77] The right to such judicial review is recognized in conventional international law, including in treaties ratified or signed by the USA, as well as in customary international law and general principles of law, a basic source of international law.

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[74] *Id*. at 42.

[75] Brief of *Amici Curiae* bipartisan coalition of national and international non-governmental organizations in support of petitioners, US Supreme Court, *Rasul v. Bush*, Nos 03-334 and 03-343. The US Supreme Court allows interested individuals and organizations to file *amicus* briefs that address relevant issues not already presented by the parties. *See* Sup. Ct. R. 37(1).

[76] *Korematsu v. US*, 323 US 214 (1944) (sustaining the conviction of a US citizen of Japanese ancestry for violating a military curfew order during the Second World War excluding all persons of Japanese descent from designated West Coast areas; the US Congress subsequently awarded reparations to those detained pursuant to that order).

[77] "A key safeguard against torture is for prisoners or others acting on their behalf to be able to invoke the power of the courts to challenge the legality of the detention and otherwise ensure the prisoner's safety. It can also serve as a safeguard against "disappearances" by invoking the courts to locate a person who has "disappeared". Section 4.8, page 102. *Combating torture: a manual for action*. Amnesty International Publications, 2003. http://web.amnesty.org/pages/stoptorture-manual-index-eng

A. Arbitrary detention is prohibited by international law

The prohibition of arbitrary detention is a fundamental right under international law, long recognized by the international community in the Universal Declaration of Human Rights and in treaties, customary international law and general principles of law.

Universal Declaration of Human Rights. Article 9 of the Universal Declaration of Human Rights, which reflects customary international law, states that "[n]o one shall be subjected to arbitrary arrest, detention or exile."[78] According to the *travaux préparatoires*, the term "arbitrary" was meant to protect individuals against both illegal and unjust laws.[79] Therefore, even an arrest or detention implemented pursuant to an existing, but unjust, law can be categorized as arbitrary.

International Covenant on Civil and Political Rights. Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by the USA, formally codifies the prohibition against arbitrary detention.[80] Article 9(1) of that treaty provides that

> "[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

According to the *travaux préparatoires*, the term "arbitrary" meant far more than "illegal" under national law. Cases of deprivation of liberty provided for by law must not be disproportionate, unjust, or unpredictable.[81] Thus, "[i]t is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily."[82]

The United Nations (UN) Commission on Human Rights demonstrated its concern about widespread denial of the right not to be arbitrarily detained by establishing the Working

[78] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[79] Parvez Hassan, *The Word 'Arbitrary' As Used in the Universal Declaration of Human Rights: 'Illegal' Or 'Unjust?,'* 10 Harv. Int'l L. J. 225 (1969); Christopher Keith Hall, *Contemporary universal jurisdiction*, *in* Morten Bergsmo, ed., *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*110 n.3 (Leiden/Boston: Martinus Nijhoff Publishers 2003).

[80] ICCPR, 16 December 1966, 999 U.N.T.S. 171.

[81] In 1964, the United Nations prepared a study on the right to be free from arbitrary arrest, detention, and exile. The study affirmed that the term "arbitrary" was not synonymous with "illegal" and that "the former signifies more than the latter." United Nations, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile 7 (1964). Accordingly, "[a]n arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of the person." *Id.*

[82] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172 (Kehl/Strasbourg/Arlington: N.P. Engel 1993).

Group on Arbitrary Detention in 1991 to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards.[83]

In addition to recognition of the prohibition of arbitrary detention at the international level, each of the regional human rights treaties recognize the prohibition against arbitrary detention.

American Convention on Human Rights. The American Convention on Human Rights, signed by the USA, contains similar provisions and protections.[84] Article 7(3) of the American Convention on Human Rights provides that "[n]o one shall be subject to arbitrary arrest or imprisonment."[85]

The European Convention on Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) provides in Article 5 (1) that "[e]veryone has the right to liberty and security of the person."[86] Article 5 (2) places strict limits on the right of the state to detain individuals.

African Charter. The African Charter on Human and Peoples' Rights (African Charter) prohibits arbitrary detention.[87] Article 6 provides that "[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

[83] *See* U.N. Commission on Human Rights Res. 1991/42 (1991). For the mandate of the Working Group, see Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997).

[84] In addition, the American Declaration of the Rights and Duties of Man, which expresses the obligations of the USA as a member of the Organization of American States, also recognizes the prohibition against arbitrary detention. American Declaration of the Rights and Duties of Man, 2 May 1948, OAS Doc. OEA/Ser.L/V/II.65, Doc. 6. Article XXV provides that "[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. . . . Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise, to be released." In addition, Article XVIII adds that "[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Finally, Article XXVI provides that "[e]very person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, ..."

[85] American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, Art.7 (3). As a signatory to this treaty, the USA is bound under international law not to defeat its object and purpose pending a decision whether to ratify it. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Art. 18. The USA has stated that the Vienna Convention largely reflects international law.

[86] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(1), 213 U.N.T.S. 221

[87] African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5.

B. The right to judicial review is an integral component of the prohibition against arbitrary detention

The right to judicial review of the lawfulness of one's detention is an integral component of the prohibition against arbitrary detention. Indeed, the right to judicial review is particularly significant because it provides an essential safeguard to protect other fundamental norms. It is recognized under conventional international law, including treaties ratified or signed by the USA, customary international law and as a general principle of law.

Universal Declaration of Human Rights. Article 8 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The *travaux préparatoires* suggest that Article 8 was designed, in part, to serve the function of a *habeas corpus* provision. However, for this right to have any meaning, there must be some access to a competent tribunal. Thus, "[i]f there exists no 'competent tribunal', Article 8 requires the establishment of such a tribunal so that an effective remedy can be provided."[88] In addition, Article 10 provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

ICCPR. Article 9 (4) of the ICCPR provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." The *travaux préparatoires* indicate that the purpose of this provision was to codify the right of *habeas corpus*. This right exists regardless of whether the underlying detention is lawful. "Article 9 (4) may thus be violated even when a person is lawfully detained."[89]

The Human Rights Committee, a body of 18 experts established under the ICCPR to monitor compliance with that treaty, has stated in an authoritative opinion that the rights set forth in Article 9 are applicable to all deprivations of liberty.[90] In several cases, the Human Rights Committee has found a violation of the prohibition against arbitrary detention when individuals have been detained without charge and with no opportunity to challenge the legitimacy of their detention. In *Vuolanne v. Finland*, for example, a Finnish soldier challenged his detention by Finnish military authorities as a violation of Article 9 (4) of the ICCPR.[91] As a preliminary matter, the Committee acknowledged the application of the ICCPR to military personnel:

> "[A]s a general proposition, the Covenant does not contain any provision exempting from its application certain categories of persons. According to article 2, paragraph 1,

[88] David Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* 33 (2000).
[89] *Id*. at 178.
[90] *See* Human Rights Committee, General Comment No. 8, in Report of the Human Rights Committee, Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40, Annex V, at 95 (1982).
[91] *Vuolanne v. Finland*, Communication No. 265/1987, U.N. Doc. CCPR/C/35/D/254/1987 (1999).

