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"The degree of civilization in a society can be judged by entering its prisons."  
Fyodor Dostoyevsky

'To deny violent extremists one of their most potent recruitment tools, we will close the prison at Guantanamo Bay'.

US National Security Strategy 2010

A defining feature of practice since 2001 has been the large scale detention of persons ‘for reasons related to the conflict’ that the US purports to be waging against al-Qaeda and associated groups. While people have been detained in many centres across the world, by the US or by proxy, a major repository for detainees, and symbol of the ‘war on terror’, has been the United States Naval Base in Guantanamo Bay, Cuba. Since early January 2002, an estimated total of nearly 800 people, including nationals of at least forty states, have at some point been transferred to and held in detention facilities at Guantanamo.3

The location of the detention centre on Guantanamo Bay, which the United States authorities claimed was beyond US sovereign territory, was an acknowledged attempt to circumvent the application of human rights protections in the United States constitution and access to United States courts.4 The detainees were labelled ‘enemy combatants’, in support of the view that normal criminal and human rights law do not apply, though the epithet was simultaneously relied upon to justify the non-application of the protective aspects

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of international humanitarian law. They came to be held in what has correspondingly been described as a ‘legal black hole’ or ‘legal limbo.’

Guantanamo Bay promptly came to symbolise the war on terror and it’s ‘flouting of the rule of law’. International condemnation was slow but gathered momentum over time, culminating in perhaps unprecedented levels of state and international criticism of US policy. Superlatives abound, with the Guantanamo regime having been condemned variously as a ‘shocking affront to democracy’, a ‘stain’ or ‘horrendous blot’ on the US reputation, and ‘the gulag of our times’.

Within the US itself, over time reflections have emerged on the implications of the camp, including that it has ‘shaken the belief the world had in America’s justice system.’ The administration has repeatedly acknowledged that it threatens national security by constituting a ‘potent recruitment tool’ for terrorists and an obstacles to international cooperation.

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7 ‘GTMO has become a symbol around the world for an America that flouts the rule of law.’ B. Obama, speech at National Defense University, 23 May 2013, transcript available at: http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html.
8 Chapter 8C on responding to Guantanamo.
14 National Security Strategy, supra note 2, p. 22. During a press conference President Obama explained that ‘the reason for wanting to close Guantanamo was because my number one priority is keeping the American people safe. One of the most powerful tools we have to keep the American people safe is not providing al Qaeda and jihadists recruiting tools for fledging terrorists. And Guantanamo is probably the number one recruitment tool that is used by these jihadist organizations. And we see it in the websites that they put up. We
Around 2008, the tide seemed to be turning on Guantanamo. Ground-breaking US Supreme Court cases recognised the rights of detainees to challenge the legality of their detention before a neutral arbiter.16 There were political pledges to ‘clean up the mess,’17 recognitions of the ‘failure of the entire system’18 and promises to relegate a ‘sad chapter in American history’ to the past.19 Incoming President Barack Obama issued an executive order concerning the closure of Guantanamo and has reiterated his pledge many times since then,20 as will be seen, however, deadlines have come and gone and the camp remains active, with some one hundred and sixty increasingly

15 In April 2013 Obama described Guantanamo as ‘inefficient’ and noted that ‘it hurts us in terms of our international standing, it lessens co-operation with our allies on counter-terrorism efforts, it is a recruitment tool for extremists, it needs to be closed.’ ‘Barack Obama says Guantanamo Bay Prison must close’, BBC News, available at: http://www.bbc.co.uk/news/world-us-canada-22358351. See also, Obama speech, 23 May 2013, supra note 7.


‘desperate’ inmates as at early 2013 and an administration coming to terms with the fact that some monsters, once created, are not readily slain.21

The facts regarding detentions at Guantanamo Bay, from the early period of the black hole epithet to the situation more than a decade later, will be sketched out in the first part of this chapter. The second part highlights the application of the legal framework of international human rights and humanitarian law to the Guantanamo detainees; while a litany of legal issues and rights violations arise, the emphasis here is on the relevant rights in relation to detention and fair trial, the denial of which, in various forms over time, has characterised the Guantanamo scheme. The third part explores the rights and duties of third party states to respond to violations such as those arising at Guantanamo, and the reaction of the international community thus far, before concluding with questions on the potential implications and repercussions of the Guantanamo Bay situation for the US, for other states, and for the rule of law more generally.

8A GUANTANAMO BAY AND ITS DETAINEE S: THE BASIC FACTS

Guantanamo Bay was let to the United States by the Republic of Cuba in 1903 under an agreement that provides in relevant part:

> While on the one hand the United States recognises the continuance of the ultimate sovereignty of the Republic of Cuba over [Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.22

Guantanamo Bay occupies a substantial area of more than 45 square miles and is ‘entirely self sufficient, with its own water plant, schools, transportation, and entertainment facilities’.23 It has been described – by Legal Counsel of

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22 Article III, Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, 16-23 February 1903, T.S. No. 418. The lease was continued by a subsequent treaty in 1934, and the United States has indicated its intention to continue that lease indefinitely.

the Justice Department\textsuperscript{24} and the United States Navy,\textsuperscript{25} respectively – as ‘under the exclusive or concurrent jurisdiction’ of the United States, and as ‘a Naval reservation, which, for all practical purposes, is American territory.’ A US court in 1992 described it as ‘a military installation that is subject to the exclusive control and jurisdiction of the United States’.\textsuperscript{26} Despite this, the US government chose the Guantanamo site partly because of its offshore location and the avoidance of legal oversight.\textsuperscript{27} The United States government has consistently asserted that Guantanamo lies beyond its sovereign territory, and beyond the reach of the Constitution and the jurisdictional purview of US courts.\textsuperscript{28} Paradoxically, however, US officials argued that it is within US jurisdiction for the purposes of excluding the application of the Torture Victim Protection Act\textsuperscript{29} which gives US courts jurisdiction over torture committed in foreign jurisdictions.

8A.1 THE DETAINES AND THEIR TREATMENT IN GUANTANAMO BAY

At the early stages, absolute secrecy surrounded the Guantanamo detainees, and controversy and confusion has surrounded the reasons for their detention, their status, and the rights, if any, to which they are entitled.\textsuperscript{30} At first, no information was available even as to who was detained, which was


\textsuperscript{26} \textit{Haitian Centers Council, Inc. v. McNary}, 969 F2d 1326, 1342 (2nd Cir.-1992).

\textsuperscript{27} John Yoo, former deputy assistant Attorney General and Justice Department’s Office of Legal Counsel, was asked why the site of Guantanamo Bay was chosen. He answered that one issue ‘was whether the federal courts were going to get involved in trying to manage how the facility worked. … you don’t want to have, I think, the judiciary getting involved while the war is going on … I don’t think that was the primary reason to pick Guantanamo, but certainly an ancillary reason why Guantanamo was picked’. John Yoo Interview, PBS, 19 July 2005, available at: http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html.

\textsuperscript{28} See e.g. positions in litigation in US courts, including in \textit{Al Odah}, supra note 4 available at: http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states.


\textsuperscript{30} See para. 8B.3 and 8B.4 in this chapter.
purportedly justified on national security grounds. Families were abruptly refused information about the identities of detainees.31

The detainees were referred to collectively as dangerous ‘enemy combatants’,32 and the ‘worst of the worst’,33 but over time the secrecy has been peeled back to expose the identities and the circumstances of the human beings behind the labels.34 It is now clear that children as young as thirteen have been among those detained and ill-treated,35 which has prompted particularly strident condemnation36 in light of special international legal obligations of

31 See blunt response in the letter from the US London Embassy to families of detainees requesting information, cited in the Abbasi case, supra note 5. ‘[W]e are not in a position to address the particular circumstances of any of the individuals detained at Guantanamo Bay’. According to a lawyer for some of the UK national detainees, in some cases journalists informed the UK families of the detentions.

32 See Abbasi, supra note 5, para. 9, citing a letter from the First Secretary at the US Embassy in London to solicitors acting for the claimants in the Abbasi case which states that ‘The United States Government believes that individuals detained at Guantanamo are enemy combatants’, 2 July 2002, in ‘Skeleton Argument of the Claimants’, para. 6, on file with author. The term was defined in 2004. See ‘Categories of Detainees’ below.

33 ‘Former Vice President Dick Cheney said Monday that the only alternative the Bush administration had to creating the Guantanamo Bay naval prison was to kill the terror suspects who are incarcerated there, and “we don’t operate that way.” The 240 prisoners left at Guantanamo, he said, are “the worst of the worst.”’ ‘Cheney: Gitmo holds ‘worst of the worst’’, Former vice president says killing suspects was only other option’, NBC News, 6 January 2009, available at: http://www.msnbc.msn.com/id/31052241/ns/world_news-terrorism/1/cheney-gitmo-holds-worst-worst.


35 Most of the ‘younger’ juveniles detained in Guantánamo (i.e. those aged between 13 and 15 years) were reported to have been released in 2004. See, e.g., ‘Transfer of Juvenile Detainees Completed’, U.S. Dept. of Defense, News Release No. 057-04, 29 January 2004, available at http://www.defense.gov/releases/release.aspx?releaseid=7041. However, see the three cases of Omar Khadr, Jawad Mohammed and El-Gharani highlighted in note 36.

36 See, e.g., The UN Committee on the Rights of the Child report, New York, 6 June 2008, noting the cases of three detainees in Guantánamo who were apprehended as juveniles. Omar Khadr was 15 when detained, convicted by military commission and served ten years in Guantánamo before being returned to Canada in 2012 to complete his sentence. Mohammad Jawad who his lawyers say was 12 when detained though the Pentagon questions this, who a US military judge appeared to accept had been tortured, whose habeas application was successful but the US continued to detain him for years while considering criminal charges for throwing a grenade, was ordered released and returned to his family in Afghanistan in 2009. Mohammad El-Gharani was held in Guantánamo since age 15 and reportedly tried to commit suicide at least seven times.
protection.\(^{37}\) Also among the detainees are elderly people as old as eighty-four and others suffering from serious mental illnesses.\(^{38}\)

Despite the emphasis on the circumstances of detention being justified by the fact that ‘these are bad people’,\(^{39}\) it is now clear, even from official statements and reports, that many of the detainees were no more than ‘victims of circumstance,’\(^{40}\) detained on the ‘flimsiest’ of pretexts.\(^{41}\) Despite the enemy combatant nomenclature, reports based on the government’s own documentation suggest that 92 percent of the men that have been held in Guantánamo are not in the government’s view ‘Al-Qaeda fighters’.\(^{42}\) Most have been acknowledged, often many years after their detention, as not being enemy combatants and not having posed a threat to the United States, even according to the broad reaching approach to the definitions of these concepts in the war

\(^{37}\) See, e.g., the special guarantees provided for juvenile defendants and detainees by e.g., Articles 10(2)(b) and 10(3) and Article 14(4) of the ICCPR; see also ‘Convention on the Rights of the Child: Optional Protocol on the Involvement of Children in Armed Conflict’, G.A. Res. 54/263, 25 May 2000, UN Doc. A/RES/54/263 (2000). The US ratified the Optional Protocol on 23 December 2002.


\(^{40}\) Leaked documents in April 2011 demonstrate the ‘indicators’ used as a basis to detain, such as wearing the same type of Casio watch used by some members of al-Qaeda, or staying in the same guesthouses as members of al-Qaeda. See, e.g., ‘Leaked Guantánamo files highlight need for fair trials and accountability’, Amnesty International, 26 April 2011, available at: http://www.amnesty.org/en/news-and-updates/leaked-guantanamo-files-highlight-need-fair-trials-and-accountability-2011-04-26. See also, ‘Guantánamo files: How interrogators were told to spot al-Qaeda and Taliban members’, The Guardian, 25 April 2011, available at: http://www.guardian.co.uk/world/interactive/2011/apr/25/guantanamo-files-interrogators-al-qaida-taliban. Reports describe 150 ‘innocent Afghans or Pakistanis, including farmers, chefs and drivers who were rounded up or even sold to US forces and transferred across the world’.

on terror.\textsuperscript{43} The vast majority have since been released, just as they were held, at the discretion of the US government.\textsuperscript{44}

However, more than a decade after its inauguration, one hundred and sixty six men remained imprisoned at Guantánamo Bay.\textsuperscript{45} The US government has identified forty six of them\textsuperscript{46} as subject to on-going, potentially indefinite detention, on the grounds that they cannot be prosecuted (either for lack of evidence or because the evidence could not be admitted, for example),\textsuperscript{47} but are considered too ‘dangerous’ (on unspecified grounds) to be released.\textsuperscript{48} A striking 86 have been cleared for release,\textsuperscript{49} yet they continue to languish in Guantánamo sometimes many years later, as the government remains unwilling or in some case unable to release them.\textsuperscript{50} The then President of the United States stated early in the war on terror that ‘to the extent appropriate and consistent with military necessity’ the detainees would be treated ‘in a manner consistent with the principles of the Geneva Conventions of 1949’.\textsuperscript{51} Upon arrival at Guantánamo Bay, the detainees were initially shackled and hooded, and photographs of them were published widely around the globe.\textsuperscript{52} Early reports by human rights groups and the press questioned

\begin{itemize}
\item \textsuperscript{43} CCR Guantánamo by Numbers, supra note 42; ACLU Guantánamo Infographic, supra note 42. Decisions on habeas corpus and to a lesser extent the task force review provides insights as to the lack of a basis to detain in some cases. ‘Final Report, Guantánamo Review Task Force’ (hereinafter ‘Guantánamo Review Task Force’), Dept. of Justice, Dept. of Defense, Dept. of State, Dept. of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff, 22 January 2010, available at: http://www.justice.gov/ag/guantanamo-review-final-report.pdf.
\item \textsuperscript{44} CCR Guantánamo by the Numbers, supra note 42; ACLU Guantánamo Infographic, supra note 42.
\item \textsuperscript{45} 166 remain imprisoned as at June 2013. For updates, see CCR Guantánamo by the Numbers, supra note 42 and ACLU Guantánamo Infographic, supra note 42.
\item \textsuperscript{46} Ibid.
\item \textsuperscript{47} See ‘Guantánamo Review Task Force’, supra note 43, p. 22; ‘CCR Guantánamo by the Numbers, supra note 42; ACLU Guantánamo Infographic, supra note 42.
\item \textsuperscript{48} Ibid.
\item \textsuperscript{49} CCR Guantánamo by the Numbers, supra note 42; ACLU Guantánamo Infographic, supra note 42
\item \textsuperscript{50} A variety of factors have been cited as preventing the release of those slated for transfer or release including inaction on the part of the Obama and Bush administrations, a moratorium placed on transfers to Yemen due to the security situation in that state generally, and restrictions placed by Congress on transfers from Guantánamo in December 2010. See, e.g., ‘Why can’t cleared prisoners leave Guantánamo Bay?’, Reprieve, 10 July 2012, available at: http://replrieve.org.uk/publiceducation/2012_07_10_Guantanamo_public_education.
\item \textsuperscript{51} Presidential Memo, 7 February 2002 and ‘Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate,’ 20 September 2002.
Case study I

whether conditions of detention were acceptable, signalling cramped conditions, excessive heat, poor sanitation and measures in contravention of the prisoners’ religious beliefs, such as forcibly shaving prisoners’ beards.\textsuperscript{53}

It was with the release of a small group of detainees in 2003, that serious allegations of torture and ill treatment began to emerge.\textsuperscript{54} Allegations of torture in Guantanamo have now been confirmed by multiple sources, including NGO reports,\textsuperscript{55} the ICRC\textsuperscript{56} and official documents.\textsuperscript{57} Information on


\textsuperscript{54} See S. Goldenberg, ‘Guantanamo abuse same as Abu Ghraib, say Britons’, The Guardian, 14 May 2004, available at: http://www.guardian.co.uk/world/2004/may/14/iraq.guantanamo; see also Chapter 7B5, above.


cases at Guantanamo are coupled with information, now widely publicised, concerning the ‘enhanced interrogation techniques’ that were authorised for use on ‘high value detainees’ by the US government. Information on connections between Guantanamo and other detention facilities (including the Abu Ghraib prison in Iraq and various CIA ‘black sites’), where evidence of torture and ill treatment is now a matter of public record, presents a picture of a broader policy and practice of which Guantanamo’s purportedly law-free characteristics were only a part.

More recent reports would suggest that allegations of torture and ill-treatment appear to have ceased, and that although conditions of detention remain strict, the treatment of detainees has substantially improved over time. Some questionable practices continue to receive attention however, notably in parts of the camp where the so-called ‘high value detainees’ are held, such as hooding detainees when they are transferred from the prison to meet with their lawyers or for other purposes and some areas remaining off-limits to

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60 See Chapter 10. On links between the two, see Goldenberg, ‘Guantanamo Record’, supra note 59; Taguba report, supra note 59. Detainees held in rendition sites were often flown in and out of Guantanamo at various stages. See, e.g., Abu Zubaydah v Lithuania Application No. 46454/11, ECtHR, 27 October 2011 and Abu Zubaydah v Poland Application No. 7511/13, ECtHR, 26 March 2013. The CIA is reported to have held a separate site at Guantanamo at the early stages.

61 See Chapters 7B7 and 10 which explores those techniques in more detail.

outsiders. Concerns also emerged as to the forced feeding of detainees on hunger strike.

