

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

BRIEF OF AMICUS CURIAE

THE INTERNATIONAL CENTRE FOR THE LEGAL
PROTECTION OF HUMAN RIGHTS (INTERIGHTS)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties. The following Kuwaiti nationals who are imprisoned at Guantanamo Bay Naval Base appeared below as plaintiffs: Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi,

Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Al Azmi. The following additional Kuwaiti nationals, who are family members of the Kuwaiti nationals listed above, also appeared below as plaintiffs: Khaled A.F. Al Odah, father of plaintiff Fawzi Khalid Abdullah Fahad Al Odah; Mohammad R.M.R. Ameen, brother of plaintiff Omar Rajab Amin; Nayef N.N.B.J. Al Mutairi, brother of plaintiff Nasser Nijer Naser Al Mutairi; Meshal A.M.TH Al Mutairi, brother of plaintiff Khalid Abdullah Mishal Al Mutairi; Mansour K.A. Kamel, brother of plaintiff Abdullah Kamal Abdullah Kamal Al Kandari; Sayer O.Z. Al Shammari, father of plaintiff Abdulaziz Sayer Owain Al Shammari; Mesfer Saleh Ali Al Ajmi, brother of Abdullah Saleh Ali Al Ajmi; Mubarak F.S.M. Al Daihani, brother of plaintiff Mohammed Funaitel Al Dihani; Mohammad A.J.M.H. Al Kandari, father of plaintiff Fayiz Mohammed Ahmed Al Kandari; Monzer M.H.A. Al Rabieah, brother of plaintiff Fwad Mahmoud Al Rabiah; Walid Z.A. Al Zamel, brother of plaintiff Adil Zamil Abdull Mohssin Al Zamil; and Hamad Madai Saad, brother of plaintiff Saad Madai Saad Al-Azmi (collectively the "Family Members").

The following appeared below as defendants: the United States of America; George W. Bush, President of the United States; Donald H. Rumsfeld, Secretary of Defense; General Richard B. Myers, Chairman of the Joint Chiefs of Staff; Brigadier

General Rick Baccus, Commander of Joint Task Force-160, and Colonel Terry Carrico, Commandant of Camp X-Ray/ Camp Delta.

No amici appeared below.

The same parties appear in this Court. The organization, The International Centre for the Legal Protection of Human Rights (INTERIGHTS), an international organization based in the United Kingdom, seeks permission to appear as an amicus in this Court.

By virtue of an order filed October 17, 2002, this Court ordered that the motion submitted by INTERIGHTS for leave to file an amicus brief by October 11, 2002 be denied 'without prejudice to renewal upon the submission, within seven days of the date of this order, of a brief signed by a member of the Bar of this Court'.

(B) Rulings Under Review. The ruling at issue in this Court is the Order and Memorandum Opinion of July 30, 2002 ("Opinion"), by the Honorable Colleen Kollar-Kotelly, United States District Judge for the District of Columbia, granting defendants-appellees' motion to dismiss plaintiffs-appellants' complaint and motion for a preliminary injunction and dismissing this case with prejudice. The Order and Opinion are reproduced in the Joint Appendix ("J.A.") at pp.343. At the present time, the Order and Opinion have not been published in any official citation.

(C) Related Cases. By Order of this Court filed September 13, 2002, this appeal has been consolidated with the related case of Rasul v. Bush, No. 02-5288, with which this case was consolidated for jurisdictional purposes in the district court by Order entered July 30, 2002, and with the related case of Habib v. Bush, 02-5284.

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INTEREST OF AMICI

Amicus Curiae is the International Centre for the Legal Protection of Human Rights (INTERIGHTS), an international human rights organisation based in the United Kingdom specialising in the application of international law in domestic and international fora. For twenty years Interights has been assisting judges, lawyers, NGOs and victims in cases before national, regional and global tribunals, including as amicus curiae and as advocate in cases raising issues of general importance concerning the interpretation of fundamental rights. It is not a campaigning organisation and focuses only on the interpretation and application of international law.