> 'each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . .' The all-encompassing character of the terms of this article leaves no room for distinguishing between different categories of persons, such as civilians and members of the military, to the extent of holding the Covenant to be applicable in one case but not in the other. Furthermore, the *travaux préparatoires* as well as the Committee's general comments indicate that the purpose of the Covenant was to proclaim and define certain human rights for all and to guarantee their enjoyment." [92]

On the merits of the claim, the Committee noted that "there is no doubt that article 9, paragraph 4, obliges the State party concerned to make available to the person detained the right of recourse to a court of law."[93] Administrative review is an insufficient remedy; only judicial review is sufficient. In this case, "[t]he procedure followed . . . did not have a judicial character, the supervisory military officer who upheld the decision . . . cannot be deemed to be a 'court' within the meaning of Article 9 (4) therefore, the obligations laid down therein have not been complied with by the authorities of the State party."[94]

In *A. v. Australia*, the Human Rights Committee held that limitation of judicial review of the lawfulness of detention of aliens in detention to a mere determination of compliance with the provisions of domestic immigration law, without the power to review whether the detention was unjust and to order release if it was unjust violated Article 9 (4) of the ICCPR.[95]

The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has recognized the essential nature of judicial review and its status under international law.[96] According to the Special Rapporteur, "[j]udicial control of interference by the executive power with the individual's right to liberty is an essential feature of the rule of law."[97] After canvassing various sources of international law, including UN instruments and the work of regional bodies, the Special Rapporteur concluded that the right to judicial review applies to all forms of deprivation of liberty, including administrative detention and immigration control measures.[98]

Declaration on the Protection of All Persons from Enforced Disappearance. Article 10.1 of this Declaration requires that: "Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought

[92] *Id*. at para. 9.3.
[93] *Id*. at para. 9.6.
[94] *Id*. at para. 9.6.
[95] *A. v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997), para. 9.5.
[96] *See* Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173 (2002).
[97] *Id.* at para. 15.
[98] *Id.* at para. 17.

before a judicial authority promptly after detention." The Declaration was adopted by the United Nations General Assembly in 1992.[99]

American Declaration and American Convention. Article 7 (5) of the American Convention, which applies to any detainee, not just to persons detained on a criminal charge, adds that "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial." Article 7 (6) of the American Convention provides that "[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."

Both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have recognized the essential role of judicial review of the lawfulness of detention in the protection of fundamental rights.[100]

In *Castillo Petruzzi v. Peru*, the Inter-American Court of Human Rights held that the suspension of *habeas corpus* relief in cases involving suspected "terrorists" was a violation of the American Convention:

> "[T]he absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress." [101]

In *Coard v. USA*, the Inter-American Commission on Human Rights concluded that the incommunicado detention of several persons by the US military during the US invasion of Grenada without the right to judicial review of the lawfulness of their detention was contrary to the American Convention. The petitioners were held incommunicado by the US military for several days, with no access to counsel or judicial review.[102] Despite their claimed status as military personnel and their capture during military operations, the USA refused to classify

[99] Resolution 47/133, 18 December 1992.
[100] In its 2002 Report on Terrorism and Human Rights, the Inter-American Commission noted the relevance of international human rights norms, including the right to due process and judicial review, in the struggle against terrorism. Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (2002). The OAS General Assembly echoed these views in Resolution 1906, which indicated that "the fight against terrorism must be waged with full respect for the law, human rights, and democratic institutions, so as to preserve the rule of law, freedoms, and democratic values in the Hemisphere." OAS General Assembly, Resolution 1906 (XXXII-O/02) (June 4, 2002).
[101] *Castillo Petruzzi v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 52 (1999). *See also Velasquez Rodriguez*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988), para.185.
[102] *Coard v. USA*, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR (1999).

the detainees as prisoners of war; they were accordingly treated as civilians. The Inter-American Commission declared that such detainees have the right to be heard and to challenge their detention: "These are the minimal safeguards against arbitrary detention."[103] According to the Commission, the need for judicial review is evident:

> "Supervisory control over detention is an essential safeguard, because it provides effective assurance that the detainee is not exclusively at the mercy of the detaining authority. This is an essential rationale of the right of *habeas corpus*, a protection which is not susceptible to abrogation."[104]

It explained that judicial review through the mechanism of *habeas corpus* can also protect a detainee's other fundamental rights.

> "The application of *habeas corpus* and similar remedies plays a fundamental role in, *inter alia*, protecting against arbitrary arrest and unlawful detention, and clarifying the situation of missing persons. Such remedies, moreover, may 'forestall opportunities for persons exercising power over detainees to engage in torture or other cruel, inhuman or degrading treatment or punishment.'"[105]

The European Convention on Human Rights. Article 5(4) adds that "[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."[106]

The European Court of Human Rights, which adopts binding judgments concerning compliance with the European Convention, has determined that detention based solely on the order of the Executive branch and with no judicial review renders such detention incompatible with human rights law. In *Aksoy v. Turkey*, a Turkish law permitted the detention of persons suspected of involvement in "terrorism" offences for up to 30 days without any form of judicial review.[107] Pursuant to this legislation, Turkish authorities detained a Turkish citizen for two weeks. As a preliminary matter, the European Court noted the importance of judicial review:

> "The Court would stress the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law. Furthermore, prompt judicial

[103] *Id.* at para. 54.
[104] *Id.* at para. 55.
[105] *Id.* (citations omitted).
[106] *Id.* Art. 5 (4).
[107] *Aksoy v. Turkey*, 23 E.H.R.R. 553 (1997).

review and intervention may lead to the detection and prevention of serious ill-treatment . . . ."[108]

The Court held that the absence of any realistic possibility of being brought before a court to test the legality of the detention, as well as the denial of access to a lawyer, doctor, relative, or friend, leaving the applicant "at the mercy of those holding him", was incompatible with the prohibition against arbitrary detention.[109] Therefore, the Court found Turkey in violation of the European Convention and its obligation to provide judicial review.[110]

In *Al-Nashif v. Bulgaria*, the European Court held that the mandatory detention of aliens without judicial review of the lawfulness of detention in cases of national security constituted arbitrary detention under Article 5(4) of the European Convention.[111] As a preliminary matter, the Court noted that "everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement."[112] Judicial review is necessary for "both the protection of the physical liberty of individuals as well as their personal liberty."[113] Thus, individuals "should have access to a court and the opportunity to be heard either in person or through some form of representation."[114] The Court declared that "[n]ational authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved."[115]

African Charter. Article 7 (1) of the African Charter provides that "[e]very individual shall have the right to have his cause heard. This comprises: (a) the right to an