Contact between detainees and the outside world has been extremely limited, and the lack of outside access to parts of the camp and to the detainees themselves has limited effective assessment of the conditions of detention. For the first few years, even the ICRC was denied access, while other human rights bodies initially denied any access were later granted it subject to agreeing not to communicate with detainees – conditions which have led the Inter-American Commission and Special Rapporteur on Torture to decline to visit. With few exceptions, detainees continue to be denied access to their families and correspondence is heavily censored.

A particular concern arises from measures imposed specifically on high value detainees regarding the ‘presumptive classification’ of everything said by certain detainees, until the government decides to declassify. This means that some detainees are completely precluded from communicating with the

63 Abu Zubaydah v Lithuania and Poland, supra note 60. Lawyers for some of the detainees who faced charges before the Guantánamo military commissions have been allowed inside, but only after volunteering to wear the same hoods the detainees wore. CCR Current Conditions, ibid. See also “ ‘Platinum’ captives held at off-limits Gitmo camp’, The Miami Herald, 7 February 2008, available at: http://www.miamiherald.com/2008/02/07/930542/platinum-captives-held-at-off.html.

64 The ICRC considered force-feeding hunger-striking detainees as a violation of Common Article 3, which is supported by CAT and the World Medical Association (WMA). Some 100 of the 166 detainees held by April 2013 were on hunger strike and some force fed; ‘Barack Obama says Guantánamo Bay Prison must close’, supra note 15. Aamer v Obama is a legal challenge to force feeding brought in US courts in 2013.

65 Limited access of monitoring bodies is referred to below. Counsel are also denied access to some parts of the camp, notably camp 7. See, e.g., “ ‘Platinum’ captives held at off-limits Gitmo camp’, supra note 63.

66 The 22 January 2009 Executive Orders issued by President Obama directed all agencies of the US Government to provide the ICRC with timely access to any individual detained by the United States in an armed conflict. B. Obama, ‘Executive Order 13491 of January 22, 2009 – Ensuring Lawful Interrogations’, Vol. 74 Fed. Reg. No. 16, p. 4893, 4894, Sec. 4. Since August 2009, official sources indicate that the ICRC has been notified of persons detained by the US military in situations of armed conflict within 14 days of their capture. Left, ‘Guantanamo Bay: What are the conditions at Guantánamo?’, supra note 53.


68 It applies to the defendants before the military commissions and was challenged in this context. C. Currier, ‘Classified in Gitmo Trials: Detainees’ Every Word’, ProPublica, 17 July 2012, available at: http://www.propublica.org/article/classified-in-gitmo-trials-detectees-every-word. It also applies to other detainees who remain detained without charge, such as Abu Zubaydah. See Zubaydah v Lithuania, supra note 60.
outside world, and requests for declassification of even innocuous drawings, writings while in detention or simple affidavits to bring legal action are routinely refused. One such detainee is described in his application to the European Court as ‘a man deprived of his voice, barred from communicating with the outside world or with this Court and from presenting evidence in support of his case’.  

8A.2 OVERVIEW OF MILITARY PROCEDURES GOVERNING DETENTION

Since 2004, several sets of procedures have been put in place by the US military in Guantanamo Bay that purported to provide some form of ‘review’ of the prisoners’ detention: the Combatant Status Review Tribunals (CSRT) and the Administrative Review Boards (ARBs), which in 2011 were replaced by the Periodic Review Board (PRBs). Although the Department of Defense stated at various stages that these processes would, for example, ‘provide an expeditious opportunity for non-citizen detainees to receive notice and an opportunity to be heard,’ as noted below the substantive scope of what exactly they could be heard on, and what the boards could consider, has always been very limited. The review procedures have not considered, for example, the correct legal classification of the detainee, whether there is any legal basis for his detention at all, or whether he is being afforded the rights to which he is entitled under international law.

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70 Both sets of procedures followed challenges to the lack of judicial oversight at Guantánamo, that would ultimately lead to the Supreme Court decision in Boumediene, supra note 16. See the ‘Long Quest for Habeas’, below.


The first set of procedures to be introduced were the CSRTs, whereby three officers of the US armed forces were charged with determining whether particular detainees meet the US’ definition of ‘enemy combatant’. Their decision was then approved by the CSRT Legal Advisor and the Director, who notified the Tribunal and the detainee if further hearings were necessary or if the decision was final. As has been acknowledged, the CSRT proceedings lacked independence and the procedural protections necessary for meaningful review, including lack of access to a lawyer, little or no access to evidence used against detainees, and no provision for the exclusion of evidence extracted under torture or coercion. Such restrictions rendered rebuttal notoriously difficult if not in some cases impossible. While providing a very


74 The definition of ‘enemy combatant’ see Order of the Deputy Secretary of Defense of 7 July 2004, supra note 73. See ‘Categories of Detainees’, para. 8B.3 below; and Chapter 6B.1.


76 Ibid., (I)(10).


80 ‘Guantanamo and beyond’, supra note 77, p. 64.

81 See, e.g., House of Commons Foreign Affairs Committee, UK Parliament, ‘Visit to Guantánamo Bay – Second Report of Session 2006-07’, 10 January 2007, p. 31, para. 96, available at: http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/44.pdf. ‘Amnesty cited a case where a detainee was informed by his Tribunal hearing that an alias allegedly used by him had been found on a computer hard drive associated with an alleged senior al Qaeda member. Neither his own alias, nor the name of the senior al Qaeda member, nor the location where the computer hard drive was found were revealed to him. He was thus unable to rebut the charge.’
slim veneer of procedural regularity, in the vast majority of cases the CSRTs confirmed the DOD’s assessment. The review was conducted once only, unless the individual was determined not to be an enemy combatant in which case the process was reportedly repeated, sometimes on several occasions.

The second procedure introduced was an annual ‘Administrative Review’ procedure, whereby a board of military officers assesses whether the ‘enemy combatant’ poses a threat to the United States, or its allies, or whether there are other factors bearing on the need for continued detention, such as the ‘intelligence value’ of the detainee. Based on that assessment, it could recommend release, transfer or continued detention, but again only rarely was a ‘recommendation’ made for release.

In 2009, the annual Administrative Reviews were temporarily suspended pending the comprehensive interagency review of the status of detainees ordered by incoming President Obama. When that review was completed, in March 2011, President Obama replaced the CSRT and ARB mechanisms for review of detention authority with a new set of procedures administered by Periodic Review Boards.

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82 Secretary of the Navy Gordon England, responsible for overseeing the CSRTs, emphasised that the CSRT system ‘is only to determine, again, if you’re an enemy combatant ...there’s already been prior determinations... so I would expect that most would indeed be enemy combatants, just because of prior reviews’. Secretary of the Navy Gordon England, Special Defense Department Briefing, U.S. Department of Defense, 1 October 2004, transcript available at: http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2242. 59 out of 539 were found to be no longer classified as enemy combatants: ‘Combatant Status Review Tribunal Summary’, U.S. Department of Defense, 10 February 2009, available at: http://www.defense.gov/news/csrtsummary.pdf.

83 One U.S. Army Major who sat on 49 CSRT panels indicated in an affidavit that in six of those hearings, ‘there was a unanimous decision that the detainee was a Non-Enemy Combatant (NEC). In all of those NEC cases, the Command directed that a new CSRT be held or the original CSRT was ordered reopened’. Affidavit filed in Hamad v. Gates, No. 07-1098, (D.C. Cir. 2007), declaration available at: http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-csrt-officers/testimony-of-an-army-major-in-mr-hamads-csrt.


This latest form of review appears similar to the ARBs. Although there are positive changes – the review occurs every six months and is now an inter-agency review rather than only by the Department of Defense\(^9\) – most of the concerns that attached to the former reviews processes continue to apply. The ostensible purpose of the boards is to confirm whether continued detention ‘is necessary to protect against a significant threat to the security of the United States’.\(^9\) The PRB review process is explicitly discretionary, its purpose being to ‘review on a periodic basis the executive branch’s continued, discretionary exercise of existing detention authority in individual cases’.

8A.3 THE LONG QUEST FOR JUDICIAL REVIEW

Among the vast amount of litigation that has been conducted by or on behalf of Guantanamo detainees over the years were the volumes of cases asserting the right to challenge the lawfulness of detention, the right to habeas corpus, before a court. This litigation, which is discussed in more detail in Chapter 11, began with a series of cases brought during 2002 on behalf of British and Australian detainees, and on behalf of twelve Kuwaiti detainees.\(^9\) The government moved to dismiss these actions for want of jurisdiction, given the location of the detention facilities outside United States sovereign territory, and the fact that the detainees are not US citizens.\(^9\) The court of first instance accepted this, ruling that it had no jurisdiction to entertain claims from aliens held

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89 Executive Order 13567, ibid.
91 ‘This order is intended solely to establish, as a discretionary matter, a process to review on a periodic basis the executive branch’s continued, discretionary exercise of existing detention authority in individual cases.’ Executive Order 13567, supra note 88.
92 The first cases were Rasul et al. v. George Walker Bush et al., No. 02-5288, 2002, a petition for a writ of habeas corpus filed before the District Court for the District of Columbia by the families of an Australian and two British citizens held by US forces in Guantanamo Bay, and Al Odah v. United States, No. 02-5251, 2002 brought by relatives of twelve Kuwaiti nationals detained at Camp X-Ray in Guantánamo Bay. The plaintiffs sought a declaratory judgment and injunction ordering that they be informed of any charges against them and requiring that they be permitted to consult with counsel and meet with their families. The complaints were consolidated and treated by the court as an application for habeas corpus.
93 Ibid.
outside the sovereign territory of the United States and the appeal court upheld this decision.

However, during 2003 the prospect of a different approach emerged. Another first instance court, hearing a similar case, found that:

[W]e simply cannot accept the government’s position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens including, on territory under the sole jurisdiction and control of the United States without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement.

When the matter was finally before the United States Supreme Court, it was asked to determine the ‘narrow but important question whether the 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 Guantanamo Bay Naval Base, Cuba’. In an historic judgment supported by six of nine judges of the Supreme Court bench in 2004, the Court found that ‘federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be totally innocent of wrong doing’.

In response, the US Congress passed the Detainee Treatment Act of 2005, explicitly eliminating any such possibility by stating that federal courts did not have statutory jurisdiction over habeas claims by aliens challenging their detention at Guantanamo Bay. However, in the 2006 case of Hamdan v. Rumsfeld, the Supreme Court interpreted the provision eliminating federal habeas jurisdiction as being inapplicable to cases that were pending at the time the DTA was enacted, thereby permitting the Court to review Hamdan’s case. Congress again responded, passing the Military Commissions Act of 2006.

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94 The court dismissed the petition for lack of jurisdiction.
95 An appeal against the decision in Rasul was dismissed by the Court of Appeals for the District of Columbia on 11 March 2003. Al Odah et al. v. United States, 321 F.3d 1134 (D.C. Cir. 2003).
96 Gherebi v. Bush, 352 F. 3d 1278, 1283 (9th Cir. 2003)
98 Rasul, supra note 16.
101 In addition to the habeas issue, it questioned the validity of the military commissions established pursuant to President Bush’s military order (see military commission below) leading to legislation governing the commissions.
which eliminated court’s jurisdiction over all pending and future habeas applications (or other causes of action) by detainees of the war on terror.

On 12 June, 2008, the Supreme Court, in the case of Boumediene v. Bush, ruled that the Military Commissions Act of 2006 unconstitutionally limited detainee’s access to judicial review and that detainees have the right to a ‘meaningful review of both the cause for detention and the Executive’s power to detain’. Since late 2008, habeas hearings have been heard in D.C. District Court. In the first few years, a striking majority of applications were granted (37 successful applications of the 57 total submitted by 2010). This underscored both the importance of the habeas right, and the extent and gravity of the errors that had lead to such detentions in the first place. The black hole was finally being closed, detainee by detainee.

However, in 2010, the United States Court of Appeals for the District of Columbia Circuit reversed the first decision to grant habeas, rebuking the lower court’s lack of deference to the government and finding that the level of correction was ‘intolerable’. Since then, the standards and approach being applied by the courts, and the results, have changed sharply; between 2010 and mid-2012, only one application had been successful.

103 Boumediene, supra note 16.
104 Ibid., at 2269.
107 The DC Circuit Court has determined that the habeas court’s evaluation of the facts should be more limited and more deferential to the government’s evaluation. The D.C. Circuit is said to have ‘prevented district judges from closely evaluating the government’s evidence but mandated that they give a presumption of accuracy to certain evidence (interrogation reports) submitted by the government, even though district courts had previously found that evidence unreliable’. Ibid., p. 4.
108 Ibid.
8A.4 THE GUANTANAMO TASK FORCE REVIEW AND CONTINUING INDEFINITE DETENTION

The Obama administration came to office a foremost critic of Guantánamo and ordered its closure. As part of this process, it established, by Executive Order 13492, a task force to review the files of all Guantánamo prisoners.109

The task force issued a final report in January 2010.110 It concluded that 156 of 240 detainees held at Guantánamo when President Obama took office were not a threat to the US and were cleared for transfer.111 Only 36 detainees of the 240 would be referred for prosecution.112 A further 48 detainees would be held indefinitely.113 The reasons purporting to justify the continued and potentially indefinite detention of this ‘remainder’ group of detainees were various, included that they were too dangerous to transfer but not feasible for prosecution, because the US did not have evidence against them, that evidence that was available could not be admitted or they had not violated US criminal law.114 These 48 detainees will remain in detention pursuant to the government’s discretion under the AUMF.115 While the US government has not disclosed the category to which it assigned particular individuals, it would seem that many of them have still not had the lawfulness of their detention reviewed.116 In some cases it is known that they were subject to the gravest forms of torture with allegedly devastating effects; whether this

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109 Executive Order 13492, supra note 20. It allowed counsel to make representations to the task force.
110 Where the Review Panel was not able to reach a consensus or additional review was thought appropriate the heads of agency met to determine the proper disposition. ‘Guantanamo Review Task Force’, supra note 43.
111 ‘26 detainees were approved for transfer in 2009 and 30 detainees from Yemen were approved for “conditional” detention based on present security conditions in Yemen.’ Ibid., p. 9-10.
112 Ibid., p. 9.
113 Ibid., p. 12. ‘48 detainees were unanimously approved for continued detention under the AUMF based on a finding that they pose a national security threat that could not be mitigated sufficiently at this time if they were to be transferred from U.S. custody. The Task Force concluded as to all of these detainees that prosecution is not feasible at this time in either federal court or the military commission system. At the same time, the Task Force concluded that there is a lawful basis for continuing to detain these detainees under the AUMF.’
114 Ibid.
115 The Detention Guidelines provided that a detainee should be considered eligible for continued detention under the AUMF if ‘(1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by the federal government is not feasible in any forum; and (3) continued detention without criminal charges is lawful’. Ibid., p. 8. The import of the lawfulness restraint is questionable, and somewhat circular, as the government has been afforded complete discretion to detain.
116 See, e.g., Zubaydah v Lithuania and Poland, supra note 60. Zubaydah is thought to be one of the 48.
is a factor in their continuing detention is likely to remain the subject of speculation.\textsuperscript{117}

8A.4.1 Limbo within Limbo: Detainees ‘Cleared’ but Not Released

A further category of detainees is worthy of note. Many detainees at Guantánamo who have, despite the obstacles, been cleared for transfer by the government still remain in detention for prolonged periods of time.\textsuperscript{118} For example, 59 of the 240 detainees subject to the task force review had been approved for transfer or release by the prior administration but remained at Guantánamo.\textsuperscript{119} Twenty-nine of the detainees subject to review had been ordered released by a federal district court as the result of habeas litigation, to little effect.\textsuperscript{120} The detention of individuals ‘cleared’ for transfer has been described as Guantánamo’s current ‘moral bankruptcy’.\textsuperscript{121}

The reasons for such failure to release are many, including slow processes and inefficiency, resistance on the part of government,\textsuperscript{122} and, strikingly, congressional obstacles imposed by the 2012 National Defense Authorization Act (NDAA), whereby military funds cannot be deployed to relocate Guantánamo prisoners.\textsuperscript{123}

In respect of a number of those cleared yet still detained, there was a real risk of torture in another state. In some such cases, the US has been criticised for returning them anyway: the Courts have narrowly upheld the government’s argument that the judiciary must accept the executive branch’s determination as to whether it is ‘more likely than not’ that individuals would be tortured.

\textsuperscript{117} Ibid.
\textsuperscript{118} See A. Worthington, ‘Guantánamo Scandal: The 40 Prisoners Still Held But Cleared for Release At Least Five Years Ago’, 6 June 2012, available at: http://www.andyworthington.co.uk/2012/06/06/exclusive-guantanamo-scandal-the-40-prisoners-still-held-but-cleared-for-release-at-least-five-years-ago/. ‘One of the greatest injustices at Guantánamo is that, of the 169 prisoners still held, over half – 87 in total – were cleared for release by President Obama’s interagency Guantánamo Review Task Force.’
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
\textsuperscript{121} Joe Margulies, counsel to Guantánamo detainee Abu Zubaydah, notes that ‘[w]hile the great moral bankruptcy of the base was once its conditions, today it is the shameful fact that scores of prisoners who have been cleared for transfer by two administrations remain in custody’. J. Margulies, ‘Trapped in Guantánamo’, \textit{LA Times}, 29 September 2011, available at: http://articles.latimes.com/2011/sep/29/opinion/la-oe-margulies-gitmo-20110929.
\textsuperscript{122} Eg. the case of juvenile M. Jawad, note 36.
\textsuperscript{123} President Obama’s power to release Guantánamo detainees is limited by the NDAA, signed in January 2012, which is described as ‘amounting to an effective prohibition on the use of military funds to transfer detainees’. On limited executive exceptions, not invoked, see ‘Why can’t cleared prisoners leave Guantánamo Bay?’, supra note 50.
or abused. For one group of detained Uighers from China, the US accepted that they could not be returned for fear of persecution. The detainees therefore asserted their right to be released into the US rather than held at Guantánamo, but the government refused, and successfully challenged the courts’ power to order their release into US soil. This, despite the fact that as the Supreme Court noted, ‘Petitioners have been held for several years in custody at Guantánamo Bay, Cuba – a detention that the Government agrees was without lawful cause’.