SUMMARY

This case concerns an application by the Plaintiffs, 12 Kuwaiti nationals (the “Kuwaiti Detainees”) who are being detained in United States custody at the Guantanamo Bay Naval Base (“Guantanamo Bay”), and 12 of their family members (the “Family Members”). The Kuwaiti Detainees have been held virtually incommunicado since they were brought to Guantanamo Bay several months ago. They have not been informed of the reasons for their detention, have been denied access to counsel and to a court.

This brief sets out issues of international law, so far as applicable and germane to the present case. This brief will not address matters pertaining to legitimate executive discretion, but will focus instead on legal rights in respect of which applicable international law prescribes a judicial remedy.

The detainees have been held in what has been described a 'legal limbo', and have, as such, been denied all safeguards relevant to the protection of their basic rights to liberty and due process. This brief seeks to demonstrate that there is no legal limbo in international law. The legal rules that apply to the situation of the detainees in Guantanamo Bay derive from a special body of international humanitarian law that comes into play in armed conflict and a core of international human rights law (“IHL”)

that applies in all situations. This brief sketches out a) relevant provisions of international humanitarian law and b) international human rights law before touching briefly on c) the inter-relationship between these two bodies of law applicable during armed conflict, so far as relevant to the present case.

In so doing, this brief seeks to demonstrate that the Kuwaiti detainees are entitled, under international human rights and humanitarian law, to certain core human rights protections irrespective of where they are detained, or their nationality. While the applicability of particular provisions of humanitarian law depend upon the status of the persons (as prisoners-of-war, civilians or other) - and status must be determined in accordance with the principle of legality - the rights protections at issue in this case are enshrined in all potentially applicable provisions. These core rights thus remain protected under international law irrespective of status.

Specifically, the Kuwaiti detainees are entitled to the following rights, on which this brief focuses: to have the basis for their detention, and their status as detainees, determined, if appropriate by a competent tribunal; to be informed of the reasons for detention; to judicial review of detention; and, so far as the reason for their detention relates to their possible implication in criminal offences, to basic due process guarantees during detention, including access to legal counsel. This brief concludes by summarising the entitlement to these rights under international humanitarian and human rights law.

I. INTERNATIONAL HUMANITARIAN LAW

International humanitarian law (IHL) applies in situations of ‘armed conflict’, defined as follows:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.... [1]

It is not in dispute, and is uncontroversial, that the United States is currently engaged in an international armed conflict.[2] It is pursuant to the conflict, the government explains, that those held at Guantanamo Bay were detained.

International humanitarian law does not apply merely on the zone of battle, but may extend to any territory under the control of warring States, ‘whether or not actual combat takes place there’.[3] The key question is whether persons fall under the power or control of one of the parties to the conflict - in this case whether the Kuwaiti detainees are under U.S. control, which is clearly the case.[4] It matters not to the application of IHL that such persons are held in Guantanamo Bay, Afghanistan, the U.S. or elsewhere. The issues

in dispute regarding the territorial or sovereign status of Guantanamo Bay are therefore irrelevant to IHL obligations.

So far as the United States' obligations are concerned, the relevant law is principally contained in applicable treaties, to which the U.S. is a party, and customary international law, generally binding on all states.[5] For present purposes the relevant law is that relative to the treatment of persons detained during an armed conflict, embodied in the Geneva Conventions, 1949[6], and Protocol I Additional to the Geneva Conventions of 1977.[7]

The United States, like Afghanistan, is party to the four Geneva Conventions, which are therefore binding as treaty law.[8] Treaties to which the United States is not party[9] remain relevant so far as they reflect customary law, and the bulk of the provisions of the First Additional Protocol to the Geneva Conventions (AP I) are generally recognised as so doing.[10] Indeed, the key provisions of relevance to the present have been accepted by the United States, and others, as reflective of customary law.[11]

A. Rights Afforded to Detainees Under IHL

A key function of IHL is to afford humanitarian protection to persons in the hands of an opposing party to the conflict, namely prisoners of war, the shipwrecked, sick and wounded, and civilians who find themselves under the control of opposing forces. Such persons are considered 'protected' from the moment when they fall into the hands of the adverse party.