[108] *Id.* at 588.
[109] *Id.* at 590.
[110] In *Brannigan and McBride v. United Kingdom*, the European Court upheld a law adopted pursuant to a derogation of Article 5 (3) of the European Convention (guaranteeing the right of all detainees to prompt access to a judge), permitting detention for up to seven days without access to a judge. *Brannigan and McBride v. United Kingdom*, 17 E.H.R.R. 539 (1994). It did so, however, only because: (1) the separate remedy of *habeas corpus*, guaranteed by Article 5 (4) of the European Convention, was available to test the lawfulness of the original arrest and detention; (2) there was an absolute and legally enforceable right to consult a solicitor forty-eight hours after the time of arrest; and (3) detainees were entitled to inform a relative or friend about their detention and to have access to a doctor. *See also Ireland v. United Kingdom*, 2 E.H.R.R. 25 (1979-80); Öcalan v. Turkey, App. No. 46221/99, Eur. Ct. H.R., at para. 69 (*quoting Winterwerp v. The Netherlands*, App. No. 0006301/73, Eur. Ct. H.R., at para. 60) ("[T]he remedy required by Article 5 § 4 must be of a judicial nature, which implies that 'the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty.'").
[111] *Al-Nashif v. Bulgaria*, Application No. 50963/99, Eur. Ct. H.R.
[112] *Id.* at para. 92.
[113] *Id.*
[114] *Id.*
[115] *Id.* at para. 94.

appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; . . . ."

In sum, the prohibition against arbitrary detention and the concomitant right to judicial review are integral features of international human rights law. Indeed, a leading international scholar and former UN Special Rapporteur on torture has concluded that the prohibition of arbitrary detention and the right to judicial review of the lawfulness of one's detention and to release if that detention is determined to be unlawful "express a rule of general international law".[116] He noted that "there are few legal systems that do not have provisions reflecting them in their ordinary law", suggesting that "rather than binding only the parties to the relevant instruments, the principles have universal application, reflecting as they appear to do 'general principles of law recognized by civilized nations'".[117]

III. International humanitarian law and the right to judicial review of the lawfulness of one's detention

The treatment of combatants and civilians in times of armed conflict is regulated by international humanitarian law.[118] The cornerstones of humanitarian law are set forth in the four Geneva Conventions of 1949 and their two 1977 Additional Protocols. Many of the provisions of these treaties are recognized to codify customary international humanitarian law. Indeed, the Geneva Conventions "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[119]

Under international humanitarian law, those like the Guantánamo detainees who were detained while participating in hostilities during the international armed conflict in Afghanistan (between 7 October 2001 and the establishment of the new government on 19 June 2002 after the Loya Jirga) are presumed to be combatants and, therefore, prisoners of war under the Third Geneva Convention.[120] If any doubt about their status arises, those captured while fighting are entitled to review by a competent tribunal to determine their status. The drafters did not intend to preclude the use of a civilian judicial tribunal. For a number of

[116] Nigel Rodley, *The Treatment of Prisoners under International Law* 269 (Oxford: Oxford University Press 1987).
[117] *Id.* (footnote omitted).
[118] *See generally* Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* (2d ed. 2002).
[119] *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Rep., para. 79.
[120] There are two presumptions. First, there is a presumption that a person captured who was taking part in hostilities during an international armed conflict is a combatant, within the protection of the Third Geneva Convention. Second, there is a presumption that a person detained who was not taking part in hostilities is a civilian, within the protection of the Fourth Geneva Convention. If a state detains a person who was fighting and the state claims that the person was not a combatant, there is, by definition, doubt about the person's status, requiring a determination pursuant to Article 5 of the Third Geneva Convention by a competent tribunal of the status of the person, who remains presumed a combatant pending that judicial determination (see below).

reasons outlined below Amnesty International believes that at the dawn of the 21st century such a tribunal should be a competent, independent and impartial tribunal composed of judges. In any event, even if a restrictive interpretation of the requirement of a competent tribunal were to be accepted, the USA has refused to establish even administrative tribunals and has therefore violated its obligations under the Third Geneva Convention and customary international law.

If the persons detained while fighting during the international armed conflict in Afghanistan had been determined by a competent tribunal to be persons not entitled to combatant status, as claimed by US authorities, then they would be civilians protected by the Fourth Geneva Convention and entitled to review of their detention under this convention. Amnesty International believes that such review should be a full judicial review. Even the small group of persons who do not enjoy all the rights of persons under one of these two conventions – spies, saboteurs and certain other persons based on their nationality (see Part III.B below) – are protected by common Article 3 as part of customary international law, Article 126 of the Fourth Geneva Convention and Article 75 of Additional Protocol I, which is considered to reflect customary international law. In any event, all persons held in Guantánamo Bay, including the category of fighters captured during hostilities during the international armed conflict in Afghanistan, whether they are prisoners of war or civilians, are now entitled to judicial review of the lawfulness of their detention under international human rights law as outlined above in Part II of this memorandum.

A. Detained fighters are presumed to be entitled to combatant status until a competent tribunal determines otherwise

The Third Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) applies to all cases of declared war or of any other international armed conflict that may arise between two or more contracting parties.[121] Its provisions set forth the criteria and procedure for determining prisoner of war status. The US military operation in Afghanistan between October 2001 and the establishment of a successor government to the Taleban government in June 2002 was an international armed conflict. Fighters confronting US forces, including the Taleban government's armed forces and those members of *al-Qa'ida* integrated into its militia, were entitled to be presumed prisoners of war until a competent tribunal decided otherwise.[122]

Those who are determined by a competent tribunal to have taken up arms unlawfully, such as civilians who took a direct part in hostilities, as well as members of militias and other volunteer groups who were not integrated into the regular armed forces, but belonged to a party to the armed conflict, who did not comply with the requirements of Article 4 (A) (2) of

[121] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3362 (Third Geneva Convention). The USA has ratified the Third Geneva Convention.

[122] As presumed prisoners of war, they are entitled to a broad range of rights under the Third Geneva Convention, including the right to be repatriated at the end of the international armed conflict (unless convicted of a criminal offence or detained in connection with a criminal investigation or prosecution) (Article 118) and judicial guarantees with respect to criminal proceedings (Articles 99 to 108).

the Third Geneva Convention, are protected by the Fourth Geneva Convention (see following section).