In addition, detainees from Yemen cleared as not posing sufficient risk to justify detention were then slated for ‘conditional’ detention based on the current security environment in that country. Their situation was given tragic voice in September 2012 when a detainee committed suicide by hunger strike, some ten years after being detained at Guantánamo and six years after the administration reportedly acknowledged he did not pose a threat justifying continued detention. On the sole basis of their nationality, not their specific conduct, these detainees continue to be held at Guantánamo.

8A.5 TRIAL BY MILITARY COMMISSION

On 13 November 2001, a Military Order was issued by the President of the United States, relating to ‘Detention, treatment, and trial of certain non-citizens in the war against terrorism’. It provides, inter alia, that the trial of any

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124 See Kiyemba II, the decision of the District Court en banc, split six to five, confirming the earlier refusal to consider the claim of the risk of refoulement, and long dissenting decisions. There is speculation that the case will be heard before the Supreme Court but at time of writing it had not arisen. The US also relies on a more restrictive standard than the ‘real and personal risk’ under international law: see Ch 7A.5.10 ‘Refoulement.’

125 Ibid. 126 Kiyemba v. Obama, 555 F. 3d 102 D.C. Cir. (2009). Certiori before the Supreme Court was ultimately denied as the government was committed to finding alternative solutions to the detainees, notably relocation to Palau in the South Pacific.


individual subject to it,\textsuperscript{131} will be by a military commission. The Order specifically excludes from the jurisdiction of the Commissions citizens of the United States.

Making the commissions operational has been a slow and faltering process on many levels. In July 2003 President Bush designated the first group of alleged al-Qaeda members detained at Guantanamo Bay for trial before the Military Commissions,\textsuperscript{132} and during 2004 the first charges were brought\textsuperscript{133} and hearings got underway.\textsuperscript{134} But before long their legitimacy was challenged, and proceedings stalled, culminating in the Supreme Court decision in Hamdan \textit{v. Rumsfeld}, finding that ‘the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the Uniform Code of Military Justice and the Geneva Conventions’.\textsuperscript{135} In response to the finding that the president did not have the power to establish such commissions, the Bush administration promptly announced its decision to seek Congressional approval,\textsuperscript{136} which it obtained in the form of the Military Commissions Act.\textsuperscript{137} The Act authorized the trial by military commission of alien unlawful enemy combatants engaged in hostilities against the US for violations of the law of war and other offenses triable by military commission. Under the 2006 Act, several detainees were tried and convicted between 2006 and 2008.\textsuperscript{138}

\textsuperscript{131} The Order provided that those subject to it were persons with respect to whom the President determines that there is reason to believe (1) that s/he is a member of al-Qaeda or (2) that s/he was engaged in international terrorism, or (3) that it is in the interests of the United States that s/he should be subject to the Order. \textit{Ibid.} Sec. 2(a)(1).


\textsuperscript{133} In February 2004, the first detainees (of Yemeni and Sudanese nationality), were charged with ‘violat[ing] the laws of war and engag[ing] in terrorism’. See N.A. Lewis, ‘Qaeda suspects face first military trials’, \textit{International Herald Tribune}, 25 February 2004.


\textsuperscript{135} \textit{Hamdan v. Rumsfeld}, supra note 100, and Chapter 11.


\textsuperscript{137} Military Commission Acts 2006 (HR-6166) and 2009 (HR-2647).

\textsuperscript{138} Salim Hamdan was convicted and sentenced to 66 months for material support for terrorism but acquitted of conspiracy. In November 2008 he was transferred to Yemen to serve out the remainder of his sentence and released on 8 January 2009. As noted below, his convic-
Two days after being sworn into office in 2009, President Obama issued an executive order halting the military commissions at Guantanamo, pending the work of the Guantanamo ‘Task Force’ which would determine inter alia who should face criminal prosecution. Meanwhile, while keeping an open position on Military Commissions, the Attorney General announced that several detainees would be transferred to the US for trial before federal courts. An attempt seemed to be afoot to bring Guantanamo within the regular legal process, though enormous controversy and debate ensued. The US Congress proceeded to block the possibility that Guantanamo detainees, including those responsible for the 9/11 attacks, would be tried by a US civilian
In April 2011, Attorney General Eric Holder referred five high profile 9/11 related cases against Khalid Sheikh Mohammed and his four co-conspirators to military commission. Several cases got underway in the course of 2012, consolidating the role of the Commissions in American history.

The decision to submit to trial by military commission in itself, and the specific Rules of Procedure of the Commissions, have given rise to profound criticism within the United States and internationally. Since the rules were first published in March 2002, they have been amended, and somewhat improved, several times. Despite this, at all stages they have provoked concern ‘still failing to provide many of the fundamental elements of a fair trial found in federal civilian courts and a court martial system’. While concerns are many, as illustrated in relation to ‘prosecution-fair trial’ below, they may be encapsulated, in the words of the Chief Prosecutor of the Military Commissions, as revolving around the ‘five uns’:

[T]hat the law of the commissions is unsettled because the system is new and untested; that the new rules are unfair because they deviate from the tried-and-true procedural protections of the courts-martial and federal courts; that the commissions are unnecessary because our federal courts are open and expert in handling terrorism prosecutions; that the commissions are unknown because they permit too much secrecy, particularly with respect to allegations of torture; and that the scope of military jurisdiction is unbounded in our government’s claim of a geographically and temporally unconstrained conflict with al-Qaeda and undefined ‘associated forces’.


147 The rules set forth in the Department of Defense Military Commission Order No. 1 were detailed by the Military Commission Instructions Nos. 1-8, issued by the Department of Defense on 30 April 2003 and on October 28, 2009, President Obama signed into law the Military Commissions Act of 2009, which was included in the National Defense Authorization Act (NDAA).

With the first military commission conviction being quashed on the basis of retroactive application of criminal law, with uncertain implications for other cases, the controversy does not look set to abate. At the same time, the impact of the commissions should be kept in perspective. Of the 800 ‘dangerous enemy combatants’ who have been subject – in some cases for several years – to detention at Guantanamo, only 10% have even been identified as subject to trial by military commission, and far fewer cases have actually proceeded to prosecution in military commissions. For the greater number held in indefinite detention, even the prospect of flawed criminal justice is better than no justice at all. The unusual plea from defence attorneys to submit their client (apparently slated for indefinite detention without trial) to trial by military commission epitomises the Catch 22 plight of the Guantanamo detainees.

8B APPLICATION OF HUMANITARIAN AND HUMAN RIGHTS LAW TO DETAINEES IN GUANTANAMO BAY

So far as the prisoners are detained by the United States in the context of or in relation to an armed conflict, they are subject to the legal framework set out in international humanitarian law. The United States is bound by IHL as a party to the armed conflict in Afghanistan, in respect of persons detained in association with that conflict. In addition, it remains bound, in the context

150 *Hamdan v. United States*, supra note 138. The US appeals court quashed the conviction of Osama bin Laden’s former driver, who served a five-and-a-half-year prison sentence for ‘material support for terrorism,’ which was unanimously found not to have been a war crime under international law at the relevant time. See Chapter 4; *Hamdan v. United States*, supra note 138.

151 The Obama administration identified 36 such detainees, three of whom have already pleaded guilty. In 2010, Ibrahim Ahmed Mahmoud al Qosi pleaded guilty to providing material support for terrorism and conspiracy and was sentenced to 14 years’ confinement, reduced to 2. He returned to his native Sudan on July 10, 2012. Omar Khadr pleaded guilty to various war crimes charges and was sentenced to 40 years’ confinement, which pursuant to a plea agreement was reduced to 8. In 2011, Noor Uthman Mohammed pleaded guilty to conspiracy and providing material support for terrorism and was sentenced to 14 years’ confinement, reduced to 34 months. In February 2012, Majid Khan pleaded guilty to various war crimes charges and been sentenced and seven convicted, several with plea agreements: ‘Guantanamo Review Task Force’, supra note 43, p. 13. By 2013, proceedings were pending against Khalid Sheik Mohammed, his four alleged co-conspirators in the 9/11 attacks and Abd al-Rahim al-Nashiri, the alleged orchestrator of the 2000 attack on the USS Cole off the coast of Yemen.

of armed conflict, by international human rights law.\textsuperscript{154} To the extent that at least some detainees are held, not because of engagement in an armed conflict against the US but pursuant to a broader ‘war on terror’ which, as discussed at Chapter 6, section B, does not constitute an armed conflict in any legal sense, or if they are detained on suspicion of activities committed before the conflict or unrelated to it, then IHL does not apply. In this case, the situation is subject only to applicable rules of IHRL.

The plight of the Guantanamo detainees as highlighted by the facts above raises myriad human rights concerns, foreshadowed in the law and practice discussed in Chapter 7. Not least the torture and ill-treatment that is now known to have occurred at Guantanamo violates the most basic inviolable norms of the international legal order. A regime that applies only to non-nationals without objective justification for such a distinction is inherently discriminatory, in violation of the right to equality.\textsuperscript{155} The right to religious freedom is plainly vitiated by some of the methods of treatment and interrogation, with obvious question arising with regard to the right to health. The rights to private and family life are eviscerated by decades of incommunicado detention and the Guantanamo regime. The right to free expression is flouted by an overreaching ban on communication that fails to carefully assess the need for restrictions in the concrete situation. Short shift is made of the essential right to a remedy, where individuals are denied access to a court and released after years of acknowledged wrongful detention with no compensation or even apology.

The Guantanamo scenario embodies a litany of violations of these and other international norms discussed throughout this book. The focus of this chapter is however on the procedural rights to detention and fair trial that would normally be afforded to persons in detention, the denial of which have characterised the Guantanamo anomaly and lead to its identification as a ‘legal black hole’ characterisation.

8B.1 THE FRAMEWORK AND REACH OF INTERNATIONAL HUMANITARIAN LAW

For present purposes, key provisions of IHL are those relative to the treatment of persons detained during an international armed conflict, embodied in the four Geneva Conventions of 1949 and in the First Additional Protocol to the Geneva Conventions of 1977. The United States, like Afghanistan, is party to

\textsuperscript{154} Chapter 7A3.4 on interplay between the two regimes and 7B3 on difficult issues arising in practice.

\textsuperscript{155} See, e.g., Chapter 7B.12 and the A \& Ors case in UK courts, discussed in Chapter 11, where detention of non-nationals only could not be justified and was held to be discriminatory.
the four Geneva Conventions, which are therefore binding as treaty law. Treaties to which the United States is not party remain relevant so far as they reflect customary law, and the bulk of the provisions of AP I are generally recognised, by the United States and others, as so doing. Specifically, Article 75 of AP I – an elaboration of the principles set forth in Common Article 3 of the Geneva Conventions, which have been described by the International Court of Justice as ‘beyond doubt’ customary in nature, has itself been recognised as customary law in a report prepared for the US Chiefs of Staff.

As described in Chapter 6, international humanitarian law does not apply merely on the zone of battle, nor within a state’s own borders. In the context of prisoners of war, the ICTY has noted that ‘with respect to prisoners of war, the convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities’. 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 Guantanamo detainees are under US control, which is clearly the case.

Provided the detainees are held pursuant to an armed conflict, it does not matter to the application of IHL whether such persons are held in the territory of the United States, in Afghanistan, or elsewhere. The issues in dispute regarding the territorial or sovereign status of Guantanamo Bay are therefore irrelevant to IHL obligations.

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156 The Geneva Conventions have been ratified by the US and by Afghanistan on 2 August 1955 and 26 September 1956, respectively.


158 According to the International Court of Justice, Common Article 3 reflects customary international law applicable in all situations of conflict. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ* Reports 1986, pp. 14 ff., para. 218.

159 Meron, *Human Rights and Humanitarian Norms*, p. 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.’ See also Remarks of M. J. Matheson (Deputy Legal Adviser, US Department of State) at a panel on ‘The United States Position on the Relation of Customary International Law to 1977 Protocols Additional to the 1949 Geneva Conventions’ at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, 2 (1987) *Amer. Uni. J. of Int’l Law and Policy* 415, 425-6.

160 *Tadic*, Jurisdiction Decision, para. 70.

161 Ibid., para. 68.

162 See ICRC Commentary to AP I, para. 2910.
Although neglected in much of the official discourse, the United States is also bound to observe both human rights treaties to which it is party and customary international human rights law. As a State Party to the International Covenant on Civil and Political Rights, this treaty provides the clearest source of human rights obligations binding upon the United States, which is bound also by for example the CAT and the American Declaration on the Rights and Duties of Man. It has signed (but not ratified) the American Convention on Human Rights, thereby expressing its willingness to act consistently with its provisions.

States can derogate from certain treaty obligations, including under the ICCPR, on the basis that they face a ‘public emergency threatening the life of [the] nation’. However, the United States has not chosen to avail itself of this procedure in respect of Guantanamo. In principle, the ICCPR therefore remains binding in its entirety. In any event, permissible derogation is subject to certain conditions, as explained in Chapter 7, of relevance to the Guantanamo detainees. First, even in case of a valid derogation, there can be no suspension of the core ‘non-derogable’ human rights. Treaties explicitly include freedom from torture or ill-treatment and retroactive application of criminal law for example in the non-derogable group, while it has become well estab-
lished that a core of fair trial rights, and procedural rights in detention, must also be respected at all times. In short, most of the key rights at issue in Guantanamo relate to rights that apply even in situations of emergency.

Additional requirements for derogation set out in Chapter 7 would also have to be met, including that derogating measures be ‘strictly required by the exigencies of the situation and proportionate to it.’ Finally, measures of derogation must not be contrary to other obligations, and they must not be discriminatory. The latter is particularly germane in a context where US citizens arrested under similar circumstances to the Guantanamo detainees are not held on Guantanamo Bay, and are subject to a different legal regime – that allows for prompt access to a court – and are specifically excluded from being subject to trial by military commission contained in the Presidential Order. In all of these circumstances, it is doubtful that the US could justify the violations of the rights in question on the grounds of derogation.

In addition to its treaty obligations, the United States is also bound by customary human rights law in respect of many of the rights in issue in relation to Guantanamo Bay detainees. Moreover, certain of the norms addressed, notably the prohibition of torture or ill treatment, or prolonged arbitrary detention, are generally recognised as jus cogens norms of international law. No circumstances (and of course no derogation), could ever justify violating rights and obligations that have attained this status.

172 While an emergency will impact upon the rights to liberty and fair trial, it does not set them aside; see e.g. Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87 of 30 January 1987, IACtHR, Series A, No. 8 (1987), para. 27: ‘since not all … rights and freedoms may be suspended even temporarily, it is imperative that “the judicial guarantees essential for (their) protection” remain in force.’ See also e.g. Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93 (1998), para. 21: ‘… a State party may not depart from the requirement of effective judicial review of detention.’ See Report of the Working Group on Arbitrary Detention (hereinafter ‘Arbitrary Detention Report’), 26 December 2011, A/ HRC/19/57, at 63(3); UN mandate-holders’ report supra note 164, para 14.

174 Derogating measures must also be consistent with other international obligations. See General Comment No. 31, supra note 171.


176 See Chapter 7A53. Arbitrary detention is often qualified as a jus cogens rule, i.e. as a rule belonging to that very restricted set of norms from which no derogation is ever admitted under international law. See, e.g., Report WGAD, supra,para. 69. It is interesting to note that the authoritative Restatement (Third) of the Foreign Relations Law of the United States among the authorities that support the qualification of the prohibition of arbitrary detention as a jus cogens rule.

177 The nature of the obligations varies in time of conflict: what amounts to arbitrary detention in international law is different in armed conflict than in time of peace, as discussed below.
While Guantanamo is in many ways an exceptional and unprecedented flouting of international legality, it is in other ways not novel. The issues raised – torture through interrogation, detention rights, fair trial rights and trial by military commissions – are issues upon which international law is developed, and which human rights courts and bodies have had to interpret and apply in countless other cases arising in relation to terrorism since before 9/11 but with greater regularity since then. There is therefore an ample body of law from which to draw, supplemented by relevant non-binding international instruments,178 that give more detailed expression and content to treaty provisions and reflect customary law.

As regards the geographic scope of IHRL, as discussed in Chapter 7 human rights obligations apply in respect of all persons in a state’s territory or subject to its jurisdiction, which may extend beyond the borders of the state where it exercises its authority or de facto control abroad.179 However the US official position is to deny that human rights law applies, in part on grounds that Guantanamo lies beyond its sovereign territory.180 Both the territory of Guantanamo Bay, and its detainees, are within the exclusive de facto control of the United States. In respect of any of the approaches to the standards under IHRL set out in Chapter 7, whether on the basis of effective control of territory on which individuals are present or control by US agents over the individuals themselves, the Guantanamo detentions would meet the test whereby the US’ obligations apply. The location of the detention centres on land that may not be United States ‘sovereign’ territory is therefore of no significance for IHRL.