All persons detained during conflict have a status under IHL. This is consistent with the general principle which is embodied in all four Geneva Conventions of 1949, described by the authoritative International Committee of the Red Cross (ICRC) Commentary on the Fourth Geneva Convention ('ICRC Commentary on GC IV'):

“Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law....”[12]

Provisions of IHL (see Common Article 3 to the Geneva Conventions and Article 75 of Additional Protocol I below) guarantee that, should persons not be considered to fall within any of the foregoing categories, such persons remain protected. And no persons who are detained during conflict lack legal status, or legal protection, under IHL.

Therefore, detainees held in relation to an armed conflict must fall into one of the following statuses: wounded, sick or shipwrecked armed forces, prisoners of war, or civilians. While this brief does not address what status the Kuwaiti Detainees are entitled to under GC, it establishes that some legal status must apply and pending a determination

of their status they must be presumed POWs (Article 5(2), GC III).[13] In the event the military or executive doubts their entitlement to POW status, the matter must then be determined by a 'competent tribunal (Article 5(2), GC III).

If not treated as POWs, the detainees must be treated as civilians. The authoritative ICRC Commentary on GC IV notes: "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 war ... he or she necessarily falls within the ambit of [the Fourth Convention], provided that its Article 4 requirements are satisfied." Even resistance fighters, for example, who do not fall within the GC III Article 4 criteria for POWs, are entitled to be treated as civilians under GC IV: "If members of resistance movement who have not satisfied the conditions, they must be considered to be protected persons under the present convention." [14]

Civilians are defined as those 'who, at a given moment and in any given manner whatsoever, find themselves in case of conflict or occupation, in the hands of a Party to the conflict ... of which they are not nationals' are afforded the full protections of GC IV. [15]

Certain rights flow from these status determinations. For instance, POWs are protected by GC III which obliges states, among other things, to ensure that any POW who is subject to judicial proceedings, whether for a pre-capture or a post-capture offence, receives a fair trial. [16] So seriously are these rights taken that "wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention" is a grave breach, which State parties are obliged to prosecute. [17] Civilians are protected by the rules set forth in GC IV. GC IV provides, among other things, that civilians may be "punished for their acts, but the trial and sentence must take place in accordance with the provisions [on due process] of Article 64 and those that follow it." [18]

· Other Person In The Hands Of The Enemy Entitled To No Greater Protection

The United States authorities are bound by the rules of customary law as well as specific treaty provisions. Common Article 3 to the Geneva Conventions and Article 75 of the First Additional Protocol to the Four Geneva Conventions, 1977 (AP I) are binding in this context as customary law. Common Article 3 is beyond doubt customary in character, [19] and Article 75 is an elaboration of the customary principles enshrined in Common Article 3. A report prepared for the U.S. Chiefs of Staff specifically recognised Article 75 as reflective of customary law. [20]

Common Article 3 provides, inter alia, that persons taking no part in hostilities are "entitled to certain judicial guarantees generally recognised as indispensable...".

Article 75 is entitled "Fundamental Guarantees" and applies to persons "who do not benefit from any greater protections...." It is applicable to persons "who are arrested,

detained or interned for reasons related to the armed conflict...until their final release, repatriation or re-establishment, even after the end of the armed conflict.”[21]

This provision represents the most basic level of protection under IHL due to any human being detained for any reason related to the conflict. As the authoritative ICRC Commentary to Additional Protocol I ('ICRC Commentary AP I') notes: "there can be no doubt that Article 75 represents a minimum standard which does not allow for any exceptions" (emphasis added).[22] Article 75 includes a number of safeguards specifically directed towards the ensuring that detention is governed by a framework of legality, and maintaining basic due process rights.

Article 75(3) provides that:

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist ... should be interpreted in the light of human rights law, as explained in the section below.

The right to be informed promptly of the reasons for detention thus applies to persons detained for any reason related to the conflict - it does not depend on the person being suspected of a criminal offence.

The specific meaning to be given to this right, including the requirement of 'promptness,' should be interpreted in the light of IHRL, as explained below.[23] Moreover, as the ICRC Commentary to the Additional Protocol itself makes clear, "even in time of armed conflict, detaining a person for longer than, say, ten days, without informing the detainee of the reasons for his detention would be contrary to this paragraph [Article 75(3)]."