Articles 4 and 5 of the Third Geneva Convention. Article 4 of the Third Geneva Convention identifies several categories of persons who are eligible for prisoner of war status once they have fallen into the power of an adversary. These include the following categories:

> "1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war.
>
> . . . .
>
> 6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war." [123]

It may not always be evident whether an individual falls within one of the categories enumerated in Article 4, and this paper does not discuss whether particular individuals in Guantánamo were in fact prisoners of war. Accordingly, Article 5 of the Third Geneva Convention provides that if any doubt arises about the status of a detainee that status must be determined by a competent tribunal on a case by case basis, and makes clear that the presumption of combatant status lasts until that tribunal decides otherwise:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[124]

The US military has long recognized the obligation to establish tribunals to determine prisoner of war status.[125] The USA has consistently established tribunals in cases of

[123] *Id*., Art. 4 (A). *See also id*., Art. 4 (B) for additional categories.
[124] Third Geneva Convention, Art. 5.
[125] For example, as long ago as 1968, a US Army regulation provided:

> "Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) requires that the protections of the Convention be extended to a person who has committed a belligerent act and whose entitlement to Prisoner of War (PW) status is in doubt until such time as his status has been determined by a competent tribunal."

international armed conflict before the conflict in Afghanistan whenever doubt arose concerning the status of a person who committed a belligerent act.[126]

Article 45 of Protocol I and customary international law. The criteria and procedure for determining prisoner of war status are spelled out in more detail in Article 45 of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), which is considered to reflect customary international law (see footnote 128).[127] Protocol I was adopted in 1977 to supplement the provisions of the 1949 Geneva Conventions.

Protocol I was signed by the USA and, although the USA decided not to ratify it, the USA has recognized that Article 45 of Protocol I reflects customary international law. The Deputy Legal Adviser of the US State Department, in explaining why the USA did not intend to submit Protocol I to the US Senate for its advice and consent to ratification, identified a number of provisions of Protocol I, including Article 45, that the USA considered to be part of customary international law by which it considered itself bound. He stated that:

> "we do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to

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Directive Number 20-5 of 15 March 1968, *reprinted in* 62 Am. J. Int'l L. 768 (1968). Doubtful cases were defined as "Persons who have committed a belligerent act and whose entitlement to status as a PW is in doubt." *Ibid.* The 1968 regulation provided that "[b]efore any detainee is released or transferred from United States custody, his status as a prisoner of war or non-prisoner of war must be determined." *Ibid.*, at 769. It further provided:

> "A detainee will be referred to an Article 5 tribunal only when:
> (1) He has committed a belligerent act, and
> (2) Either of the following conditions exist:
> (a) There is doubt as to whether the detainee is entitled to PW status.
> (b) A determination has been made that the status of the detainee is that of a non-prisoner of war and the detainee or someone on his behalf claims that he is entitled to PW status." *Ibid.*

As recently as 1997, a US Army regulation provided:

> "In accordance with Article 5, [Third Geneva Convention], if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, [Third Geneva Convention] such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6(a) (1997).

[126] *See* US Department of Defense, Conduct of Persian Gulf War: Final Report to Congress app. L at 578 (1992); *Contemporary Practice of the US Relating to International Law*, 62 Am. J. Int'l L. 754, 768 (1968) (setting out the requirements for Article 5 tribunals during the Vietnam war).

[127] Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (Protocol I).

prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Those principles are found in article 45."[128]

Article 45 of Protocol I, which concerns the protection of persons who have taken part in hostilities, provides:

> "1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.
>
> 2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such case the detaining Power shall advise the Protecting Power accordingly."

According to the authoritative commentary published by the ICRC (ICRC Commentary on the Additional Protocols) on Article 45, the presumption of prisoner of war

[128] Remarks by M. Matheson (Deputy Legal Adviser, US Department of State) in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions,* 2 Am. U. J. Int'l L. & Pol. 415, 425-426 (1987), cited in Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law,* Clarendon Press, page 65. The Deputy Legal Adviser stated that "the United States will consider itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law, either now or as it may develop in the future". *Id.*, at 420.

Similarly, the US Army's Judge Advocate General's School has indicated that Article 45 of Protocol I is consistent with customary international law. Judge Advocate General's School, US Army, Operational Law Handbook, JA 422, at 18-2 (1997) (stating that "the US views [Article 45] as customary international law"). Five years later, a revised version of this manual (Judge Advocate General's School, U.S. Army, Operational Law Handbook, ch. 2 (2002)) stated that the US viewed Article 45 as "customary international law or acceptable practice though not legally binding", but no evidence was cited or exists demonstrating that the customary rule of international law codified in Article 45 has been abrogated. Indeed, despite the refusal to establish Article 5 tribunals for detained fighters from Afghanistan, the USA has never repudiated the Deputy Legal Adviser's statement concerning Article 45.

status is designed to protect combatants.[129] Thus, the burden is on the captor to prove that prisoner of war status is unwarranted. "If the captor wants to contest such a presumption, it is up to him to present evidence that the person concerned is not a prisoner of war . . . ." [130]

> "[T]he authors of the Protocol intended to reduce to a minimum those cases in which a captor could arbitrarily deny the status of prisoner of war to a person who had been apprehended. To this purpose they introduced a complete set of legal presumptions which automatically operate in favour of persons who have been captured."[131]

The requirement that Article 5 tribunals be fair. Regardless whether the Article 5 tribunals must be judicial or not, they must be fair.

The ICRC proposed that Article 5 determinations be made simply "by some responsible authority".[132] Given the serious consequences of such determinations, such as prosecutions for murder with the prospect of the death penalty, it was proposed that the determination be made by a military tribunal, but this suggestion was not accepted:

> "[I]t was felt that to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention. A further amendment was therefore made to the Stockholm text stipulating that a decision regarding persons whose status was in doubt would be taken by a 'competent tribunal', and not specifically a military tribunal."[133]

Nothing in Article 5 itself suggests that the competent tribunal need only be an administrative, rather than a judicial tribunal. Indeed, one of the leading commentaries on Protocol I, citing the *travaux préparatoires*, explains that "[t]he word 'competent tribunal' rather than 'military tribunal' was used to permit civil courts to act if allowed by the law of the party to the conflict."[134]To the extent that such tribunals were intended to operate on the battlefield, initial administrative determinations – without precluding judicial determinations later – might make sense. However, the extensive guarantees and procedures in the 1968 regulations governing US administrative tribunals in Viet Nam (see below) suggest that such tribunals must have convened at a distance from the battlefield and judicial tribunals would have certainly been feasible, in the same way that general courts martial are feasible in war zones. This conclusion applies with even greater force with respect to detained fighters at Guantánamo, thousands of miles from any hostilities. It is also consistent with the

[129] Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds., Commentary on the Additional Protocols to the Geneva Conventions 546 (Geneva: International Committee of the Red Cross and Martinus Nijhoff Publishers 1987) (ICRC Commentary on the Additional Protocols).
[130] *Id*. at 547.
[131] *Id*. at 553.
[132] ICRC Commentary on Third Geneva Convention, at 77.
[133] *Id.*
[134] Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, *New Rules for Victims of Armed Conflict: Commentary o the Two 1997 Protocols Additional to the Geneva Conventions of 1949* (The Hague/Boston/London: Martinus Nijhoff Publishers 1982), at 260 n.1 (citing II B Final Record of the Diplomatic Conference of Geneva (1949), at 270.

requirement in Article 45 (2) of Protocol I that persons not held as prisoners of war whose status is in doubt who are facing a criminal charge are entitled to a judicial determination of their status. Surely, the same right should be accorded to all persons detained while participating in hostilities, not just to persons facing a criminal charge.