Confirming this, the Inter-American Commission on Human Rights, in a request to the government of the United States to take certain ‘precautionary measures’ to protect the detainees, noted that:

The determination of a state’s responsibility for violations of the international human rights of a particular individual turns not on that individual’s 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.181


179 The apprehension and detention of suspects plainly constitutes exercising such authority abroad: see e.g. Reinette v. France (1989) 63 DR 189 and 7B2.1.

180 See US official position that these obligations do not apply to the Guantanamo detainees in e.g. letter dated 31 January 2006, addressed to the Office of the High Commissioner for Human Rights, by the Permanent Representative of the United States of America to the United Nations and Other International Organizations in Geneva, ibid, Annex 2, 43-4.

181 Inter-American Commission on Human Rights, Precautionary Measures in Guantanamo Bay, Cuba, 13 March 2002.
8B.3 STATUS OF DETAINES

The US authorities categorise the detainees, collectively, as enemy combatants:

The United States Government believes that individuals detained at Guantanamo are enemy combatants, captured in connection with an on-going armed conflict. They are held in that capacity under the control of US military authorities. Enemy combatants pose a serious threat to the United States and its coalition partners.182

Although the term has been used since the beginning of detentions at Guantanamo Bay it was defined by the US Department of Defense in an order in July 2004:

An enemy combatant ... shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.183

As discussed in Chapter 6, as a matter of international law, this ‘enemy combatant’ classification does not, however, denote the legal status of prisoners.184 In armed conflict, the particular status of persons captured by a party to the conflict, and the corresponding rights to which they are entitled, is determined by IHL. Detainees are either wounded, sick or shipwrecked armed forces (protected by the First or Second Geneva Conventions), prisoners of war (protected by the Third Geneva Convention) or civilians (protected by the Fourth Geneva Convention).

All persons subject to detention have some status under IHL. This general principle is embodied in all four Geneva Conventions, described by the authoritative ICRC Commentary on the Fourth Geneva Convention thus:

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.185

182 Letter from the First Secretary at the US Embassy in London to solicitors acting for the claimants in the Abbasi case, supra note 5, 2 July 2002, in Skeleton Argument of the Claimants, para. 6, on file with author.
184 ‘Enemy combatants’ may cover privileged combatants, entitled to POW status, or other fighters who have the legal status of civilians, as discussed below and in 6A.2.1.
185 ICRC Commentary to GC IV, p. 51.
Moreover, as will be seen, residual provisions of IHL also ensure by way of safeguard that any person not afforded greater protection — under provisions applicable to the above categories of detainees — remains subject to basic minimal protections under IHL.\footnote{This may arise because they fail to satisfy the nationality requirements of GC IV. See para. 8B.3.2 on civilians, below.}

The detainees have been described, on many occasions, as ‘unlawful combatants’. While this term is not an international legal one either, and does not denote the status of persons under IHL as described above, it has some legal significance which is better captured by the alternative term ‘unprivileged combatant’. Under IHL,\footnote{See eg Chapter 6A2.1 and 6B1.} certain persons enjoy what is known as ‘combatant’s privilege’ which entitles them to engage in hostilities and protects them from prosecution for the mere fact of participation. As opposed to these ‘legal’ combatants who enjoy immunity from prosecution for mere participation in hostilities, other persons who take a direct part in hostilities may be criminally prosecuted for doing so.\footnote{See ‘POWs’, para. 8B.3.1, below. While IHL does not expressly prohibit persons from taking part in hostilities, they do not have the ‘privilege’ of not being prosecuted for doing so.} Once captured, however, such persons remain entitled to the protection of IHL as ‘civilians’, or at a minimum to the above-mentioned residual protection under IHL, as discussed further below.

### 8B.3.1 Entitlement to POW status

Early on in the life of the Guantanamo camp, one of the questions that provoked much controversy was whether detainees were entitled to POW status. Under IHL, ‘combatant’s privilege’, mentioned above, entails three important consequences.\footnote{The distinction between privileged and unprivileged combatants is reflected in the US Supreme Court’s distinction between lawful and unlawful combatants in the decision \textit{ex parte Quirin} (1942) 317 US 1 at 30-1. See Chapter 6B.2.1 ‘enemy combatants’.} First, the privileged combatant is allowed to conduct hostilities and as such cannot be prosecuted for bearing arms or attacking enemy targets, unless the conduct amounts to a war crime.\footnote{Privileged or lawful combatants are subject to capture and detention as prisoners of war, and can be prosecuted only for serious crimes such as war crimes or crimes against humanity, whereas unprivileged or unlawful combatants can, in addition, be subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. Letter from the US Embassy in London in \textit{Abbasi}, supra note 5, n. 109.} Second, he or she is a legitimate target to the opposing forces. Third, in the event of capture, such combatants are afforded POW status, and a range of rights that go beyond the basic protections provided for in IHL or the core non-derogable IHRL rights.\footnote{These include the right to be ‘protected, particularly against acts of violence or intimidation and against insults and public curiosity’ (Article 13 GC III), to ‘complete latitude in the exercise of their religious duties, including attendance at the service of their faith’ (Article}
Chapter 8

The group of persons entitled to combatant’s privilege, and in the event of capture to prisoner of war status, is defined in GC III, Article 4(A). Principally, these include members of the armed forces of another party, though it also includes irregulars such as members of militia or volunteer corps that fight alongside a party to the conflict, provided they satisfy four conditions: being ‘commanded by a person responsible for his subordinates; having a fixed distinctive sign recognisable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war.’

POW status is therefore automatically due to persons who fought in the armed forces of a state – in this case members of the Taleban armed forces. The fact that the government was not the recognised representative of the State is not relevant for present purposes, as the Taleban undoubtedly were the de facto government and the de facto armed forces of the state of Afghanistan. Some of the individuals designated ‘enemy combatants’ by the US, which includes the Taleban, may therefore be POWs.

However, although the US recognised that the Third Geneva Convention could, in principle, apply to the members of the Taleban army, it justified the continued denial of POW status across all detainees on the basis that ‘Taleban combatants have not effectively distinguished themselves from the civilian population of Afghanistan’ and that they are ‘allied’ with a terrorist group. However, these criteria, set forth by Article 4 of the Third Geneva Convention, apply to irregulars that fight alongside a party to the conflict and not to the armed forces of a party to the conflict itself. The fact that armed forces may, for example, have been ‘armed militants that oppressed and terrorized the people of Afghanistan’, or that they did not conduct operations in accordance with the laws of war does not affect their entitlement to POW status.

The position is different as regards other ‘irregulars’, including al-Qaeda fighters, whose entitlement to POW status depends on their meeting the four-

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34 GC III), and to be treated with due respect for rank and age, to be allowed to send and receive communications, and to keep personal property and effects (Article 18 GC III).

192 No party to the conflict denies that the Taleban were the de facto government of Afghanistan given that they controlled 90 per cent of the State’s territory prior to the conflict.

193 ‘Afghanistan is a party to the Geneva Convention. Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the treaty because Afghanistan is a party to the Convention’. See ‘Statement by the Press Secretary on the Geneva Convention’, 7 May 2003, transcript available at: http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html.

194 White House Press Secretary, after having recognised the potential applicability of GC III to members of the Taleban, decided that Talibain detainees are not entitled to POW status as they failed to satisfy the ‘four conditions’ of Art 4 GCIII intended to determine the status of irregulars fighting alongside a party. See also ‘Decision re application of the Geneva Convention on Prisoners of War to the conflict with Al Qaeda and the Taleban’, White House, 25 January 2002, p. 3, available at: http://pegc.no-ip.info/archive/White_memo_20020125.pdf. See ibid.
part test in Article 4(A). With respect to those who were considered members of al-Qaeda fighting alongside the Taleban, US authorities justify the decision not to recognise them as POWs on the basis that, since ‘al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention ... , its members ... are not covered by the Geneva Convention’. It is a question of fact, but must be seriously doubted, whether those detainees who were considered members of al-Qaeda and not Taleban forces would meet the four-part test, by being distinguishable from the civilian population, and being capable of conducting military operations in accordance with IHL (as distinct from the question whether they have committed violations). While Taleban fighters would then appear to be entitled to POW status, other detainees most probably would not. As noted further below, any doubt as regards entitlement to POW status should be resolved by a competent tribunal.

8B.3.2 ‘Civilian’ detainees

If not treated as POWs, the detainees must be protected as civilians, ‘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’. Such persons are protected by the Fourth Geneva Convention. Following the position adopted by the authoritative ICRC Commentary to the Fourth Geneva Convention, the ICTY has noted:

195 Ibid.
196 It is insufficient for the detaining power to note that violations of the laws and customs of war have occurred – an allegation routinely made by one side against the other in the context of conflict.
197 See A. Neier, ‘The Military Tribunals on Trial’, New York Review of Books, at http://www.nybooks.com/articles/15122. Neier argues that ‘[i]n Afghanistan, neither Taleban fighters nor members of the Northern Alliance have worn uniforms. Therefore the requirement of a “fixed distinctive sign” can’t be met literally; but since most of these combatants were not attempting to disguise themselves as civilians pretending to be other than what they were, the lack of uniforms should not prevent those captured in combat from being recognised as prisoners of war.’
198 See Article 5(2) GC III on the independent tribunal that must be established in case of doubt. See also ‘determining status’ below on the US refusal to concede that there was even any ‘doubt’ in this respect.
199 Article 4 GC IV.
200 See ICRC Commentary to GC IV, p. 51: ‘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.’
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 or of the First or Second Convention, he or she necessarily falls within the ambit of [the Fourth Convention], provided that its Article 4 requirements are satisfied.201

The question arises whether persons who have taken up arms and fought with the opposing party in Afghanistan, as unprivileged or unlawful combatants, should still be entitled to civilian status upon capture. Such persons certainly lose their status as protected civilians for the purpose of conduct of hostilities law and can legitimately be targeted for as long as they take up arms.202 However, once captured, they have ‘civilian’ status, and are entitled to the protections afforded to that category of detainees. The ICRC Commentary thus explicitly notes that resistance fighters, for example, who do not fall within the GC III, Article 4 criteria required for POW status, are entitled to be treated as civilians under GC IV.203 Other commentators likewise note that unprivileged combatants are entitled to be treated as civilians upon capture, and afforded the procedural and substantive protections of GC IV.204

Unlike POWs, who were privileged combatants entitled to fight, those who took up arms without meeting the criteria for privileged combatant can be prosecuted for their belligerent acts.205 They must, however, in this respect as in others, be afforded the protections of GC IV which include due process rights, discussed below. As the ICRC Commentary notes, the fact that persons may be entitled to protection as civilians ‘does not mean that they cannot 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.’206

While GC IV appears on its face to exclude ‘nationals’ of co-belligerent states and neutral states,207 the ICTY Appeals Chamber has determined that, rather than imposing a strict nationality test, GC IV should be understood to protect persons ‘who do not have the nationality of the belligerent in whose hands they find themselves’.208 To the extent that persons held at Guantanamo were

201 Prosecutor v. Delalic et al., Case IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 271.
202 See Chapter 6A.2.1.2 ‘Direct Participation in Hostilities’.
203 ICRC Commentary to GC IV, pp. 50 ff.
206 ICRC Commentary to GC IV, p. 50, and Article 126 GC IV.
207 Article 4 GC IV.
arrested for their allegiance, or perceived allegiance, to 'enemy' forces, and are not US nationals, they fall into the group that GC IV was intended to protect.

8B.3.3 Persons not covered by GC III or GC IV

If any of the detainees are for any reason deemed excluded from both categories protected by GC III and GC IV, they are nonetheless protected by customary IHL, binding on the United States. As noted, 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 and provide a minimal level of protection for all persons falling into the hands of a party to the conflict.

Common Article 3, which protects persons taking no part in hostilities (including persons who once did but who are hors de combat or have otherwise laid down their arms), articulates the core principles that are elaborated upon throughout the Geneva Conventions, and as such has been described as a 'convention in miniature'. It provides a 'compulsory minimum' and has been referred to by the Appeals Chamber of ICTY as the 'quintessence of the humanitarian rules found in the Geneva Conventions as a whole'. It guarantees humane treatment, but also protects against, inter alia, 'the carrying out of sentences without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples'.

Article 75 of Additional Protocol I, entitled 'Fundamental Guarantees', 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'. As the authoritative ICRC Commentary to Additional Protocol I notes: 'there can be no doubt that Article 75 represents a minimum standard which does not allow for any

regarded as crucial ... the lack of allegiance to a State ... was regarded as more important than the formal link of nationality'. The tribunal's caution – that 'an approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts' (ibid., para. 166) – has resonance in this context.

209 If, e.g., the nationality/allegiance requirements of GC IV were considered not met, an individual unprivileged combatant may be deemed not to fall under either GC III or GC IV. See, however, 'Civilian Detainees' above.

210 On the customary character of Common article 3 and some of the provisions of AP I, see above.

211 See, e.g., ICRC Commentary to CG IV, Commentary to Common Article 3, p. 48.

212 The ICRC refers to it as a minimum and an 'invitation to exceed the minimum'. Ibid., p. 52.


214 See Article 75(1) and (6), reinforced by Article 45 AP I.
Article 75 includes a number of safeguards specifically directed towards ensuring that detention is governed by a framework of legality, and maintaining basic due process rights, as discussed below in relation specific rights. This provision represents the most basic level of protection under IHL due to any human being detained for any reason related to the conflict.

8B.3.4 Determining Detainees ‘Status’ and Implications?

As discussed above, determining the status of the detainees is a process upon which the application of the correct framework of legal protection of rights depends. Status determinations are legal questions to be determined according to the rules of international law. Contrary to the approach manifest in relation to Guantanamo detainees, the decision to afford particular status to prisoners is not itself a matter for executive, or military, discretion: there can, of course, be no discretion to go beyond or discard the law.216

These determinations of status (and closely related to it, the lawfulness of detention addressed below) must be made on an individual case-by-case basis. As the Inter-American Commission on Human Rights emphasised, in a letter to the United States government concerning the Guantanamo detainees:

> the importance of ensuring the availability of effective and fair mechanisms for determining the status of individuals falling under the authority and control of a state, as it is upon the determination of this status that the rights and protections under domestic and international law to which those persons may be entitled depend. The Commission therefore requested that the United States “take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent Tribunal.”

The requirement of ‘fair and effective mechanisms’ to determine fundamental questions that affect individual rights is reflected throughout human rights law,217 and manifest in IHL.218 Of particular note in the Guantanamo context is Article 5 GC III, which provides that in case of doubt as to whether detainees might be entitled to be treated as POWs, the matter must be deter-

215 ICRC Commentary on AP I, para. 3032 (emphasis added).
216 See above for a statement by the US President that ‘to the extent appropriate and consistent with military necessity’ the detainees would be treated ‘in a manner consistent with the principles of the Geneva Conventions of 1949’. Letter to the Speaker of the House of Representatives and the President of the Senate, 20 September 2002.
217 The Commission referred to ‘numerous international instruments, including Article XVIII of the American Declaration’ by which the United States is bound. See judicial oversight, below.
218 See e.g. Art 5GCIII, and Arts 46 and 78 GC IV.
mined by a ‘competent tribunal’. This customary principle of international law has been long recognised by United States officials, as well as in United States military regulations and practice. Yet the US position was to deny that there was any ‘doubt’ as to the status of detainees or the question whether any of them have been wrongfully denied POW status. Somewhat paradoxically, it supported this proposition on the basis that ‘the President’s determination that Taleban detainees do not qualify as POWs is conclusive ... and removes any doubt that would trigger the application of the Convention’s tribunal requirement’. As with any legal standard, the existence of doubt must be assessed with a degree of objectivity and not according to the exclusive determination of the potentially affected power.

The widespread debate and speculation around status, and conflicting views even from within the US administration itself as to POW entitlement, leaves little doubt about one thing and that it was, indeed, ‘doubt’ as to the correct status of certain detainees, which should have been resolved by a ‘tribunal’ in accordance with the Third Geneva Convention.

While Article 5 relates only to determinations regarding prisoner of war status, it may be seen, not as a provision in a vacuum, but as a manifestation of a general principle that fair mechanisms are essential if the rights contained

219 Most of the provisions of GC III are considered to be reflective of customary international law. See ICJ, Advisory Opinion on Nuclear Weapons, paras. 79, 82. See also R. Baxter, ‘Multi-lateral Treaties as Evidence of Customary International Law’, 41 (1965-66) BYIL 275, at p. 286.


221 Joint Service Regulation on Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1 October 1997), Chapters 1-6 (a) and (b), in Department of the Army, the Navy, the Air Force and the Marine Corps, Washington DC (1997) at p. 2.


223 Argument of the United States government before the Supreme Court in Hamdi v. Rumsfeld (Case 03-6696), Supreme Court Certiiorari to the United States Court of Appeals for the Fourth Circuit, 28 June 2004, referred to in the partially dissenting opinion of Souter J and Ginsburg J p. 12.