Article 75 (4) provides:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

These rights, such as the content to be associated with the right to 'all necessary rights and means of defence...' should be interpreted in the light of human rights law, which, as explained in the section below, includes access to counsel from the early stages of detention.[24]

II. HUMAN RIGHTS (IHRL)

The United States authorities are bound to observe human rights treaties to which it is party and international customary human rights law. As a State Party to the International Covenant on Civil and Political Rights (ICCPR)[25], this treaty provides the clearest source of human rights obligations binding upon the United States. The United States is bound also by the American Declaration on the Rights and Duties of Man (ADRDM)[26], and has signed (but not ratified) the American Convention on Human Rights (ACHR)[27], thereby expressing its willingness to act consistently with its provisions.

In international law, treaty provisions are supplemented by international instruments elaborated by international experts in the field which, while they are not binding per se, give more detailed expression to some of the binding prescriptions and prohibitions of international law. Instruments of relevance to the present case include the Helsinki Declaration of Minimum Humanitarian Standards[28], the Paris Minimum Standards of Human Rights Norms in an Emergency (“Paris Standards”)[29] and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[30]

· Territorial and National Scope

Human rights obligations apply in respect of all persons in a state's territory or subject to its jurisdiction, which extends beyond a state's borders where that state has de facto control over another state's territory, or where it exercises its authority abroad.[31] Respect for the human rights protected in international law are owed to nationals and aliens alike, without distinction.[32]

The location of the detention centres on land that may not be United States sovereign territory is of no significance for IHRL. Also, the Kuwaiti nationality of the plaintiffs does not affect the rights due to them.

The Inter-American Commission on Human Rights, in a recent request to the government of the United States to take certain 'precautionary measures' to protect the detainees, noted that

“[t]he determination of a state’s responsibility for violations of the international human rights of a particular individual turns not on that individuals’ nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state’s authority and control.”[33]

· Obligations in Emergency

Derogation in Time of Emergency

Like other human rights treaties, the ICCPR provides a procedure whereby states in time of 'public emergency threatening the life of a nation' may renounce parts of their obligations.[34] While the United States has not chosen to derogate from the provisions of the ICCPR, which therefore remains binding in its entirety, it is noted that in any event a 'core' of human rights are so fundamental cannot be derogated from, even in time of emergency.[35] While certain restrictions on the rights to liberty and to fair trial, that would be unlawful in time of peace, may be permissible in time of emergency, the violations of the rights addressed in this brief, are not. These cover the core issues of legality, the right to have the reason for ones detention determined and to be informed of that reason, the right to habeus corpus and to a judicial remedy, and basic due process rights including access to counsel.

Strict Necessity Test

To the extent that certain aspects of the rights at issue can be said to permit of derogation, any particular measures restricting those rights must be 'strictly required by the exigencies of the situation.'[36] This would depend on a showing that the security risk to the nation would be increased as a result of, for example, allowing access to a lawyer or to a U.S. court. Similarly, no alternative measures or safeguards must be reasonably available to meet or minimise the security concerns (such as informing of the reasons for detention while limiting the provision of sensitive information, for example).

Compatibility with other Legal Obligations

Moreover, any derogation from human rights treaties does not affect other international obligations, notably those enshrined in IHL (such as the fair trial rights, discussed above) that continue to apply, and which do not permit of any derogation.[37]

A. Rights Afforded to Detainees Under IHRL

Under the ICCPR, restrictions on liberty are subject to safeguards, the most fundamental of which is that the restriction must be governed by the principle of legality. Other safeguards include the right to access a court to determine the lawfulness of arrest and detention, right to counsel, and right to be notified of reasons for an arrest or detention.