In any event, whether Article 5 tribunals need be judicial or not, they must comply with guarantees of due process and fundamental fairness. In addition, an individual must have the right "to assert his entitlement to prisoner of war status under such condition as will provide all generally recognized guarantees as to proper judiciary [sic] procedures."[135] In the case of the Guantánamo detainees, concerns about according detainees due process guarantees by a tribunal near the battlefield have no relevance. Thus, although Article 75 (4) of Protocol I does not expressly apply to determinations by an Article 5 tribunal, it would be the starting point for determining what guarantees under international humanitarian law apply to such determinations, and, as Article 75 (8) demonstrates, the broader guarantees of international human rights law would also apply. The fundamental guarantees set forth in Article 75 include, *inter alia*, prompt notification of any charges and an opportunity to present a defence. Article 14 (1) of the ICCPR, which reflects general principles of law common to national and international courts, guarantees that "[i]n the determination of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". According to a leading commentary on the ICCPR, this term is interpreted broadly.[136] The rest of the article outlines extensive fair trial rights, including the right to appeal to a higher tribunal according to law.

The USA has recognized that Article 75 reflects customary international law. The Deputy Legal Adviser of the US State Department, in explaining which provisions of Protocol I that the USA considered reflected customary international law, declared:

> "We support in particular the fundamental guarantees contained in article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favourable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction based upon race, sex, language, religion or belief, political or other opinion, national or social origin, or any similar criteria."[137]

[135] *Id*. at 554.

[136] Nowak, *supra*, at 242.

[137] Matheson, *supra*, n. 124, at 427. The USA has never repudiated the Deputy Legal Adviser's statement. In addition, the US Army's Judge Advocate General's School has indicated that Article 75 of Protocol I is consistent with customary international law. Judge Advocate General's School, US Army, Operational Law Handbook, JA 422, at 18-2 (1997). Jeanne M. Meyer & Brian J. Bill, eds, *Operational Law Handbook* (Charlottesville, Virginia: International and Operational Law Department, Judge Advocate General's School 2002), Chapter 2, page 1; Brian J. Bill, ed., *Law of War Workshop Deskbook,* (Charlottesville, Virginia: International and Operational Law Department, Judge Advocate General's School 2002), Chapter 3, pages 8-9.

The USA has long recognized that Article 5 tribunal procedures must be fair. Current US Army regulations expressly recognize a number of fundamental guarantees to detainees before such tribunals, including the requirement that at a written record be made of the proceedings, that proceedings shall be open except for security reasons, that the detainee will be advised of his or her rights at the beginning of the hearing, that the detainee will have the right to be present with counsel at all open sessions of the tribunal, that a detainee shall be entitled to the services of a qualified interpreter, that the detainee has the right to call witnesses and to examine or cross-examine witnesses, that the detainee cannot be compelled to testify himself or herself.[138]

The 2002 and 2003 Inter-American Commission decisions. With respect to the Guantánamo detainees, the Inter-American Commission on Human Rights has found on two occasions that the USA must comply with the provisions of the Third Geneva Convention and establish a competent tribunal to determine the proper status of the detainees. According to the Commission, the pertinent facts concerning the detainees were not subject to dispute:

> "These include the fact that the government of the USA considers itself to be at war with an international network of terrorists, that the USA undertook a military operation in Afghanistan beginning in October 2001 in defending this war, and that most of the detainees in Guantánamo Bay were apprehended in connection with this military operation and remain wholly within the authority and control of the USA government. . . . It is also well-known that doubts exists [sic] as to the legal status of the detainees."[139]

Likewise, the Commission found that the international law standards were equally clear regarding the obligation to establish a competent tribunal to determine the status of the detainees:

> "[A]ccording to international norms applicable in peacetime and wartime, such as those reflected in Article 5 of the Third Geneva Convention and Article XVIII of the American Declaration of the Rights and Duties of Man, a competent court or tribunal,

[138] The 1968 US Army regulation applicable during the international armed conflict in Viet Nam set out a more comprehensive and detailed list of guarantees, including the requirement that at least one of the three members of the tribunal be a judge advocate or other military lawyer familiar with the Geneva Conventions, that when a panel is evenly split the decision will be in favour of prisoner of war status, that a detainee be able to present his or her case with the assistance of a qualified advocate or counsel, that a detainee shall be entitled to the services of a qualified interpreter, that the detainee will have the right to be present with counsel at all open sessions of the tribunal, that the detainee's counsel will have free access in private to the detainee and the right to confer privately with essential witnesses, including prisoners of war, that the detainee has the right to call witnesses and to examine or cross-examine witnesses and the detainee has the right to remain silent. Directive Number 20-5 of 15 March 1968, *reprinted in* 62 Am. J. Int'l L. 768, 770-775 (1968).

[139] Decision of the Inter-American Commission on Human Rights To Adopt Precautionary Measures In Relation to Detainees In Guantanamo Bay, Cuba, March 13, 2002, at 3.

> as opposed to a political authority, must be charged with ensuring respect for the legal status and rights of persons falling under the authority and control of a state."[140]

For these reasons, the Commission indicated that precautionary measures were both appropriate and necessary "in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights."[141] In March 2003, the Commission reiterated its request for precautionary measures, requesting that the USA "take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal."[142]

B. Individuals who are determined not to be prisoners of war are entitled to the right to judicial review of the lawfulness of their detention

Even if a detainee is determined by a competent tribunal not to be a prisoner of war, such individuals are not without rights. With a few minor exceptions (see below), all such persons are subject to the full protection of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).[143] They all remain under the protection of international human rights law, at least to the extent that there is no express conflict with a specific international humanitarian law provision.

Absence of a gap between the Third and Fourth Geneva Conventions. All individuals captured in time of armed conflict, regardless of their status, are subject to the protections of international humanitarian law:

> Every person in enemy hands must have some status under international law; he is either a prisoner of war . . . covered by the Third Geneva Convention, a civilian covered by the Fourth Convention, or . . . a member of the medical personnel of the armed forces covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. [144]

The International Criminal Tribunal for the former Yugoslavia made a similar pronouncement concerning the provisions of humanitarian law. In the *Celebici* decision, the Trial Chamber noted that "there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of

[140] *Ibid.*
[141] *Id*. at 4.
[142] Decision of the Inter-American Commission on Human Rights To Adopt Precautionary Measures In Relation to Detainees In Guantanamo Bay, Cuba, March 18, 2003, at 2.
[143] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. 3365 (Fourth Geneva Convention). The USA has ratified the Fourth Geneva Convention.
[144] International Committee of the Red Cross, Commentary: III Geneva Convention Relative to the Protection of Civilian Persons in Time of War 51 (Jean S. Pictet ed. 1958) (ICRC Commentary to Fourth Geneva Convention).

war . . . he or she necessarily falls within the ambit of [the Fourth Geneva Convention], provided that its article 4 requirements are satisfied."[145]

Article 4 of the Fourth Geneva Convention provides that "[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The breadth of coverage set forth in Article 4 was "intended to ensure that all situations and cases were covered."[146] In sum, "all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left."[147]

Limited exceptions to full protection of the Fourth Geneva Convention. The only exceptions to full protection of the Fourth Geneva Convention are nationals of a state not a party to the Fourth Geneva Convention (almost every state is a party, including all the states known to have nationals detained at Guantánamo); nationals of the party that is holding them (no US national is held in Guantánamo); nationals of a neutral state in the territory of a belligerent state; and nationals of a co-belligerent state with normal diplomatic representation with the detaining state.[148] Any person held in Guantánamo who may fit any such category is entitled to judicial review of their detention under international human rights law.