224 The official US view that the question of status is not susceptible to external oversight, is inconsistent with the Supreme Court’s rejection of the idea that matters which are essentially ‘military’ are therefore beyond supervision: ‘the allowable limits of military discretion and whether or not they have been overstepped in a particular case are judicial questions’. Hamdi v. Rumsfeld, supra note 175, at 28.

225 The Inter-American Commission has referred to ‘well-known ... doubts ... as to the legal status of the detainees’ in its Request for Precautionary Measures in Guantanamo Bay, Cuba, addressed to the Government of the United States of America on 13 March 2002.

226 IHL is not prescriptive as to the precise process to be followed in determining status. A ‘tribunal’ implies impartial determination and unilateral executive or military determination of status is insufficient. ICRC Commentary on AP I, Part III, Section II: Combatant and prisoner-of-war status, paras. 1745-6.
in IHL are to be given meaningful practical effect.\textsuperscript{227} Indeed, the request from the Inter-American Commission suggested that objective mechanisms should be invoked where any dispute as to status arises.\textsuperscript{228} The Guantanamo experience may illustrate the need to clarify when such tribunals for resolving doubt should be established and how to make them effective.

By contrast, the military review mechanisms outlined above, which allow individuals limited opportunity to challenge whether they fall within the ‘enemy combatant’ category, have never been mechanisms to determine their correct status under international law. As a result of the amorphous scope of the enemy combatant label, covering a range of persons, some entitled to POW status and others civilians, including some who may have committed crimes for which they should lawfully be detained and prosecuted, these processes are of little legal significance.

The determination of status is important, not least as it is linked to the legal basis for detention and applicable law with significant consequences for detainees.\textsuperscript{229} However, as the foregoing demonstrates, basic rights relating to detention and fair trial apply to the Guantanamo detainees whether they are to be considered POWs, civilians or unlawful combatants not entitled to any greater protection under IHL. POW status, while undoubtedly significant in terms of the added protections that GC III affords to individuals, is not therefore essential to the protection of the basic rights in question, such as the right to know the reasons for one’s arrest, to access counsel at an early stage of detention, to have recourse to judicial oversight of the detention and ultimately the right to a fair trial. In some ways, it is perhaps surprising then that the debate on affording POW status to the majority of the detainees was considered so significant, and from a US administration point of view so potentially problematic in light of the broader objectives of the war against terror.

This emphasis may have been influenced by fears as to the denial of POW status and enhanced vulnerability of US armed forces abroad. Another appeared to be the desire to preserve ‘interrogation’ rights in light of special rules of

\textsuperscript{227} See Articles 43 and 78 GC IV (the latter applying to detentions during occupation): decisions to detain civilians for imperative security reasons must be ‘made according to a regular procedure’. Such procedure ‘shall include the right of appeal for the parties concerned’ and ‘Appeals shall be decided with the least possible delay.’

\textsuperscript{228} The right to be heard by a competent impartial tribunal where one’s rights are at stake is part of international human rights law. See Article 14, ICCPR, Article 8 American Declaration on the Rights and Duties of Man, Article 8 American Convention on Human Rights and Article 6 ECHR.

\textsuperscript{229} Notably, if denied POW status they may be prosecuted for mere participation as opposed to only for crimes under international law. They also lose their entitlement to the enhanced rights protections due to POWs under GC III which in some respects go beyond those guaranteed by IHRL.
interrogation under GCIII.230 However, there is no prohibition on questioning POWs per se or seeking to secure information from them; the prohibition is on coercing a response, prohibited under IHL and IHRL for all detainees. The rules on repatriation were also discussed as potentially relevant and limiting to the US.231 Article 118 of GC III provides that ‘POWs shall be released and repatriated without delay after the cessation of active hostilities,’ though this does not apply to persons charged with or convicted of a criminal offence.232 As one commentator noted: ‘if the captives are POWs, they must eventually be returned ... the Taleban fighters may be too dangerous ever to be released ... which ... commits the US to detaining them indefinitely’.233 Concern about affording POW status may thus have revealed an insidious assumption that if GC III does not apply there is no legal framework to limit the power to detain indefinitely. Whether or not GC III applies, at a certain point hostilities, and any conflict that is a real conflict, will cease and reasons ‘related to the conflict’ that may justify detention under IHL, will also cease to exist.

In conclusion, the POW debate was in some ways a distraction. Considered through a legal lens, most detainees were probably not POWs, but they were nonetheless entitled to protections under IHL and IHRL. The denial of POW status was a first step towards a selective approach that invoked a war paradigm to displace human rights protections, without accepting the IHL protections that follow. It formed part of a process of putting the detainees beyond the protection of the law and the treatment of them beyond its restraint. The failure to think of the detainees as either criminal suspects or POWs has been described by someone involved in prisoner abuse as a significant step to the way captors saw, and ultimately treated, their captives.234

230 According to GC III, POWs need only provide their name, date of birth, rank and serial number, and no ‘form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatsoever’. Article 17.
231 The English Court of Appeal in the Abbasi cases described this assumption as follows: ‘Furthermore, whereas in a conventional war prisoners of war have to be released at the end of hostilities, there is the possibility that, by denying the detainees captured during the war against terrorism the status of prisoners of war, their detention may be indefinite.’ Abbasi, supra note 5.
232 Article 119 provides an explicit exception to the duty to repatriate in these circumstances where proceedings are pending, or where the detainee has been convicted and is serving a sentence.
234 Quoted in Brody, ‘The Road to Abu Ghraib’, supra note 55.
Chapter 8

8B.4 SPECIFIC RIGHTS OF DETAINED UNDER IHL AND IHRL

The following section explores particular rights in relation to detention and fair trial owed to the detainees under applicable IHL and IHRL. It will consider the rights that correspond to particular categories of prisoners under IHL, as well as the minimal rules of IHL applicable to all prisoners held in relation to the conflict and IHRL applicable to all prisoners, and the extent to which these rights have been respected in relation to the Guantanamo detainees.

8B.4.1 Existence of a lawful basis for detention

In accordance with the rule of law, the liberty of individuals cannot be restricted other than on grounds – and in accordance with procedure – provided for in clear and accessible law. This ‘principle of legality’ is explicitly provided for in applicable human rights law, but it is a fundamental principle that underpins any system of law, national or international.

This principle of legality applies no less in time of armed conflict than in time of peace, although the legal justifications for detention differ. During conflict, IHL permits, for example, the detention of combatants to preclude further participation in hostilities and, in extreme circumstances, the detention of civilians where imperative reasons of security so demand. In time of conflict, the prohibition on ‘arbitrary detention’ in human rights must be understood by reference to these permissible grounds of detention in IHL.

Outside armed conflict where IHRL is the primary source of applicable law, treaties do not generally specify permissible grounds for detention (with the exception of the ECtHR), but instead they prohibit ‘arbitrary detention’. It is clear that arbitrariness connotes substantive as well as pro-

235 See, e.g., Article 9(1) ICCPR. ‘No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’. See also Article V, ADRDM.

236 Although these treaty provisions apply to IACs, the ICRC has suggested that the imperative reasons of security should provide a baseline standard for any detention in any type of conflict. Moreover, Additional Protocol II explicitly mentions internment. It is generally considered that a power to detain fighting forces and where reasons of security so require, even for NIAC. See ICRC institutional position, set out in J. Pejic, ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence’ (2005) 87(858) International Review of the Red Cross 375, and Pejic, ‘Conflict Classification’, supra note 233.

237 See Chapter 6B2.4 on war of detentions and 7B3 on the interplay of IHRL and IHL.

238 Preventive detention is permissible under IHRL only exceptionally and for a limited duration, and where safeguards such as judicial oversight are respected. See Chapter 7A5.3. See also UN mandate-holders’ report, supra note 164.

239 Under Art. 5 ECHR, grounds for detention are set out, which include for example the commission of crime, deportation, education of a minor, and public health reasons, but notably not ‘administrative’ or so-called ‘security’ detention or ‘intelligence gathering’.

240 Art. 9 ICCPR, like the ACHR, refers instead to ‘arbitrary’ deprivation of liberty.
cedural elements, and not just any `ground’ enshrined in domestic law will justify detention. It is well established that in time of conflict or of peace, detentions may be justified where persons have committed a crime for which they may be punished, except upon reasonable and specific suspicion that the individual involved has committed an offence, and on certain other grounds such as with a view to deportation, of less immediate relevance to the present situation.

Less clarity and more controversy attend the permissibility of `security,’ ‘preventive’ or ‘administrative’ detention, as alleged in relation to the Guantanamo detainees. The Working Group on Arbitrary detention for example, in the context of detention by the US on the war on terror, has held that such detention cannot be justified, absent a derogation under article 9. Other bodies, while not specifically endorsing its lawfulness, seem to implicitly accept that in certain circumstances such administrative or security detention does happen, and focus on clarifying the requirements that it be exceptional, legally clear and subject to strict safeguards. While differences of approach appear to surround the question whether preventative detention can ever be justified, what is clearer is that if it is permissible this is only in exceptional circumstances and subject to stringent safeguards, and could certainly never be justified in the long term still less indefinitely.

As noted above, unprivileged combatants can be prosecuted for involvement in hostilities whereas privileged combatants can be prosecuted only for war crimes.

'The “reasonableness” of the suspicion... presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence... [T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of “reasonableness” to the point where the essence of the safeguard... is impaired.’ Fox, Campbell and Hartley v. the United Kingdom, Appl. Nos. 12244/86; 12245/86; 12383/8), Judgment of 30 August 1990, Series A, No. 182, para. 32.

See, e.g., detention pending deportation made explicit in Art. 5 ECHR and implicit in e.g. the prohibition on arbitrary detention in Art. 9 of the ICCPR. Transfer must however be in process and reasonably imminent to justify detention; where deportation is precluded or ruled out (see, e.g. 82.4 above in relation to those subject to the moratorium), such persons cannot be held indefinitely on the basis of possible future transfer.

Some assert that there is no such right, others that it is limited. The ECHR itemized grounds for detention do not include ‘administrative’ or ‘security’ detention, and any such detention would at a minimum require derogation. See N. S. Rodley, ‘Detention as a Response to Terrorism’, in Salinas de Frias, White and Samuel (eds.), Counter-terrorism: International Law and Practice (Oxford: Oxford University Press, 2012).

See ‘Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development’, Working Group on Arbitrary Detention, 2 March 2010, UN Doc. A/HRC/13/30/Add.1, para. 33. This is in line with the ECHR approach. For a parallel case under the ECHR, see A & Ors Derogation, (2009) 49 EHRR 29, discussed in Chapter 11.

safeguards, the Human Rights Committee has noted: ‘if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions [of Article 9, ICCPR], 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).’

There must therefore be a lawful basis for detention, whether found in IHL or consistent with the framework set down in IHRL, and this must be determined in relation to each individual at the outset of detention and on an on-going basis. If at any point in the course of detention there is no clear legal basis for the detention of any individual, then that detention is not governed by the principle of legality and is arbitrary. If persons have been detained en masse, absent individual assessments as to the existence of a lawful basis of detention as discussed below, this detention is necessarily arbitrary.

The US position has long been based on the status of the individuals as dangerous ‘enemy combatants,’ though as noted above this is not a legal classification established in international law. It has been asserted that: ‘The law of war allows the United States – and any other country engaged in combat – to hold enemy combatants without charges or access to counsel for the duration of hostilities.’ While it was suggested at an early stage that most were detainees from the Afghan conflict, other accounts (including former Pakistani President Musharraf’s memoirs), indicate that many were detained in Pakistan, and it is known that others were detained much further afield and with less plausible connections to the Afghan conflict. Moreover, as noted above, more than 90% of the detainees are not, on the government’s own view, opposition ‘fighters’ at all. IHL may provide basis for some of the

248 Human Rights Committee, General Comment No. 8: Right to liberty and security of the person (Article 9) [1982], UN Doc. HRI/GEN/1/Rev.6 (2003) at 130, para. 4.
249 As noted in Chapter 6B.2.4, if persons are detained pursuant to an international armed conflict and that conflict then ceases, or becomes a non-international conflict, the original lawful basis for detention may no longer exist. Persons must be released unless there is another lawful basis for continued detention.
250 See, e.g., ‘Response of the United States of America dated 21 October 2005 to Inquiry of the UNHCR, Abu Zubaydah v Lithuania and Poland brief, Chapter 10: the US continues to assert the right to detain on broad unspecified law of war grounds. See above on the 48 detainees were identified for long term detention. Special Rapporteurs dated 8 August 2005, Pertaining to Detainees at Guantánamo Bay’, p. 3, available at: http://www.asil.org/pdfs/ilib0603211.pdf.
252 Eg Boumediene and Others, Algerians detained in Bosnia. See Chapter 10 – many of the rendition victims picked up around the globe ended up in Guantánamo at some point on their journeys.
battlefield detainees but the generic and broad reaching ‘war on terror’ makes this more difficult to assess.\(^{253}\)

Various explanations have been provided by the US authorities at various stages, justifying continued detention by reference to perceived threats,\(^{254}\) or as in the task force review published in 2010, explaining that certain categories of individuals could not be transferred and could not be prosecuted.\(^{255}\) But none of these reasons constitute a legal basis for detention. The determination that some of the detainees are still considered ‘dangerous’ provides a controversial basis per se for lawful detention, and one that likely depends on derogation, and which is certainly subject to the stringent requires of temporariness and procedural safeguards (below). While it could on one view have provided justification for some detentions around the time of 9/11, it is highly questionable to what extent the case for such preventative detention can be said to be necessary now.\(^{256}\) Other justifications advanced at earlier stages, for example the CSRT’s findings that ‘factors’ such as intelligence value might justify detention, lay still less claim to legitimacy and have no support under either IHL or IHRL. Despite the flexibility afforded under the ICCPR, possible preventive effect, the potential utility in solving other crimes, or other (unspecified) factors, cannot be reconciled with the constraints of the international legal framework highlighted above, including its emphasis on clear grounds for detention prescribed in law.

Finally, it is trite to note that once individuals are cleared for release following applicable national procedures, on the basis that none of the bases in national law apply, they must be released. The continued detention of many detainees months and years after their release has been ordered or authorised may well amount to arbitrary detention.

There would appear to have been a lawful basis for detaining at least some of the Guantanamo prisoners on the bases set out above, for example as regular combatants (Taliban) detained during a real armed conflict in Afghanistan (as opposed to the metaphorical ‘war on terror’), as unlawful combatants charged with unlawful conduct of hostilities, or as persons detained on reasonable suspicion of having committed a crime, properly understood as such according to criminal law applicable at the relevant time, including war crimes or crimes against humanity. However, the lack of clarity as to the law pursuant to which they are held and its application to any individual, coupled with

\(^{253}\) The IHL justification does not last forever. See ‘Repatriation’, below.

\(^{254}\) See the PRB process discussed above, and previously the broader justifications under the ‘Administrative Review Implementation Directive Issued’, DoD News Release, 15 September 2004 which included intelligence value.

\(^{255}\) As noted above the reasons were various – ranging from lack of evidence to inadmissibility of evidence (which would appear to relate in some cases to the incidence of torture in the past).

\(^{256}\) The onus is on the state detaining on such exceptional grounds to show that each particular detention is strictly necessary and proportionate.
the lack of procedural oversight (discussed below), is an anathema to the fundamental principle that detention can be justified only when pursuant to clear and accessible law.

8B.4.2 Information on reasons for arrest and detention

It follows from the requirement that there be clear reasons for an arrest, provided in law, and from the duty to determine the prisoners’ status, that information concerning these matters should be conveyed to the prisoners themselves. Only once this has happened can they assert the precise rights that correspond to them under international law. The right to such information is enshrined as one of the minimal standards of protection due to persons in the hands of the enemy under IHL and in human rights law.257

Article 75(3) of AP I 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.258

The right to be informed promptly of the reasons for detention under IHL thus applies to persons detained for any reason related to the conflict.

There is no precise time frame associated with the requirement of ‘promptness’, as account must be taken of all the circumstances including (for as long as relevant) military considerations arising out of the detention of persons in the zone of battle.259 However, 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)).

Under IHRL also, all detainees must be informed promptly of the reasons for their arrest and detention, as set forth in Article 9(2) of the ICCPR.260

257 Article 9(2) ICCPR.
258 Emphasis added.
259 This requirement should be interpreted in the light of human rights law; see the flexibility afforded and limits to it in e.g. Medvedyev &Ors v France 2010, at 7B3 and below.
260 As with the IHL protection in Article 75(3), this applies to all detainees, not only those held pursuant to the suspected commission of a criminal offence. The Human Rights Committee has noted that ‘if so-called preventive detention is used ... information of the reasons must be given’. Article 75(3), para. 2. See Human Rights Committee, General Comment No. 8: Right to liberty and security of the person (Article 9) [1982], UN Doc. HRI/GEN/1/Rev.6 (2003) at 130, para. 4. The Paris Standards, for example, include the right to know the reasons for the detention within seven days as a ‘minimum right’ of the detainee. The UN Body of Principles similarly includes this right, as one guaranteed to persons under
detainees therefore have a right to be informed of the reasons for their arrest under the minimum rules of IHL protection applicable to all persons and under human rights law.