Judicial Oversight

The UN Human Rights Committee has noted that continued procedural guarantees, including judicial guarantees and the right of persons who allege that their rights have been violated to 'a remedy'[38] are rights that remains effective in time of emergency,[39] and that are themselves essential to guarantee the protection of other (non-derogable) rights.[40]

This is in line with the Inter-American Court on Human Rights (ACHR), which has explicitly acknowledged that 'the judicial guarantees essential for the protection of such rights'[41] are also non-derogable, and these have been held to include habeas corpus.[42] Indeed, the ACHR has noted that it is precisely in such exceptional emergency situations that judicial supervision assumes greatest importance.[43]

The European Court of Human Rights (ECHR) noted that 'although the Court is of the view - which it has expressed on several occasions in the past...that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention.'[44]

The ECHR, like the UN Human Rights Committee, has specifically addressed this requirement of 'promptness' of judicial supervision, including in situations of emergency and the context of terrorism related cases. In *Brogan v. United Kingdom*[45], the ECHR again recognised that the specific circumstances of the fight against terrorism may impact on the length of permissible detention before being brought before a judge. Yet in that case, four days and six hours was deemed excessive. In another case concerning problems posed by terrorism, the Court considered detention for twelve to fourteen days without judicial supervision to be unacceptable.[46]

Access to Counsel

The right to consult counsel is explicit in the ICCPR (Article 14(d)) and it is emphasised throughout the jurisprudence of international human rights bodies that the right must take effect from the earliest stages of detention. It is one of the most basic aspects of fair trial rights, prized by international law.

Paramount among the safeguards that the ECHR has emphasised must be in place from the earliest stage of detention is the right to access a lawyer. In *Brannigan and McBride* the Court relied on the right to consult a lawyer within the first days of detention as an essential element in its decision that detention for one week without judicial review could, in exceptional circumstances, be justified.

The Paris Standards[47] also include among the conditions that must be met for administrative detention: "(b) The right to communicate with, and consult, a lawyer of his own choice, at any time after detention." The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, also provides that 'anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him' (Principle 10), an 'effective opportunity to be heard promptly by a judicial or other authority' and 'the right to defend himself or to be assisted by counsel as prescribed by law' (Principle 11). The Principles specify that "...communication of the detained or imprisoned person with the outside

world, and in particular his family or counsel, shall not be denied for more than a matter of days."

Reasons for Arrest

The requirement that reasons for detention be given to the detainees is set forth in Article 9(2) of the ICCPR, and applies to all detentions, not only those pursuant to the suspected commission of a criminal offence.

In interpreting Article 9 ICCPR, the Human Rights Committee has noted that "if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions [of Article 9], i.e., it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2), and court control of the detention must be available (para. 4)"[48]

The Article 9(2) rule is elaborated upon in the Paris Standards. Including the right to know the reasons for the detention within seven days as a 'minimum right' of the detainee, it adds: "disclosure of such facts in support of the grounds as the detaining authority considers to be prejudicial to the public interest need not be made to the detainee, without prejudice to the power of the reviewing authority in its discretion to examine in camera such facts if it considers it necessary in the interests of justice...."

III. Relationship Between IHL and IHRL

IHL comes into operation in times of armed conflict. IHRL applies at all times and enshrines minimum standards relevant to all situations, including armed conflict. The existence of an armed conflict, or the applicability of IHL to the situation, does not therefore oust the role of IHRL.[49] Similarly, as the UN Human Rights Committee has recalled, derogation from certain IHRL in time of emergency can never justify violations of IHL.[50]

Temporally, the two strands of law therefore overlap and apply simultaneously during time of emergency, including armed conflict. As explained, neither adheres to strict territorial limits, and in the situation of Guantanamo Bay, both strands of law are clearly applicable.

In most cases, including on the issues at stake in the present case, the two bodies complement and supplement one another.[51] Each strand provides a tool in the interpretation of the other. Depending on the nature of the issue at stake, one or other body of law may provide the most specific guidance: as such, IHRL in armed conflict is informed by the standards of IHL,[52] whereas many provisions of IHL are in turn interpreted in the light of the fuller jurisprudence available from IHRL.

In the present context there are several areas where cross referral from one area to the other are essential to a proper understanding of the legal framework. For example, in

order to determine whether a detention was, in fact, arbitrary, reference may be made to the grounds for detention of person in armed conflict, governed by IHL. Critically for the present case, the due process rights protected by IHL are a prime example of an area where the framework of law is given more specific meaning by reference to IHRL. The references in, for example, GC IV and Article 75 of AP I, to 'fair trial', 'necessary facilities for preparing the defence' and 'all necessary rights and means of defence', for example, should therefore be interpreted in the context of the human rights norms applicable even in times of emergency.