Protection of persons not entitled to combatant status under the Fourth Geneva Convention. Unlawful participation in hostilities is not a ground for denying the protection of the Fourth Geneva Convention. This is confirmed by Article 5 of the Fourth Geneva Convention, which denies certain rights and privileges to protected persons detained as spies, saboteurs or persons suspected of or engaged in activities hostile to the state or occupying power, all of whom would be considered persons not entitled to combatant status. If the spies are members of the armed forces, they would be combatants who forfeited their combatant status. If they were civilians unlawfully participating in hostilities, they would lose the full scope of protection of the Fourth Geneva Convention.[149] However, they would still retain their status as civilians. Article 5 does not preclude the individual from claiming any rights guaranteed under international human rights law or international humanitarian law. During the Vietnam War, the USA classified spies, saboteurs and "terrorists" as civilians.[150] Amnesty

[145] *Prosecutor v. Mucic (Celebici)*, Case No. IT-96-21-T (Nov. 16, 1998), at para. 271.
[146] ICRC Commentary to Fourth Geneva Convention, *supra*, at 47.
[147] *Id*. at 60.
[148] Fourth Geneva Convention, Art. 4 (2). However, such persons would still benefit from the protections of Part II of the Geneva Convention (General protection of populations against certain consequences of war) (Articles 13 to 26).
[149] For example, in occupied territory, such persons would "be regarded as having forfeited rights of communication under the present Convention". Article 5, Fourth Geneva Convention.
[150] Annex A of Directive Number 381-46 of 27 December 1967, Criteria for Classification and Disposition of Detainees, reprinted in 62 Am. J. Int'l L. 766, 767, 768 (1968) ("A detainee who is suspected of being a spy, saboteur or terrorist" is to be classified as falling within the category of "Civil Defendants" within the broader group of "Non-Prisoners of War); "Non-Prisoners of War who are suspected as Civil Defendants will be released to the appropriate GVN [Government of Viet-Nam] civil authorities".).

International believes that any person held in Guantánamo who may fit any such category is entitled to judicial review of their detention under international human rights law.

Protection of persons not entitled to combatant status under Protocol I. The provisions of the Fourth Geneva Convention are supplemented by Protocol I, signed, but not ratified, by the USA. As confirmed by the ICRC Commentary to the Additional Protocols, no individual is without some form of protection under international humanitarian law and there are "no gaps in protection."[151] Thus, Article 45 (3) of Protocol I provides that any person who has taken part in hostilities and who does not benefit from the more favourable treatment in accordance with the Fourth Geneva Convention is still entitled to the protection of Article 75, which, as noted above, the USA considers to reflect customary international law.[152] Article 75 of Protocol I contains fundamental guarantees and applies to all persons who are captured in connection with an armed conflict and who do not benefit from more favourable treatment under the Geneva Conventions or under Protocol I.

In addition to numerous substantive guarantees in Article 75, individuals who are arrested, detained or interned for actions relating to the armed conflict are entitled to numerous procedural protections under Article 75. These individuals must be informed promptly of the reasons for their detention.[153] Unless they are accused of penal offences, they must be released with minimum delay and, "in any event, as soon as the circumstances justifying their arrest, detention or internment have ceased to exist."[154] They may only be prosecuted before an impartial and regularly constituted court that respects "generally recognized principles of regular judicial procedure."[155]

Individuals accused of war crimes or crimes against humanity who do not benefit from more favourable treatment under the Geneva Conventions or Protocol I shall be accorded the treatment provided by Article 75, whether or not the crimes of which they are accused constitute grave breaches.[156]

Thus, even persons determined by a competent tribunal not to be entitled to combatant status are entitled to protection under international humanitarian law.[157] Indeed,

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[151] ICRC Commentary to Protocol I, *supra*, at 558.

[152] Protocol I, Art. 45 (3). *See also* Protocol I, Art. 50 (1) ("A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.").

[153] *Id*. at Art. 75 (3).

[154] *Id*.

[155] *Id*., Art. 75 (4) (identifying numerous guarantees of the right to a fair trial in a non-exhaustive list).Significantly, there is no right of derogation to the provisions of Article 75. ICRC Commentary to Additional ProtocolsI, *supra*, at 879-880.

[156] *Id.*, Art. 75 (7) (Persons accused of such crimes "should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; . . .").

[157] *See generally* Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45 (2003); George Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 92 Am. J. Int'l L. 892 (2002).

the fact that a person has unlawfully participated in hostilities is not a criterion for excluding the application of the Fourth Geneva Convention (the assertion that a person was unlawfully participating in hostilities necessarily involves recognition of that person as a civilian entitled to the protection of the Fourth Geneva Convention) or the protections of Protocol I.[158] Similarly, a combatant who violates the rules of armed conflict is not necessarily deprived of the right to be recognized as a combatant if he falls into enemy hands.[159]

In the Fourth Geneva Convention, in cases where an individual is suspected of engaging in activities that are hostile to the security of the state and such acts are committed in the territory of the detaining state that person's rights under the convention are more limited than those of other civilians.[160] Under these circumstances, an individual so detained is not "entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State."[161] However, the exercise of the right to judicial review of the lawfulness of detention could not be considered a right "prejudicial to the security of [the] State".

Civilians detained under house arrest or interned are entitled to judicial review of the lawfulness of their detention. Under the Fourth Geneva Convention, civilians are entitled to numerous protections.

Although Article 42 of the Fourth Geneva Convention permits a state party to place an alien civilian in the territory of a party to the international armed conflict under assigned residence (house arrest), or to intern a civilian "if the security of the Detaining Power makes it absolutely necessary", Article 43 requires that the placement of such an alien in assigned residence or the internment be "reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose". It also provides that if this detention continues, "the courts or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit".[162]

Although Article 43 and the ICRC Commentary on this provision indicate that the detaining state may choose between a court and an administrative board, the ICRC Commentary states:

> "The procedure provided for in the Convention is a minimum. It will be an advantage, therefore, if States Party to the Convention afford better safeguards (examination of

[158] Dörmann, *supra*, at 50.
[159] Protocol I, *supra*, at art. 44(2). *But see id*. at arts. 44(3) and (4) (combatants who fail to distinguish themselves from the civilian population when they are engaged in an attack or in a military operation preparatory to an attack shall forfeit their right to be classified as prisoners of war).
[160] Fourth Geneva Convention, Art. 5.
[161] *Id*.
[162] Civilians who are detained in occupied territory under house arrest or interned for imperative security reasons are entitled under Article 78 to periodic review of their detention, with the right to appeal. Article 78 guarantees the right to appeal, with periodic review of unfavourable decisions on appeal.