In Guantanamo, neither individual detainees nor their families were informed of the reasons for their detention, beyond a general statement concerning enemy combatants and dangers to the national security of the United States or its allies. The US justified this approach on grounds of security, and enquiries seeking information were met with abrupt responses to this effect.261 Although the Combatant Status Review Tribunals were thought to be a promising step at least in this respect, as they were described by the Department of Defense as providing the detainee with ‘an opportunity to review unclassified information relating to the basis for his detention’, in fact the information provided was so cursory and conclusory (e.g. that detention was ‘based on the US Authorisation for the Use of Military Force and informed by the laws of war’262) as to be meaningless.263 Likewise, the Task Force review that has identified a group of 48 detainees for continuing detention does not indicate to the individuals into which category they fall. The failure to provide basic information as to the legal basis and reasons for detention is another manifestation of the disregard for the obligations to provide prompt, timely and adequate information concerning reasons for detention.

8B.4.3 Judicial oversight of detention

IHL enshrines the rights to be brought promptly before a court upon arrest and to challenge the lawfulness of arrest and continued detention. Under that body of law, judicial review of all forms of detention by a judicial body is guaranteed as a fundamental right in itself, and as a safeguard against violation of other rights. The Human Rights Committee has noted accordingly that procedural protections including ‘judicial guarantees’264 and the right to ‘a
remedy’ in respect of violations, remain effective notwithstanding serious security concerns or the existence of a national emergency.

The jurisprudence of the European Court of Human Rights is instructive in this respect, given its experience in considering the compatibility of counter-terrorist measures with fundamental human rights standards under the European Convention on Human Rights (which for present purposes is substantively the same as the ICCPR). With regard to promptness of judicial supervision, for example, the European Court of Human Rights has shown some flexibility in allowing longer lapses of time in extreme security situations than would otherwise be permissible. In this respect battlefield logistics and the need to transfer detainees from one location to another may be compelling factors contributing to delay immediately following arrest, but presumably not to the on-going denial of judicial supervision several thousand miles away and several years later.

The flexibility of the human rights framework is subject to limits and premised on the satisfaction of certain conditions. First, the state has to demonstrate valid reasons as to why it cannot ‘process’ suspects any earlier. Second, the permissibility of extended periods without judicial oversight a) depends on the existence of other attendant safeguards absent in the present case, and b) has never been deemed permissible for such prolonged (still less indefinite) periods of detention as are involved in the present situation. There is no precise formula for the length of time as all the circumstances must be taken into account, but the question is usually whether hours or days constitute an acceptable period within which detainees must be brought before a judge.

265 Article 2(3) ICCPR.
266 UNHRC General Comment No. 29, para. 14; UN Working Group on Arbitrary Detention, Dliberation 9 on arbitrary detention under customary law, A/HRC/22/44, 24 December 2012, para. 47; Advisory Opinion on Judicial Guarantees in Situations of Emergency, IACHR.
267 On several occasions it has acknowledged that ‘the investigation of terrorist offences undoubtedly presents the authorities with special problems,’ and as noted below affords some flexibility in this respect. Aksoy v. Turkey, Appl. No. 21987/93, Judgment of 18 December 1996, ECtHR, Reports 1996-VI, para. 78.
268 In Koster v. The Netherlands (Appl. No. 12843/87), Judgment of 28 November 1991, ECtHR, Series A, No. 221, in light of the claim that military maneuvers prevented the detainee from being brought before a military court, the Court noted that some allowance should be made for the military context; however in the circumstances of that case five days was rejected as the military court could in fact have sat sooner, if necessary on Saturday or Sunday (para. 25). See also J. McBride, ‘Study on the principles governing the application of the ECHR during armed conflicts and internal disturbances and tensions’, Council of Europe, Steering Committee for Human Rights CDDH), Committee of Experts for the Development of Human Rights (DH-DEV), DH-DEV (2003)001, para. 45; Medvedyev v France, 2010.
270 Twelve to fourteen days and for 4 days and 6 hours have been deemed excessive. Aksoy v. Turkey, supra note 267, para. 78. See also Sükik and Others v. Turkey, Appl. Nos. 23878/94-23883/94, Judgment of 26 November 1997, ECtHR, Reports 1997-VIII; Brogan v. United Kingdom, Appl. No. 11209/84, Judgment of 29 November 1988, ECtHR, Series A, No. 145.
Where states have derogated, and afforded other safeguards (including the essential right to access counsel, discussed below), flexibility for a week has been permitted for example, but in another case terrorism concerns have been found not to justify holding individuals for 20 days without judicial intervention.

With regard to the right to challenge the lawfulness of arrest, or the right of *habeas corpus*, as noted above human rights jurisprudence from national and international courts and bodies confirms straightforwardly that this is a fundamental right that must be respected at all times. The English Court of Appeals noted in relation to the Guantanamo detainees, ‘the recognition of this basic protection in both English and American law long pre-dates the adoption of the same principle as a fundamental part of international human rights law’. The UN Human Rights Committee has clarified that ‘the principles of legality and the rule of law require that ... in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of the detention must not be diminished by a State party’s decision to derogate from the Covenant’. As the Committee noted, it is precisely in exceptional emergency situations that judicial supervision assumes greatest importance. The Inter-American Court on Human Rights has recognised that *habeas corpus* is one of ‘the judicial guarantees essential for the protection of [non-derogable] rights’, and as such is itself non-derogable.

Promoted in part by the war on terror, and in particular by Guantanamo as the flagship of arbitrary detention, the nature of the procedural rights of detainees have been underscored and clarified through standards setting and judicial practice. This includes in relation to the judicial oversight of detention specifically, and the requirements of promptness, effectiveness and...
accessibility. The fact that IHL also recognises the principle of independent oversight of essential questions concerning rights protection in conflict was discussed above, in the context of the right to have one’s status determined by a competent tribunal and review of administrative detention. IHL does not provide a right to access judicial review of lawfulness of detention, and so long as the individual is detained pursuant to an international armed conflict this right does not automatically arise. In non-international conflicts, the legal situation is controversial as discussed in Chapter 7. On one view, the right to habeas corpus under IHRL continues to apply in such circumstances, where there is no overriding rule of IHL. The ICRC has suggested that, at a minimum, review must be independent and effective in practice. It is submitted that while genuine exigencies of conflict require a flexible approach to judicial review of detention, this must be limited, and persons should be subjected to judicial review when they are removed physically and temporally from the zone of conflict and it is possible to afford judicial oversight. In any event for the vast majority whose detention was not, or is no more, pursuant to a genuine armed conflict this right to habeas corpus clearly applies.

Where there is a right to challenge, the right must be rendered effective in practice, by adequate access by the detainee to information and evidence against him and legal support. The Guantanamo detainees were for many years expressly denied the right to challenge the lawfulness of detention. The Presidential Military Order authorising their detention specifically excluded the right to judicial challenge, declaring that ‘the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal’. With the seminal Boumediene case in 2008, referred to above, the US Supreme Court judgment provided

278 Ibid., at para. 63(3).
279 See Article 5 GC III and Articles 42 and 78 GC IV. While the ‘regular procedure’ for handling decisions on administrative detention involves a right to be heard, this is not necessarily by a judicial body. However the duty of periodic review and the right to appeal must be to a court or independent administrative body; see Gasser, ‘Protection of the Civilian Population’, p. 289.
280 See Chapter 7B3.
281 Ibid on the difficult issues regarding inter-relationship that arise.
282 Pejic, describing the ICRC position, states that ‘mounting an effective challenge will presuppose the fulfilment of several procedural and practical steps, including: i) providing internees with sufficient evidence supporting the allegations against them, ii) ensuring that procedures are in place to enable internees to seek and obtain additional evidence, and iii) making sure that internees understand the various stages of the internment review process and the process as a whole. Where internment review is administrative rather than judicial in nature, ensuring the requisite independence and impartiality of the review body will require particular attention. Internees should also benefit from expert legal assistance in the internment review process’. Pejic, ‘Conflict Classification’, supra note 233.
283 Presidential Military Order, supra note 130, Sec. 7(b)(i).
a critical reassertion of the detainees’ rights to habeas corpus and some hope for detainees.284

However, many still await their habeas proceedings years, and now in some cases more than a decade, after their detention, bringing into sharp relief the discussion above as to whether the right must be afforded within days or weeks.285 Moreover, while early habeas reviews showed careful judicial scrutiny, and a high level of findings that there was no basis for detention,286 more recently questions have also arisen as to how ‘meaningful’ the review of lawfulness of detention has become, with Courts almost always deferring to the government or being overturned on appeal.287 Some have questioned whether the promise that Boumediene v. Bush provided of ‘meaningful’ judicial review has been ‘effectively negated’.288 The Inter-American Commission on Human Rights (IACHR) recently noted that although Guantánamo detainees have a theoretical right to judicial review of their detention ‘the US courts appear consistently to defer to the Executive in a manner that renders this right illusory’.289

8B.4.4 Prosecution – fair trial rights

This section highlights some of the fair trial rights to which the detainees are entitled and compares briefly these standards and the military commission procedures in operation in Guantánamo Bay.

As noted above, the legal status of a prisoner impacts on the legitimacy of prosecuting that detainee for crimes related to the conflict. Specifically, if detainees were formerly privileged combatants (entitled to be treated as POWs), they may not be prosecuted for acts of war, while those unprivileged combatants, who fought absent the right to do so, may. All categories of prisoner, however, may equally be prosecuted for the commission of international crimes such as war crimes or crimes against humanity.290 GC III provides that any POW subject to judicial proceedings is entitled to a fair trial.291 So seriously

284 Boumediene, supra note 16.
285 Abu Zubaydah v Lithuania and Poland, supra note 60.
286 By 2010, 57 cases (56%) were successful, then only 1 was cleared in more than the year thereafter: Seton Hall Habeas Report, supra note 106, p. 1; Smith, ‘Federal Court Rejects Virtually all Habeas Petitions’, supra 251.
287 Smith, ‘Federal Court Rejects Virtually all Habeas Petitions’, supra 251.
290 Indeed international law recognises the obligation on states to prosecute for such egregious crimes. See Chapter 4.
291 See Articles 82-8 and 99-107 GC III.
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 states parties are obliged to prosecute.\(^\text{292}\)

For civilians who are subject to penal sanction, GC IV requires respect for the basic ‘judicial guarantees generally recognised as indispensable’\(^\text{293}\) and notes that ‘the trial and sentence must take place in accordance with the provisions [on due process] of Article 64 and those that follow it’.\(^\text{294}\) By way of minimum standard for any person not falling into the above categories, Article 75(4) AP I provides:

\[
\text{(a) ... for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence.}^{295}
\]

Basic due process rights are therefore provided for under IHL for all categories of detainee. The interpretation of certain of 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 provides, in greater detail, the fair trial rights to be afforded to any person who may be subject to criminal proceedings.\(^\text{296}\)

Under IHRL, the right to a fair trial contained in the Universal Declaration of Human Rights\(^\text{297}\) was fleshed out in notable detail by Article 14 of the International Covenant on Civil and Political Rights. Certain aspects of the right – for example the right to a ‘public’ trial – are explicitly subject to restriction to the extent that genuine reasons of public security or protection of witnesses so require.\(^\text{298}\) Others – such as the right to trial without ‘undue delay’ – enshrine an inherent flexibility that has regard to all circumstances,

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\(^{292}\) Article 130 GC IV.

\(^{293}\) Article 72 GC IV.

\(^{294}\) ICRC Commentary on GC IV, p. 50, and Article 126.

\(^{295}\) Common Article 3 further provides that persons taking no part in hostilities (including persons who once did but who are hors de combat, or have otherwise laid down their arms), are ‘entitled to certain judicial guarantees generally recognised as indispensable’.

\(^{296}\) Fair trial has been recognised as one of the areas of substantive coherence between the two bodies of law where there is no conflict between IHL and IHRL and ‘harmonious interpretation’ is possible. Chapter 7B3.

\(^{297}\) 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 ... any criminal charge against him’.

\(^{298}\) The ECHR has found that security considerations do not justify a failure to hold a trial in public, particularly as measures can be taken to accommodate security concerns, such as preventing the identity of witnesses becoming known to the public. See, e.g., Doorson v. Netherlands, ECHR judgment of 26 March 1996 and Van Mechelen v. Netherlands, ECHR judgment of 23 April 1997.
including peculiarities of armed conflict. However, the ‘principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency,’ and ‘minimum due process rights’ are recognised to apply at all times. A plethora of issues arise regarding the compatibility of the military commissions with the requirements of IHRL, a few of which are highlighted below.

8B.4.4.1 Military commissions and the right to trial before an independent and impartial tribunal

Resort to military commissions to prosecute the Guantanamo detainees has, in and of itself, raised considerable controversy, on account of apparent inconsistency with various aspects of applicable IHL and IHRL.

A preliminary issue arises under IHL emerges from the rules governing prisoners of war. According to GC III, POWs ‘can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of this present chapter have been applied’. The Military Order explicitly excludes US citizens from the jurisdictional reach of the Military Commissions, and US armed forces would be subject to the Uniform Code of Military Justice, which provides in some detail for the protection of rights denied to the detainees in the current situation. As controversy surrounds the status of at least certain detainees, and they are entitled as a matter of law to be presumed POWs until their status has been determined by the requisite competent tribunal, it would appear that recourse to such tribunals is a violation of the GC III obligations.

299 ‘The difficulty in bringing someone to trial because of conflict and disturbance would be a legitimate consideration in assessing the reasonableness of the length of any pre-trial detention but there would still be a need to demonstrate that continued efforts were being made to hold the proceedings.’ Council of Europe Expert Study, para. 45. However (as discussed above), the relevance of factors such as battlefield logistics have diminished, if not vanished, years and miles from the original zone of battle.

300 See General Comment No. 31, supra note 171.


302 Many other concerns have arisen over time, not addressed here, such as the right to an appeal protected in IHRL but denied in the Military Commission’s earlier Rules.


304 Article 5(2) GC III.
The question of more broad-reaching effect is whether the Commissions are ‘competent independent and impartial tribunal[s] established by law’, that meet the fair trial guarantees to which all prisoners are entitled. There are examples from across international practice of military commissions being found to lack the necessary independence from the executive branch and from the military. 305 Human rights bodies have consistently found the use of military courts to try civilians in Guatemala, 306 Peru, 307 Chile, 308 Uruguay, 309 Egypt, 310 and elsewhere to violate fundamental due process rights. 311 In other contexts the US itself has criticised the use of military courts on the basis that ‘they do not ensure civilian defendants due process before an independent tribunal’. 312 In addition to concerns regarding the inappropriateness of special or military jurisdictions as such, are more specific ones regarding the ‘special’ procedures that almost inevitably flow from resort to special jurisdictions, to the detriment of fair trial rights. 313

305 Ibid. See, e.g., Art. 8 (1), American Convention on Human Rights. States are not to create ‘[t]ribunals that do not use the duly established procedures of the legal process ... to displace the jurisdiction belonging to the ordinary courts or judicial tribunals’: Castillo Petruzzi and others v. Peru, Merits, Judgment of 30 May 1999, IACtHR, Series C, No. 52, paras. 130-1; see also Ocalan v. Turkey, Appl. No. 46221/99, ECtHR, Merits, Judgment of 12 March 2003, para. 114. Human Rights Committee: see e.g., HRC General Comment 13; Concluding Observations of the Human Rights Committee: Uzbekistan, UN Doc. CCPR/CO/71/UZB (2001), para. 15. ECtHR: Inal v. Turkey, Appl. No. 825/1031 (1998); Ocalan v. Turkey. African Commission: see EIPR and INTERIGHTS (on behalf of Sábado & Ors) v. Egypt, ACHPR, No 334/06 (2012).


308 See Comision Inter-Americana de Derechos Humanos; Segundo Informe sobre la Situacion de los Derechos Humanos en Chile (1976), OEA/Ser.L./V/II.37, Doc. 19.


310 Sábado & Ors, supra note 306.


In the context of the Guantanamo detainees, various independent intergovernmental experts and bodies, academic commentators and NGOs have expressed concern that use of military commissions jeopardises essential fair trial rights under human rights law. In the words of British law lord, Lord Steyn: ‘The military will act as interrogators, prosecutors, defence counsel, judges, and when death sentences are imposed, as executioners’, a situation he described as a ‘monstrous failure of justice’.

8B.4.4.2 Scope of Crimes Prosecuted

Some of the questions that have generated controversy relate not to the commissions or their process as such, but to the substantive scope of their jurisdiction. Consistent with the principle of legality, individuals can only be prosecuted for acts that constituted, at the time of their commission, crimes clearly defined in law. The jurisdiction of the military commissions, by contrast, has been criticised for its breadth and uncertainty in several respects. Firstly, the Commissions are prosecuting ‘war crimes’, despite serious doubts as to the ‘armed conflict’ threshold having been met. Moreover, the jurisdiction over ‘material support for terrorism’ provided for in the Military Commission Act 2006, despite such a crime not having formed part of international law at the time of the commission of the alleged offences, highlighted the additional questions regarding retroactivity of criminal law, as discussed in Chapter 4. On this basis, in 2012 US courts quashed an early military commission conviction for ‘material support’ on the basis that it did not amount to a war crime at the relevant time.