To the extent that there is any lacunae, or perceived lacunae, in either area of law, the other serves to supplement it and to ensure that the basic rights of all persons, including the Kuwaiti detainees in the present case, are respected.

IV: Conclusion

The relevant provisions of international law, both IHL and IHRL, protect the Kuwaiti detainees irrespective of their location on Guantanamo Bay. While their status as detainees is relevant to the specific legal provisions afforded to them, these provisions all have in common the protection of the core rights which are asserted in the present case. Specifically, the minimal guarantees of international law ensure that their detention must be governed by the principle of legality, and that the detainees must be informed of the reasons for detention, have access to judicial review of their detention and be afforded basic due process guarantees, including access to legal counsel.

Respect for these rights is not a matter of executive discretion, but is a legal question susceptible to judicial determination according to the rules of IHL and IHRL.

The principle of legality is fundamental, and underpins any system of law, national or international. Pursuant to the principle of legality, the Kuwaiti detainees have the right to have their status as detainees clarified. This determines the precise legal framework applicable to their cases, which is relevant to an assessment of the reasons for and legitimacy of their detention (e.g. as civilian detainees their detention meets the test of 'strictly necessary... security for the state...') as well as the precise scope of rights to which they are entitled under IHL, as civilians, POWs or other, as explained above.

The detainees have a right to be informed of the reasons for their arrest. This is recognised under the minimal rules of protection under IHL and IHRL.[53]

If it unfolds that the justification for their detention relates to the commission of a criminal offence, they have the right to be informed of charges against them. This right is guaranteed by both IHL and IHRL.[54]

Judicial review of all forms of detention by a judicial body is guaranteed by international law, even in time of emergency. The right under IHRL is to be brought before a court promptly[55] and to challenge the lawfulness of arrest.[56]

Judicial review is a fundamental right in itself and a safeguard against violation of other rights. While courts have shown some flexibility in the application of law in extreme security situations (for example allowing up to 14 days without judicial oversight), this has a) depended on the existence of other attendant safeguards absent in the present case, and b) never been deemed permissible for such prolonged (and indefinite) periods of detention as are involved in the present case.

While of lesser relevance on the facts of the present case, if any issue were to arise as to whether detainees had been involved in hostilities and might be entitled to be treated as POWs, there is also an explicit IHL obligation to have the matter determined by a 'competent tribunal' (Article 5, GC III).

The detainees are also entitled to basic due process rights, under IHL and IHRL applicable in all situations including emergencies. Notably, if they are suspected of criminal conduct, they are entitled to access to a lawyer. Under IHL, the right is explicit for civilian detainees,[57] but applies as one of the most basic "judicial guarantees generally recognised as indispensable..." and as one of the necessary rights and means of defence...." These rights specifically apply "before and during trial." [58] In the light of IHRL there can be little doubt that access to counsel is one of the essential rights or means of defence.[59]

* Per D.C. Cir. Rule 28(a)(2), authorities chiefly relied upon are marked with an asterisk

[1] Para. 70 of the Appeal Chamber majority decision in *The Prosecutor v. Dusko Tadic* IT-94-1-AR72, Decision, 2 October 1995 (Tadic Jurisdiction Appeal Decision), Part IV n.119. See also ICC Statute.

[2] The question whether that conflict arose with the vicious attacks of September 11, 2001 or with the military response thereto, on October 7 when the United States and others intervened militarily in Afghanistan, is not relevant, as there was clearly an armed conflict at the date of the detentions.

[3] Tadic Jurisdiction Appeal Decision, para. 70.

[4] See for example, the protection afforded to persons who have fallen in the power of a Party to the conflict, which the ICRC Commentary to the Additional Protocol to the Geneva Conventions makes clear involves persons "in enemy hands or who have fallen into the power of the enemy" (ICRC Commentary AP I, para. 2910).

[5] Customary international law, comprising state practice and *opinio juris* of states, is defined in Article 38 of the Statute of the International Court of Justice.