> cases at more frequent intervals, or the setting up of a higher appeal court). The main point is that no protected person should be kept in assigned residence or in an internment camp for a longer time than the security of the Detaining State demands."[163]

Since the USA is a party to the ICCPR, it must ensure that its national law guarantees the right recognized in Article 9 (4) of that treaty to judicial review of the lawfulness of detention in assigned residence or internment. An administrative board would not satisfy the requirement under international human rights law, as reflected in Article 9 (4) of the 1966 ICCPR, that any detained person have the right to judicial review of the lawfulness of his or her detention and to release if that detention is determined to be unlawful. As noted above in Part II, this fundamental right applies at all times to all categories of detainees and all forms of detention, including, as held in the *Castillo Petruzzi* and *Coard* cases, persons accused of "terrorist" offences and civilians interned during an international armed conflict.

The rights of those persons with limited protections under the Third and Fourth Geneva Conventions are protected by international human rights law. To the extent that some persons do not enjoy the full panoply of rights of prisoners of war under the Third Geneva Convention or of civilians under the Fourth Geneva Convention or of protected persons under Protocol I, Article 75 (8) of Protocol I makes clear that they are still entitled to all of the protections of international human rights law outlined above, including the right to judicial review of the legality of their detention and to release if that detention is determined to be unlawful. It states:

> "No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1 [of Article 75]".[164]

For example, persons detained pursuant to Article 5 of the Fourth Geneva Convention as spies, saboteurs or persons suspected of or engaged in activities prejudicial to the security of the detaining state would not forfeit their right under international human rights law to judicial review of the lawfulness of their detention and to release if that detention was unlawful. Indeed, as noted above, even under the terms of Article 5 itself, the exercise of judicial review could not be considered a right "prejudicial to the security of [the] State". They could not be subjected on national security grounds to indefinite administrative detention not subject to judicial review of the lawfulness of their detention.

IV. The geographic scope of international obligations

As evidenced by treaties, resolutions of intergovernmental organizations, authoritative interpretations by international courts and treaty bodies and commentaries by legal scholars, under international law, states are obligated to respect and ensure the human rights both of

[163] ICRC Commentary on the Fourth Geneva Convention, *supra*, at 261.
[164] Protocol I, Art. 75 (8).

persons who are within their national territories and also to persons elsewhere who are subject to its jurisdiction and control.[165]

The 1948 Universal Declaration of Human Rights states that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[166]

"Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction or *de facto* jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues."[167]

Article 2 (1) of the ICCPR requires a member state "to ensure to all individuals within its territory and subject to its jurisdiction" the rights recognized in that treaty.[168] In an authoritative interpretation adopted on 29 March 2004 that confirmed previous decisions, the Human Rights Committee has explained that this provision imposes an obligation on member states to extend the protections of the ICCPR to all individuals subject to their jurisdiction:

> "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."[169]

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[165] Similarly, the Draft Articles on State Responsibility adopted by the International Law Commission recognize a state's responsibility under international law for the acts of state organs. The scope of such responsibility is not limited by territorial constraints. *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

[166] Universal Declaration of Human Rights, Art. 2. It adds that "[e]veryone is entitled to all the rights and freedoms set forth in the declaration, without discrimination of any kind, . . ." *Id.*

[167] Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L. 78 (1995).

[168] Commentators have interpreted this provision "as a disjunctive conjugation indicating that a state party must be deemed to have assumed the obligation to respect and ensure the rights recognized in the Covenant 'to all individuals within its territory' and 'to all individuals subject to its jurisdiction.'" Theodor Meron, Human Rights In Internal Strife: Their International Protection 40 (1987).

[169] Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc.

In a typical prior opinion on the subject, *Sergio Euben Lopez Burgos v. Uruguay*, the Human Rights Committee held that Uruguay violated the ICCPR when members of the Uruguayan security forces detained and ill-treated a Uruguayan national in Argentina and then forcibly returned him to Uruguay.[170] Indeed, the Committee found "it would be unconscionable to so interpret the responsibility under the . . . Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[171]

The rights guaranteed by both the American Declaration on the Rights and Duties of Man, as well as the American Convention on Human Rights, apply wherever a state exercises jurisdiction or control. For example, the American Declaration states that "[e]very person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights."[172] The American Convention provides that member states "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination . . . ."[173] Significantly, the American Convention defines the word "person" to mean every human being.[174]

The Inter-American Commission on Human Rights on several occasions has recognized the extraterritorial application of human rights obligations.[175] In *Coard v. USA*, the Commission was asked to review US actions in Grenada following its invasion of the island in October 1983. In its opinion, the Commission acknowledged that international obligations are not limited to a state's territory, but apply to any location where a state wields control over individuals:

> "Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad.[176]

CCPR/C/74/CRP.4/Rev.6 (2004) , at para. 10. General Comment No. 31 replaced General Comment No. 3, U.N. Doc. HRI/GEN/1/Rev. 5 (2001), at 112.

[170] *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (6 June 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

[171] *Id.* at para. 12.3. *See also Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 at 92 (1984).

[172] American Declaration, Art. XVII.

[173] American Convention, Art. 1 (1).

[174] *Id.* Art. 1 (2).

[175] *See also Ferrer-Mazorra v. USA*, Case No. 9903, Report No. 51/01, Annual Report of the IACHR, at para. 180 ("OAS Member States are obliged to guarantee the rights under the Declaration to all individuals falling within their authority and control, . . .").

[176] *Coard et al. v. USA*, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR (1999), at para. 37.

The Inter-American Commission reaffirmed this fundamental principle in relation to persons detained at Guantánamo when it adopted precautionary measures, urging the USA to comply with international human rights and humanitarian standards there. It declared that such standards applied in respect to all persons subject to US authority and control:

> "The determination of a state's responsibility for violations of the international human rights of a particular individual turns not on the individual's nationality or presence within a particular geographic area, but rather whether under specific circumstances, that person fell within the state's authority and control."[177]

The Commission went on to note that "no person under the authority and control of a state regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights."[178] In March 2003, the Commission reiterated its position on Guantánamo.[179]

Similarly, the European Court of Human Rights has repeatedly determined that the protections afforded by the European Convention apply to all territories and people over which member states have effective control.[180] In *Loizidou v. Turkey*, for example, a Greek Cypriot alleged that Turkish forces in northern Cyprus had denied her access to her land.[181] As a result, she alleged Turkey was in violation of the European Convention. As a preliminary matter, the European Court determined that Turkey exercised "effective overall control" of the policies and actions of the authorities in northern Cyprus. It then determined that Turkey could be held liable for breaching European Convention obligations even though such acts were committed outside Turkish territory:

> "The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[182]

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[177] *Decision of the Inter-American Commission on Human Rights To Adopt Precautionary Measures In Relation to Detainees In Guantanamo Bay, Cuba*, 13 March 2002, at 2. *See also Saldaño v. Argentina*, Report N. 38/99, Annual Report of the IACHR 1998.