316 Reports and commentary have been issued by ACLU, CRR, HRW, AI, and Human Rights First.


318 See, e.g., Art. 15 ICCPR and Chapter 7A.5.5.


320 The US Appeals Court found that ‘[t]here is no international-law proscription of material support for terrorism’. Hamdan v. United States, supra note 138, at 22.
8B.4.4.3 Right to Access Evidence and Present a Defence

The minimal IHL standard set out in Article 75(4) provides that an accused shall: ‘(a) ... 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’.321 The ICCPR provides for the right to ‘have adequate time and facilities for the preparation of his defence .... to defend himself in person or through legal assistance … and to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’.322 One constant source of concern has been, perhaps unsurprisingly, the use of secret evidence and the very limited access by the accused to information and evidence against him. There can be little doubt that, as human rights courts have recognised, ‘there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person’.323 A key baseline question is however whether ‘sufficient information’ is available to enable the accused to know the nature of the evidence and to defend himself fully, and whether any prejudice is ‘counterbalanced’ by safeguards to ensure fair trial.324

The right of Guantanamo detainees to access ‘relevant and material’ evidence has been recognised by US courts in habeas proceedings.325 Particular care is due in the context of criminal trials where the standards are higher than for certain other types of civil proceedings where secret evidence has been considered,326 and all the more so where the death penalty is considered. Counsel engaged in the military commission process and comment-

321 Article 75(4).
322 Article 14, ICCPR.
323 A & Ors Derogation, supra note 245; Botmeh and Alami v. the United Kingdom, No. 15187/03, Judgment, 7 June 2007, sec. 37.
325 Eg Al Odah v. United States, 559 F.3d 539 (D.C. Cir. 2009). The Court found that individuals had the right to access ‘relevant and material’ secret evidence. The Court of Appeals left open the possibility that ‘alternatives to disclosure’ might ‘effectively substitute for un-redacted access.’ Ibid., at 547.
326 See discussion of e.g. UK closed material proceedings in Chapter 7B.7.
ators criticise the extent of the government’s reliance on secret evidence, the lack of a right to full access to exculpatory evidence, and the lack of resources enabling the accused to himself gather and present evidence in his defence. Particular procedural requirements, such as seeking the prosecution’s approval for the presentation of witnesses, are seen to belie respect for the ‘equality of arms’ principle.

In addition, specific rules of evidence, while they have improved over time, continue to pose challenges to the right to fair trial. Notable among them is the admissibility in certain circumstances of coerced statements and evidence derived from cruel, inhumane, and degrading treatment. A strident attack on the system by the Commissions’ former chief prosecutor, who accused his superiors of pressing ahead with politically motivated trials, singled out the use of evidence obtained through torture as destroying the trials’ credibility. The reliance in legal proceedings of such evidence falls foul of the well-established prohibition, explicit in Article 15 of CAT and implicit in the prohibition against torture across international law, as discussed in Chapter 7.


Ibid. [T]he prosecutor can unilaterally veto a defense attorney’s decision to call a witness. A defense lawyer who wishes to summon a witness must first get the prosecutor’s consent. If the prosecutor says no, the lawyer must argue its merits with the prosecutor in front of the judge. This unfair allocation of power between prosecution and defense directly violates an essential fair trial principle, known as “equality of arms”, and locks in a prosecutorial advantage that undercuts a vigorous and effective defense.’ R. Dicker, ‘Guantánamo’s perversion of justice,’ The Guardian, 3 September 2012, available at: http://www.guardian.co.uk/commentisfree/2012/sep/03/guantanamo-perversion-justice.

Evidence obtained through torture or inhuman treatment is inadmissible in all circumstances. Whereas, for example, evidence obtained in breach of other rights to respect for private life under Article 8 may still be used in a prosecution so long as, in all the circumstances, this would not make the trial unfair. See e.g., Singharasa v. Sri Lanka, Communication No. 1033/2001, Human Rights Committee, Views of 23/08/2004, UN Doc. CCPR/C/81/D/1033/2001; A & Ors, supra note 245; Sibbi & Ors, supra note 306.
8B.4.4.4 Access to Counsel

The assistance of a defence lawyer is a primary means of ensuring the protection of the fundamental rights of people suspected or accused of criminal offences, protected both under IHL and IHRL. IHL provides, explicitly and implicitly, for access to counsel for persons suspected of having committed a criminal offence, irrespective of their status as POWs, civilians or persons entitled to the basic minima of human rights protection. The detailed rights afforded to POWs under GC III include the right to legal representation.\(^334\) Likewise, among the due process rights afforded to civilians protected by GC IV is 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’.\(^335\) The ICRC Commentary to AP I notes that the right in Art 75(4) AP I to ‘all necessary means of defence’ must be interpreted to include the right to communicate with a ‘qualified defence lawyer’.\(^336\) The right to ‘all necessary rights and means of defence’ provision explicitly applies ‘before and during ... trial’, and should be interpreted in the light of human rights law which, as explained below, includes access to counsel from the early stages of detention as one of the core protections against abuse and arbitrariness.

The right to consult counsel is explicit in the fair trial provisions of Article 14(d) ICCPR. The Human Rights Committee, like other human rights courts and bodies applying other international instruments, has recognized that the right operates from the earliest stages of detention and is a particularly important at the time of interrogation.\(^337\) The right under human rights law, reflected in some of the IHL provisions, is to counsel of choice,\(^338\) safeguarding the essential relationship of trust between lawyer and client. There is no objection in principle to restrictions requiring for example security clearance for lawyers providing advice and representation, provided their independence

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334 Article 84 GC III.
335 Article 72 GC IV.
336 ‘H[He must be able to understand the assistance given by a qualified defence lawyer. If these conditions were not fulfilled, the defendant would not have the benefit of all necessary rights of defence.’ ICRC Commentary on AP I, para. 3096.
337 The Human Rights Committee has stated that ‘all persons who are arrested must immediately have access to counsel’. See Concluding observations of the Human Rights Committee: Georgia, UN Doc. CCPR/C/79/Add.74 (1997), para. 28; Brannigan, supra note 270, paras. 62, 64 (notwithstanding the declared state of emergency in that case); Sabbeh & Ors, supra note 306. Article 5. \textit{Paris Standards} Principle 11. \textit{UN Body of Principles.}
338 Article 14(3)(d) ICCPR. \textit{See also} Principle 1 of the Basic Principles on the Role of Lawyers; Article 8(2)(d) of the ACHR; Article 6(3)(c) of the ECHR; Article 7(1)(c) of the ACHPR, Article 21(4)(d) of the ICTY Statute; Article 20(4)(d) of the ICTR Statute, Article 67(1)(d) of the ICC Statute. Under IHL, the right to choose one’s defence lawyer is guaranteed by Article 105 GC III.
is not compromised and the right to a lawyer of choice is not entirely under-
mined, for example by exclusive use of lawyers from the armed forces.339

The determination to deny access to counsel was apparent from the outset
and integral to the decision to house detainees in Guantanamo. The Guanta-
namo experience testifies to the importance of such access, as a safeguard
against torture and exorbitant public allegations, such as those levelled against
‘high value detainees’340 but dropped once detainees had access to coun-
sel and were able to challenge.341

There has been little or no right to consult or be represented by a lawyer
as part of the ‘review mechanisms’ at Guantanamo.342 While there is access
to counsel for habeas proceedings and the military commission trials,343 the
government has sought to restrict access to counsel in 2012, arguing that once
habeas petitions are filed, it should control subsequent access to counsel.344

The effective implementation of the right to consult counsel requires that
counsel can ‘communicate with the accused in conditions giving full respect

339 See Chahal v. United Kingdom, supra note 269, p. 3.
340 See, e.g., the case of Abu Zubaydah publicly proclaimed by President Bush and others to be
in al Qaeda’s ‘top three’. President Bush, ‘Remarks by the President at Thaddeus Mc-
‘Remarks by the President at Connecticut Republican Committee Luncheon’ 9 April 2002,
0409-8.html; President Bush, ‘Remarks by the President in Address to the Nation’ 6 June
20020606-8.html (describing him as ‘al Qaeda’s chief of operations’). See, e.g., S. Benen,
php.
341 When he obtained access to lawyers and prepared to challenge his detention, after more
than 6 years of incommunicado detention, these allegations were withdrawn. The U.S. no
longer alleges he was a member of al Qaeda, Osama bin Laden’s senior lieutenant, or had
any role in any al Qaeda operation – including 9/11. Annex 3: Respondent’s Memorandum
of Points and Authorities in Opposition to Petitioner’s Motion for Discovery and Petitioner’s
v Lithuania, supra note 60.
342 See Chapter 8A2 supra. See, e.g., B. Mears, ‘Military limiting Guantanamo detainee access
to lawyers’, 7 August 2012, available at: http://security.blogs.cnn.com/2012/08/07/military-
limiting-guantanamo-detainee-access-to-lawyers. ‘Executive Order 13,567 does not provide
detainees who undergo PRB review with a judicially enforceable right to counsel, or any
justification for asking the Court to impose a counsel-access regime on the PRB process
other than the one developed, per the Order’s direction, by the Secretary of Defense’.
343 The rules of procedure provide that every accused shall be assigned a defence counsel,
chosen by the Chief Defense Officer among the Judges Advocate of the United States Armed
Forces. See Military Commission Instruction No. 4, ‘Responsibilities of the Chief Defense
Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense
Portals/0/milcominstrno4.pdf.
344 Ibid.
for the confidentiality of their communications'. Confidential consultation with his or her defence lawyers is as an essential aspect of the right of every defendant and integral to the preparation of a defence. Yet Military Commission Order No. 3 of 5 February 2004 provided explicitly for the regulation and monitoring of lawyer-client communications. Persistent concerns have since been expressed by attorneys before the military commissions as to the lack of confidentiality of lawyer-client communications, with a senior military defence lawyer reportedly stating that attorneys were ‘ethically obliged’ not to follow the rules.

8B.4.4.5 Transparency and Public Trial

The right to a public trial is protected in human rights law, though it is not an absolute right and the right to close proceedings temporarily to protect national security is well recognised. Limitations on the right to be present at parts of the accused’s own trial have been a feature of the military commission’s proceedings from the start. The exclusion of the accused was criticised during the earlier proceedings, and the MCA continues to allow a trial to continue in the absence of the accused in certain circumstances.

Controversy also surrounds the extent of the exclusion of the public. Measures have been taken in Guantanamo to ensure that public can monitor the trials, a time lapse enables court to ensure that no statements that may jeopardise security can be released. This may an example of a measure that provide a balance between open justice and protection of national security in exceptional situations, but concerns have been expressed as overuse of the mechanism. Notably the protection of information concerning allegations of torture or ill-treatment by US personnel is reportedly a common feature of

345 Human Rights Committee, General Comment 13, para. 9.
346 See, e.g., Article 8(2)(d) ACHR, Article 67(1)(b) of the ICC Statute; Principles 22 and 8 of the Basic Principles on the Role of Lawyers, Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
348 Marine Col. J.P. Colwell, the chief military defense counsel for the commissions, is reported to have written to all military commission defense lawyers that they were ethically obligated to refuse to follow rules which required screening by the dept of defense of all communication from lawyer to client. ‘Guantanamo Chief Military Defense Lawyer Orders His Attorneys Not to Agree to Communication Monitoring’, ACLU, 11 January 2012, available at:http://www.aclu.org/national-security/guantanamo-chief-military-defense-lawyer-orders-his-attorneys-not-agree.
349 Secret evidence can be employed, during which time the accused cannot attend his trial, though his military lawyer may do so. See Military Commission Instruction No. 1, ‘Military Commission Instructions’, Department of Defense, 30 April 2003, Sec. 7 (B), available at: http://www.mc.mil/Portals/0/milcominstno1.pdf.
350 MCA 2009, H. R. 2647-397, § 949d.
commission’s proceedings, and serves no apparent legitimate purpose. This feeds broader allegations that “the commissions are best understood not as a legitimate forum for trying war crimes, but as an avenue for short-circuiting legal processes that might hold us accountable for our wrongs.”

8B.4.4.6 When Fair trial is a Matter of Life or Death

Finally, it is recalled that the military commissions may impose the death penalty, which has in fact been sought in relation to proceedings which are pending at time of writing. The death penalty, while not illegal per se under international law, is strictly regulated by it, as set out in Chapter 7. Under IHL, persons subjected to criminal proceedings during any type of armed conflict may not be sentenced to death except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. Under IHRL, it can only be applied to the most serious crimes and cases, taking into account all mitigating personal circumstances. As recognized in IHL and IHRL, it should not be applied to minors or the elderly.

Critically, a trial that leads to the death penalty must meet the highest standards of fair trial under IHRL or constitute an arbitrary deprivation of the right to life. As the Inter-American Court noted:

‘Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.’

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351 Ibid. ‘[I]f the 9/11 defendants speak up about torture in custody, or their lawyers try to, the audio feed from the courtroom is immediately cut off and the information will never appear in the public record.’ Dicker, ‘Guantánamo’s perversion of justice’, supra note 330.
355 The Right to Information on Consular Assistance, in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, IACHR, Series A, No. 16, para. 136. See also Restrictions to the Death Penalty (Article 4.2 and 4.4 of the American Convention on Human Rights), Advisory Opinion OC-3/83, 8 September 1983, IACHR, Series A, No. 3 and the decision of the ECtHR in Ocalan v. Turkey, supra note 305. In these circumstances, the death penalty may also amount to cruel or inhuman treatment. See, e.g., Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt.
If the death penalty is applied, as provided for in the Military Order, a violation of fair trial rights may also give rise to a violation of the detainee’s right to life.\textsuperscript{356}

\section*{8C RESPONDING TO GUANTANAMO}

\subsection*{8C.1 THE OBLIGATIONS OF OTHER STATES}

This chapter has focused on the obligations of the United States, as the detaining power, under IHL and IHRL. It is pertinent to reflect however on the obligations incumbent on other states to respond in the face of flagrant violations as in the situation at hand.

As we have seen in Chapter 6, under IHL, states parties to the Geneva Conventions have positive obligations to ensure respect for the Conventions, described as meaning that they should ‘do everything in their power’ to ensure that they are respected universally.\textsuperscript{357} Several points are worthy of emphasis in the context of the on-going Guantanamo experience. First, states are not simply entitled, but are obliged, to take measures to respond to violations of IHL, and as authoritative commentary has noted, the proper working of the system under the Geneva Conventions demands that they do so.\textsuperscript{358} Secondly, the obligation is both a negative and a positive one. It requires states to refrain from committing violations, facilitating violations or cooperating with an offending state, for example by arresting and transferring detainees to a power that is believed to be violating the rights of those prisoners under IHL. It also involves positive measures of prevention, without prescribing what measures the state may deem necessary or effective.\textsuperscript{359}

The action that states should take is not prescribed, and available options may include invoking the under-utilised inter-state judicial mechanisms that

\footnotesize{\textsuperscript{356} Article 6(1) ICCPR prohibits the arbitrary deprivation of life and Article 6(2) explicitly requires that any imposition of the death penalty is subject to certain requirements, \textit{inter alia}, that it is imposed by a competent court in a manner that is ‘not contrary to the provisions of the present Covenant’. See Chapter 7A5.1. It may also amount to inhuman or degrading treatment. \textit{See Öcalan v. Turkey}, supra note 305.}

\footnotesize{\textsuperscript{357} Article 1(1) of AP I paraphrases this positive obligation set forth in Article 1 of the 1949 Conventions. See Chapters 3.1.2 and 6.A.2.7}

\footnotesize{\textsuperscript{358} ICRC Commentary GC I, p. 18.}

\footnotesize{\textsuperscript{359} \textit{See Chapter 6, IHL}, references to Common Article 1 of the Geneva Conventions; \textit{see also Nicaragua}, paras. 220 and 255 and Articles 40 and 41 of the ILC’s Articles on State Responsibility.}
exist,\textsuperscript{360} or, at a minimum, it may be expected that states would make meaningful diplomatic representations that the violations should stop. As ‘observance of humanitarian law transcends the sphere of interest of any individual state’,\textsuperscript{361} representations should not be limited to the protection of nationals of the state but reflect the role of states parties to the Geneva Convention system as guardians of the protections contained therein.

Finally, a specific positive obligation under IHL is the obligation, in the event of grave breaches of the Conventions – such as wilfully depriving prisoners of war of the rights of defence – to seek out and prosecute those individuals responsible.\textsuperscript{362} The obligations of individual accountability referred to above (and the rights of individuals to redress) thus coincides with states’ obligations under IHL.

The obligations of states under human rights law are cast differently, and while there is a duty to ‘ensure’ that the right of those within the state’s control are respected, there is no general duty to ensure that other states refrain from violations. However, as discussed in Chapter 7, where the state itself exercises its authority or control abroad, IHRL is invoked. Moreover, under IHRL states may not transfer persons within their jurisdiction to another state where there is a significant risk of rights violations in the other state, such as torture or inhuman treatment, or a ‘flagrant denial of justice’, which may be implicated if states were asked to extradite or transfer persons to Guantanamo Bay for detention and/or prosecution.\textsuperscript{363} Finally, the basic obligations to give effect to the object and purpose of a treaty to which a state is party, in good faith, presumably generally precludes facilitating or encouraging other states to commit violations of it. In this respect, questions arise as to whether other forms of state cooperation with the process of Guantanamo detentions or the trials by military commission, such as through intelligence sharing or evidence gathering,\textsuperscript{364} would breach the spirit, if not the letter, of IHRL.

Developments in relation to state responsibility are also relevant to this assessment of the interests and obligations of third states in face of the sort

\textsuperscript{360} Recourse to the ICJ is available between states, and although rarely utilised in practice, human rights bodies such as the Human Rights Committee under the ICCPR are available and could be invoked by one state against another.