[6] Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (“Geneva I”), Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (“Geneva II”), Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (“Geneva III”), Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (“Geneva IV”), all done at Geneva, 12 August 1949, entered into force for the United States, 2 February 1956.

[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

[8] The Geneva Conventions of 12 August 1949 (hereafter 'Geneva I, II, III and IV' respectively) have been ratified by the US and by Afghanistan, on 02.08.1955 and 26.09.1956, respectively. See www.icrc.org.

[9] While the United States has not ratified Additional Protocol I of 1977, it signed it on 12 December 1977.

[10] AP I is increasingly recognised as forming part of customary law: see Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon, 1991) 67, suggesting that the US has accepted the bulk of AP I as customary law. The ICTY has noted that: 'While both Protocols have not yet achieved the near universal participation enjoyed by the Geneva Conventions, it is not controversial that major parts of both Protocols reflect customary law.' *Prosecutor v. Kordic & Cerkez*, IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss the Amended Indictment, 2 March 1999, para. 30. The Geneva Conventions, 1949, also fall within customary law: Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 239, 249 and Theodor Meron, 'The Geneva Conventions as Customary Law', 81 *AJIL* 348, 349.

[11] See re. Article 75, below.

[12] International Committee of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: 1958), p. 51.

[13] Article 5 GC III is supplemented in this respect by Article 45 AP I, which places the burden of proof on this issue on the detaining power, providing that:

“[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 . . . 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.”

[14] ICRC *Commentary, GC IV*, p. 50 et seq.

[15] Article 4 GC IV. Certain categories of persons are excluded from the protection of GC IV, including nationals of co-belligerent states (which does not cover Kuwaiti nationals) and 'nationals of a neutral state.' Nationals of a neutral state are excluded if their arrest occurred 'in the territory of [the] Party to the conflict' in whose hands they are held. Because the Kuwaiti Detainees were arrested in Afghanistan (and not the United States) they would not be excluded from protection. ICRC Commentary, GC IV, p. 48. The International Criminal Tribunal for the former Yugoslavia (ICTY) made clear, the GC IV applies to "protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves."

[16] See Articles 82-88 and 99-107 GC III. This explicitly includes the right to legal representation (Article 84).

[17] Article 130.

[18] ICRC Commentary, GC IV, p. 50. By virtue of Article 126 these provisions on due process apply to all persons detained - in occupied territories or civilian internees on U.S. territory. These due process rights include the right to be "promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them..." (Article 71, GC IV). They also include the right "to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence..." (Article 72, GC IV).

[19] According to the International Court of Justice, Common Article 3 is customary international law applicable in all situations of conflict. See the *Military and Paramilitary Activities (Nicaragua v. US)*, 1986 ICJ 14, at pp. 232, 249 (June 27) para. 218.

[20] Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon, 1991) 65, refers to a study of IHL prepared for the Joint Chiefs of Staff which states that Article 75 is one of the provisions of IHL that is "already part of customary law."

[21] See Article 75(1) and (6) and Article 45 AP I, which notes:

3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.

[22] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Jean Pictet, Geneva 1987 (hereafter "Commentary to AP I", para 3032.

[23] See Relationship between Human Rights and Humanitarian Law, below.

[24] See Relationship between Human Rights and Humanitarian Law, below.

[25] ICCPR was adopted by the General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976.
http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

[26] American Declaration on the Rights and Duties of Man (ADRDM) was adopted by the Ninth International Conference of American States, Colombia in 1948.
<http://www.worldpolicy.org/americas/treaties/adrmd.html>.

[27] The American Convention on Human Rights (ACHR) was adopted at San Jose, Costa Rica on 22 November 1969. <http://www.oas.org/juridico/english/Sigs/b-32.html>.

[28] The Declaration of Minimum Humanitarian Standards, adopted in December 1990, sets forth the core human rights that must be preserved in every situation and at all times. See Theodor Meron & Allan Rosas, Current Development: A Declaration of Minimum Humanitarian Standards, 85 AM. J. INT'L L. 375, 375-77 (1991).