[178] *Decision of the Inter-American Commission on Human Rights To Adopt Precautionary Measures In Relation to Detainees In Guantanamo Bay, Cuba*, 13 March 2002, at 3.

[179] *of the Inter-American Commission on Human Rights To Adopt Precautionary Measures In Relation to Detainees in Guantánamo Bay, Cuba, 13 March 2002, at 2.*

[180] *See* European Convention, *supra*, at Art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.").

[181] *Loizidou v. Turkey*, 23 E.H.R.R. 513 (1997).

[182] *Id.*, at 530. *See also Cyprus v. Turkey*, 4 E.H.R.R. 482, 586 (1982) ("The High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual responsibility, whether that authority is exercised within their own territory or abroad."); *Drozd and Janousek v. France and Spain*, 14 E.H.R.R. 745, 788 (1992) ("The term jurisdiction is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory."); *Bankovic v. Belgium*, App. No. 52207/99 (19 December 2001) (a state may be held responsible for violations of the European Convention if "through the effective control of the relevant territory and its inhabitants abroad as a consequence of

Although international human rights law recognizes a limited right of derogation from certain provisions, international humanitarian law provides no such general exception.

> "The exceptional circumstances constituted by armed conflict demand by their very nature that no derogations from any of the warring parties' obligations be allowed if humanitarian law is to serve the purpose of protecting the individual. Thus, in contrast to certain rules of human rights law, the humanitarian law norms are without exception non-derogable."[183]
>
> By its terms, the fundamental guarantees set forth in Protocol I allow for no derogation. As indicated in the commentary, "Article 75 is not subject to any possibility of derogation or suspension and consequently it is these provisions which will play a decisive role in the case of armed conflict."[184]

V. The temporal scope of international obligations

The right to judicial review of the lawfulness of detention applies at all times, including in time of war or public emergency. Although a few human rights treaties permit states parties to derogate from certain obligations under those treaties in time of public emergency, authoritative interpretations by international courts and treaty bodies make clear that they do not permit derogation of the right to judicial review of the lawfulness of detention.[185] Moreover, the obligations of states parties under international humanitarian law, such as the Geneva Conventions of 1949 and their two Additional Protocols are not subject to any derogation in time of armed conflict. In any event, the USA has not sought to derogate from its obligation under the ICCPR to guarantee judicial review of the lawfulness of detention.

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military occupation or through the consent, invitation or acquiescence of the Government of that territory, [it] exercises all or some of the public powers normally to be exercised by that government . . . ."); *Ocalan v. Turkey*, App. No. 46221/99 (12 March 2003)..

[183] The President of the ICRC has recognized the importance of international human rights law, both as an aid to interpretation of international humanitarian law and to fill in gaps in that body of law:

> "For example, fundamental judicial guarantees are a cornerstone of protection in peacetime and in armed conflict. This is confirmed by the wording of Article 75 of Additional Protocol I of 1977, which is applicable in international armed conflicts, a provision clearly influenced by human rights law. Similarly, the application of human rights standards is needed in non-international armed conflicts in order to supplement humanitarian law provisions governing the treatment, conditions of detention and rights regarding a fair trial of persons deprived of liberty."

Speech by ICRC President Jacob Kellenberger to the U.N. Commission on Human Rights 17 March 2004, at 1. Similarly, The International Court of Justice has also recognized in the *Nuclear Weapons* case the human rights law continues to apply during armed conflict. *Legality of the Threat or Use of Nuclear Weapons*, *supra*, at para. 25.

[184] ICRC Commentary to Protocol I, *supra*, at 879-880.

[185] However, most human rights treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the African Charter on Human and People's Rights, do not permit derogation of their obligations under any circumstances whatsoever.

The lists of non-derogable obligations in the three treaties permitting derogation of certain treaty obligations – the ICCPR, the American Convention on Human Rights and European Convention on Human Rights - are not exhaustive. Specifically, the right of judicial review is now recognized to be a non-derogable obligation.

For example, in its General Comment No. 29, the Human Rights Committee explained that although the right to judicial review does not appear on the list of non-derogable obligations in Article 4 of the ICCPR, "the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2."[186] Indeed, "[s]tates parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."[187] The Committee then noted the important role played by judicial review in ensuring compliance with other fundamental norms:[188]

> "It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. . . . Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15."[189]

For these reasons, the Committee made clear the non-derogable nature of the fair trial provisions of the ICCPR, including the right to judicial review:[190]

> "Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offense. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay

[186] Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11.
[187] *Id.*
[188] *Id.* at para. 16.
[189] *Id.* at para. 15.
[190] Weissbrodt, *supra*, at 110. *See also* Human Rights Committee, General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) ("[W]hile reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.").

> on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."[191]

The Inter-American Court on Human Rights has also stressed the importance of judicial review and the applicability of this fundamental right even in time of public emergency. In *Advisory Opinion OC-9/87*, the Inter-American Court concluded that states cannot derogate from judicial guarantees, including the right to *habeas corpus* or any other effective judicial remedy.[192] In *Advisory Opinion OC-8/87*, the Court was even more emphatic about the importance of habeas corpus protection and its relevance in times of public emergency:

> "In order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment."[193]

Accordingly, the Court concluded that the right of judicial review, including *habeas corpus*, cannot be suspended, even in time of war, public danger, or other emergency that threatens the independence or security of the state.[194]

As of 3 June 2004, the USA had not submitted any formal announcement of its intent to derogate from its international obligations. Even if it had, however, it would not have been able to derogate from its obligations under Article 9 (4) to guarantee judicial review of the lawfulness of detention.

Conclusion

The USA has an obligation when taking security measures to deal with threats to public safety to ensure that any such measures comply with international law and do not compromise fundamental rights. Although it has been treated as such by the USA, Guantánamo is simply not a "legal black hole."

Amnesty International is concerned that the detainees held at Guantánamo are being denied the right to judicial review of the lawfulness of their detention and to release if that detention is determined to be unlawful, as well as other rights long-recognized under both

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[191] Human Rights Committee, General Comment No. 29, *supra*, at para. 11. *See also* U.N. Doc. CCPR/C/79/Add.93 (1998), at para. 21 ("[A] State party may not depart from the requirement of effective judicial review of detention.").

[192] *See Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, 6 October 1987, para. 41.

[193] *Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, 30 January 1987, para. 35.

[194] *See also Castillo Petruzzi v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 52 (1999).

human rights law and international humanitarian law. The US Supreme Court in *Al Odah v USA* should hold that all detainees currently held at Guantánamo Bay are entitled to challenge the lawfulness of their detention in a court of law and that they should be released if such detention is deemed unlawful.