[29] Paris Minimum Standards of Human Rights Norms in a State of Emergency; see Richard B. Lillich, Current Development: The Paris Minimum Standards of Human Rights Norms in a State of Emergency, 79 AM. J. INT'L L. 1072, 1073 (1985).

[30] The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988 http://www.unhchr.ch/html/menu3/b/h_comp36.htm, visited 9 October 2002.

[31] The apprehension of suspects constitutes exercising such authority abroad: see *Reinette v. France* (1989) 63DR 189. On 'effective control of territory', see *Loizidou v. Turkey* (1996) 23 EHRR 513. See also *Bankovic & Others v. The Contracting States* also parties to the North Atlantic Treaty Application No. 52207/99 before the ECHR, which distinguishes aerial bombardment from exercising territorial control.

[32] Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, 1995), 581.

[33] Request for Precautionary Measures from Inter-American Commission on Human Rights to US government, re: Detainees in Guantanamo Bay, Cuba, dated March 12, 2002 (the "Precautionary Measures"),
<http://www.humanrightsnow.org/oasconventiononguantanamodetainees.htm>.

[34] Article 4 ICCPR, Article 27 ACHR.

[35] See UN Human Rights Committee General Comment 29 on States of Emergency (Article 4), para. 7.

[36] Article 4 ICCPR and Article 15 ECHR. For example the European Court has noted that while "the investigation of terrorist offences undoubtedly presents the authorities with special problems...", as each measure has to be strictly necessary, "...it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention." *Aksoy v. Turkey* (100/1995/606/694), 18 December, 1996.
<http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/589.txt>,
<http://www.echr.coe.int/Eng/press/2000/oct/aksoy%20jud%20epress.htm#fn>.

[37] See UN Human Rights Committee General Comment 29 on States of Emergency (Article 4), UN Doc. CCPR/C/21Rev.1/Add.22, August 31, 2001.

[38] Article 2(3) ICCPR.

[39] *Ibid.* para. 14.

[40] States of Emergency (Article 4), General Comment No. 29, para. 16.

[41] Article 27(2) ACHR.

[42] *Habeas Corpus in Emergency Situations*, Inter-American Court of Human Rights Advisory Opinion (OC-8/87), No. 8, June 30, 1987.

[43] *Habeas Corpus in Emergency Situations*, para. 12.

[44] *Aksoy v. Turkey*, para. 78.

[45] *Brogan v. United Kingdom*, (1989) 11 EHRR 117, 29 November 1988.

[46] *Sakik & Others v. Turkey*, No. 87/1996/706/898-903, ECHR (1997), 26 November 1997.

[47] See Article 5.

[48] *Right to Liberty and Security of Persons* (Article 9), General Comment No. 8, UN Doc. HRI/GEN/Rev., June 30, 1982, para. 4.

[49] See *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996) 226, para. 25, in which the ICJ observes that "...the protection of the International Covenant on Civil and Political Rights does not cease in time of war, except by operation of Art. 4 of the Covenant..."

[50] See UN Human Rights Committee General Comment 29 on States of Emergency (Article 4), para. 7.

[51] In the event of apparent inconsistency in the content of the two strands of law, the more specific provisions will prevail. See Theodor Meron, 'The Humanization of Humanitarian Law', (2000) 94 AJIL, 239.

[52] See Case 11.137, *Abella v. Argentina*, IACHR, paras. 158-61, OEA/Ser.L/V.97, doc. 38 (1997). See also the *Bankovic* case, n.46.

[53] Article 75 (3) (any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly ... of the reasons why); ICCPR Article 9(2) provides: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

[54] Article 71 GC IV provides for civilians the right to be "promptly informed ... of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible". Article 75 (4)(a) provides for the right "to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;..." See also Article 9(2) ICCPR.

[55] ICCPR Article 9(3): "Anyone arrested or detained on a criminal charge 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 release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

[56] ICCPR Article 9(4): "Anyone 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."

[57] Article 72, GC IV: They also include the right "to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence..." Note that POWs likewise have an explicit right to legal representation (GC III, Article 84).

[58] Article 75 AP I.

[59] Article 14 (d) ICCPR and the body of jurisprudence and other sources, set out above.