\textsuperscript{362} See ‘Grave Breaches’, Chapter 6.

\textsuperscript{363} See Inter-American Convention to Prevent and Punish Torture which precludes extradition where there are ‘grounds to believe’ that, among other things, the person ‘will be tried by special or \textit{ad hoc} courts in the requesting state’. Article 13, Inter-American Convention to Prevent and Punish Torture, Cartagena de Indias, 9 December 1985, in force 28 February 1987, OAS Treaty Series No. 67. See Chapter 7A.5.10.

\textsuperscript{364} See discussion of evolving understanding of obligations of non-cooperation, beyond in cases of extradition in Chapters 4 and 7.
of basic violations of human rights and IHL that Guantanamo Bay epitomises.\textsuperscript{365} States may incur responsibility where they aid and assist other states in the commission of international wrongs such as those arising at Guantanamo.\textsuperscript{366} The prohibition on arbitrary detention and denial of basic fair trial guarantees, as well as torture, have been authoritatively described as peremptory norms of international law;\textsuperscript{367} as the International Law Commission has indicated, where such obligations are breached, any state has an interest in acting to invoke the responsibility of the offending state, stopping the violation and ensuring that the wrong is put right.\textsuperscript{368} Moreover, gross or systematic breaches of such norms arise, which is likely to be met in the Guantanamo scheme, the ILC Articles shift from permissive to mandatory language, requiring that states ‘shall’ cooperate to end the breach.\textsuperscript{369} In an interesting endorsement of these rules and their potential relevance in this context, the Parliamentary Assembly of the Council of Europe resolution on Guantanamo calls on states ‘to respect the erga omnes nature of human rights by taking all possible measures to persuade the United States authorities to respect fully the rights under international law of all Guantánamo Bay detainees’.\textsuperscript{370}

In short, the obligations to ensure respect for IHL, the more contained obligations of IHRL and developments in relation to state responsibility in international law together reflect an important principle that certain egregious violations are not matters for the state itself, but for the international community as a whole. The legal imperative for states to take action to address the Guantánamo situation is plain, even if they are left considerable scope to decide how best to do so. They should not take steps, whether in military or criminal matters, that directly or indirectly facilitate or contribute to the violation and they should invoke effective means, through diplomatic or other channels, to end the violations of rights of all detainees and restore the rule of law.

\textsuperscript{365} See Chapters 3 and 7.
\textsuperscript{366} Art. 16 ILC Articles.
\textsuperscript{367} See, e.g. General Comment 29, para. 11 and ILC Commentaries to Articles on State Responsibility, Introductory Commentary to Part Two, Chapter 3. Commentators include human rights, from the non-derogable rights common to the ‘three major human rights treaties’ to longer lists. See Chapter 7A., ‘International Human Rights Law’, Framework.
\textsuperscript{368} Article 48, ILC’s Articles on State Responsibility.
\textsuperscript{369} Ibid., Art. 41.
\textsuperscript{370} Resolution 1433 (2005), Lawfulness of detentions by the United States in Guantánamo Bay, Parliamentary Assembly Council of Europe.
8C.2 THE INTERNATIONAL RESPONSE TO THE GUANTANAMO DETENTIONS

The situation of the Guantanamo detainees has provoked an unusual level of condemnation of the international community. Serious concerns expressed by international human rights mechanisms and non-governmental organisations were perhaps predictable. But opponents have been vociferous, coordinated and diverse, illustrated by an unusually vocal statement of concern from the ICRC and strident criticism being levelled not only from NGOs and international human rights bodies, but also from quarters not usually associated with international human rights advocacy. Examples from the UK, the US’s foremost ally in the ‘war on terror’, may illustrate the point. The UK Court of Appeal took the unusual step of commenting on what it viewed as the ‘objectionable’ lack of oversight by another country’s courts. Breaking with the convention that Law Lords do not speak out on politically sensitive issues, still less criticise another state’s government, a distinguished English Law Lord condemned publicly the ‘monstrous failure of justice’, describing the military commissions as ‘kangaroo courts’ which ‘convey the idea of a pre-ordained arbitrary rush to judgment by an irregular tribunal which makes a mockery of justice’. A total of 175 members of both houses of the UK parliament, crossing party lines, took the unprecedented step of lodging an amicus brief with the US Supreme Court, adding to the many other briefs submitted to the Court. The media have been similarly critical, including those otherwise sympathetic to controversial aspects of the ‘war on terror’.

Official inter-state reactions, for their part, are generally less transparent and more difficult to measure meaningfully. As regards the protection of nationals, initially, protracted negotiations between the US and certain governments (notably the UK and Australia) were widely reported, but apparently focused on the situation in respect of their own nationals detained in Guanta-

371 International organisations having criticised the situation include the Working Group on Arbitrary Detention and the Inter-American Commission on Human Rights. See Report of WGAD, supra. Reports of the HR Committee, HR Council, UN mandate-holders’ report, IACHR and Council of Europe Parliamentary Assembly are among those to criticise Guantánamo.


373 See Albsai, supra note 5.

374 Steyn, ‘Guantanamo Bay: The Legal Black Hole’, supra note 5. Lord Steyn declared also that the trials before the military commissions would be ‘a stain on United States justice’.

375 Many other briefs were filed from jurists and organisations around the world. They can be found at www.ccr-ny.org.

376 See, e.g., ‘Unjust, Unwise, Unamerican: America’s plans to set up military commissions for the trials of terrorist suspects is a big mistake’, The Economist, 12 July 2003, which notes the support offered by that publication to military action in Iraq and Afghanistan, while condemning the proposed military commissions as ‘illiberal, unjust and likely to be counter-productive’.
Presumably as a result of this quiet diplomacy, a few of the detainees were returned to their country of origin, while in respect of others special arrangements were made for the application of better standards than those applicable to detainees of other nations, including undertakings that the death penalty would not be applied. This is exemplified by the case against David Hicks, the Australian national who is one of the first four detainees to be tried by military commission, but on the basis of different arrangements than apply to the other accused of Yemeni and Sudanese nationality. As regards UK nationals remaining in Guantanamo, the UK Foreign Secretary stated that ‘our position remains that the detainees should either be tried in accordance with international standards or they should be returned to the UK.’ Ultimately, their return to Britain was formally requested by the government on this basis, and almost all have been returned.

Over time, public condemnation emerged at governmental level. It was 2006 when German Chancellor Angela Merkel was clear, if restrained, in stating that ‘an institution like Guantanamo in its present form cannot and must not exist in the long term.’ In the U.K. the Attorney General for England and Wales described the camp’s existence was ‘unacceptable’ and ‘not meeting acceptable fair trial standards,’ while the Lord Chancellor

377 See e.g. ‘Guantanamo deal for Australia duo’, BBC on-line, 26 November 2003, available at: http://news.bbc.co.uk/1/hi/world/asia-pacific/3238302.stm. Reports of the British government negotiating agreements with the Pentagon so that British prisoners would not receive the death penalty have been criticised: ‘This gives a new dimension to the concept of ‘most-favoured nation’ treatment in international law. How could it be morally defensible to discriminate in this way?’ Steyn, ‘Guantanamo Bay: The Legal Black Hole’, supra note 5.

378 Ibid.


382 As at September 2013, only one British resident, Shaker Aamer, remains in Guantanamo.


385 At a speech to the International Criminal Law Association annual conference, ‘Terrorism and the rule of law’ in London on 25 June 2004, Lord Goldsmith stated: ‘While we must be flexible and be prepared to countenance some limitation of fundamental rights if properly justified and proportionate, there are certain principles on which there can be no compromise. Fair trial is one of those – which is the reason we in the UK have been unable to accept that the US military tribunals proposed for those detained at Guantanamo Bay offer sufficient guarantees of a fair trial in accordance with international standards.’
condemned it as ‘shocking affront to democracy’. The Council of Europe Parliamentary Assembly’s resolution statement that ‘the United States Government has betrayed its own highest principles in the zeal with which it has attempted to pursue the “war on terror”. These errors have perhaps been most manifest in relation to Guantánamo Bay’ is one example among others of criticism at the regional level.

Less clear, however, has been the willingness of states to bring their full weight to bear, individually and collectively, beyond the protection of their own nationals. Indeed questions remain as to the extent of state cooperation with the Guantanamo regime. While governments appeared publicly to be agitating on behalf of their nationals, allegations of collusion with the Guantanamo system of detention continue to emerge. The Special Rapporteur on Terrorism and Human Rights has reported that ‘[m]any countries (Bahrain, Canada, China, France, Germany, Italy, Jordan, Libya, Morocco, Pakistan, Saudi Arabia, Spain, Tajikistan, Tunisia, Turkey, United Kingdom, Uzbekistan) have sent interrogators to Guantanamo Bay’.

One way in which states have however become more robust, beyond public criticism, is in relation to international cooperation. As discussed in Chapter 4B, there have been growing indications by states as to their unwillingness

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387 Resolution 1433 (2005), Lawfulness of detentions by the United States in Guantánamo Bay, Parliamentary Assembly Council of Europe.

388 See also Resolution 1340 (2003), Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay, Parliamentary Assembly Council of Europe; and Resolution 1539 (2007), The United States of America and international law, Parliamentary Assembly Council of Europe.


390 MI5 and MI6 officers carried out around 100 interrogations at the US prison on Cuba between 2002 and 2004. This account suggests that in secret memos, UK ministers said in early 2002 that their ‘preferred option’ for British nationals was to transfer them to Guantánamo Bay, rather than to secret detention. I. Cobain, Cruel Britannia: A Secret History of Torture, (Portobello Books Ltd., 2012).

(or inability, given the constraints of IHRL) to cooperate with the US in respect of Guantanamo detentions, and specifically a military commission process that may lead to the death penalty, unfair trial, or other serious violations of human rights. In this respect, the Council of Europe Parliamentary Assembly (PACE) resolution is pertinent in quite explicitly calling on member states to:

‘... refuse to comply with United States’ requests for extradition of terrorist suspects liable to detention at Guantánamo Bay; vi. to refuse to comply with United States’ requests for mutual legal assistance in relation to Guantánamo Bay detainees, other than by providing exculpatory evidence, or unless in connection with legal proceedings before a regularly constituted court...’.392

In a case concerning extradition to face terrorism trials and detention on US soil, it is noteworthy that both the UK government (arguing that there was no impediment to extradition) and the ECHR (in agreeing and allowing extradition) noted that there was no prospect of the individual being transferred to Guantánamo or subjected to military commission, in which case transfer would by implication have been problematic.393 Indeed within the US, the US president, and the Guantánamo task force, have explicitly recognised the impediment to international cooperation that Guantánamo and the commissions process entailed.394

Thus, criticism has been voiced by states, representations have been made and non-cooperation has been threatened. While practice may develop as the military tribunal process unfolds, potentially into death penalty, the focus of concerted state action has to date been on the protection of the state’s own nationals. Perhaps as a result all Western detainees have now left Guantánamo.395 While defence of a state’s nationals is wholly appropriate, by so limiting interventions the approach has been to rely on different rather than equal treatment in respect of the protection of universally applicable human rights standards. This falls considerably short of the requirements of international law referred to in the previous section. Interestingly, the Council of Europe resolution on Guantánamo alludes to this obligation when it calls on all states ‘to respect the erga omnes nature of human rights by taking all possible measures to persuade the United States authorities to respect fully the rights under international law of all Guantánamo Bay detainees’.396

392 Resolution 1433 (2005), Lawfulness of detentions by the United States in Guantánamo Bay, Parliamentary Assembly Council of Europe.
393 Ahmad & Ors v. United Kingdom, Appl. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (2012).
394 ‘Guantanamo Review Task Force’, supra note 43. Obama 23 May 2013 speech, note 9, where he states categorically that partners will not cooperate with Guantánamo.
395 Juvenile Canadian detainee Khadr was reportedly the last Western detainee to leave Guantánamo.
396 Resolution 1433 (2005), Lawfulness of detentions by the United States in Guantánamo Bay, Parliamentary Assembly Council of Europe.
8C.3 SEEKING JUSTICE FOR GUANTANAMO?

Of the hundreds of individuals who have been detained on dubious legal bases in Guantanamo, some have been released, some slated for indefinite detention, others for trial by military commission and some for release – but held in the limbo within a limbo\(^{397}\) pending release. One thing they have in common is that none have been afforded compensation. And no one has been investigated and held to account for crimes committed against them at Guantanamo Bay. The lack of accountability for ‘war on terror’ crimes described elsewhere in this study applies with equal force to the allegations of torture or other crimes having been committed in Guantanamo. As US governments have changed and attitudes on key issues related to Guantanamo shifted, one description is of a ‘legacy of torture’ giving way to a ‘legacy of impunity’.\(^{398}\)

In the absence of a political solution, detainees have inevitably sought legal and judicial solutions, in the US and elsewhere. The habeas litigation is discussed above and in Chapter 11. Attempts to secure damages from US courts have thus far proved fruitless. Firstly, as noted above detainees are specifically precluded by legislation from seeking any damages before US courts.\(^{399}\) While the ban on habeas proceedings has been lifted, this ban on the right to a remedy remains in place, representing a manifest violation of victims’ right to a remedy under international law. For those victims that have left and sought remedies, among the obstacles on the national level has been a finding that those accused of responsibility for their torture or ill-treatment enjoyed official immunities from civil suit. This was illustrated by one claim for damages brought by former Guantanamo detainee where torture was held

\(^{397}\) See ‘A.I.X Limbo within Limbo’.


\(^{399}\) Presidential Military Order, supra note 130, Order, Sec 7(b)(2): ‘(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.’ Detainee Treatment Act 2005: ‘... [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.’ It has been made explicit that ‘a military commission may not adjudge the payment of damages ...’: 2010 Manual for Military Commissions, supra note 141. Cases of former detainees have been dismissed by a D.C. District Court because of a lack of jurisdiction as ‘The Congress has spoken with particular clarity on the matter’: al Jenko v. Gates, Civil Case No. 10-1702 (RJL), (D.C. Dist. Ct. 2011), dismissed, p. 11-12.
by a US court to fall within the scope of the employment of government officials, who were as a consequence immune from liability. 400

Attempts in other countries to seek redress for the detainees are on-going. Some legal actions sought to force foreign governments to intervene in Guantánamo. A case brought before the English courts by family members of one of the seven UK nationals detained at Guantánamo Bay, for example, was ultimately unsuccessful as English courts were found not to have jurisdiction to provide a remedy directly to persons held by another state on the sole basis of their nationality. Nor, contrary to the applicant’s submissions, was there held to be any duty incumbent on the Secretary of State to make diplomatic representations on behalf of the detainee. The court noted, however, its ‘deep concern that, in apparent contravention of fundamental principles of law, Mr Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal’. 401

Others cases seek to advance accountability for criminal conduct arising in relation to Guantánamo. Various attempts to bring charges in France or Germany against former Secretary of Defense Donald Rumsfeld, former CIA director George Tenet, and former White House Counsel and Attorney General Alberto Gonzales and legal advisers, in respect of torture at Guantánamo and elsewhere, have thus far proved unsuccessful. 402 Other initiatives have had greater traction, however, such as criminal investigations opened in Spain into the alleged torture and abuse of Guantánamo detainees by ‘possible material and instigating perpetrators, necessary collaborators and accomplices’. 403

400 Rasul v Myers 512 F.3d 644, 660 (D.C. Cir. 2008) (Rasul I), vacated Rasul v Myers 129 S.Ct. 763 (2008), aff’d Rasul v. Myers 563 F.3d 527 (D.C. Cir. 2009) (per curiam). According to the Court of Appeal: ‘The plaintiffs concede that the torture, threats, physical and psychological abuse inflicted on them, which were allegedly approved, implemented, supervised and condoned by the defendants, were intended as interrogation techniques to be used on detainees... While the plaintiffs challenge the methods the defendants used to perform their duties, the plaintiffs do not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence. Therefore, the alleged tortious conduct was incidental to the defendants’ legitimate employment duties.’ Rasul, at 858-59 (internal citations and quotation marks omitted).

401 Abbasi, supra note 5, para. 107. At paras. 66-7 the court noted that the treatment of detainees was ‘objectionable’, and had given rise to ‘serious concerns internationally’.


403 Decision to open a preliminary investigation into the alleged torture and abuse of four former Guantánamo detainees (Hamed Abderrahman Ahmed, Ikassrien Lahcen, Jamiel Abdul Latif Al Banna and Omar Deghayes), Juzgado Central de Instrucción No 5, Audiencia
Having apparently had no response to letters rogatory to the US and UK inquiring whether any investigations are currently pending into the individual cases of the four plaintiffs,\textsuperscript{404} the Spanish courts decided there was jurisdiction over these cases in Spain\textsuperscript{405} and reactivated the investigation.\textsuperscript{406}

In a second case known as the ‘Bush Six’ case,\textsuperscript{407} a criminal complaint was filed against six administration lawyers for participating in or providing assistance to the torture and abuse of persons detained at Guantanamo Bay.\textsuperscript{408} In that case the US did respond\textsuperscript{409} and the case was ‘temporarily stayed’ – transferred it to the US Department of Justice ‘for it to be continued, urging it to indicate at the proper time the measures finally taken by virtue of this transfer of procedure’.\textsuperscript{410} One might well question whether, in light of US inaction, such deferral was unwarranted or at a minimum precipitous, but

\begin{footnotesize}
\begin{enumerate}
\item Nacional, Madrid (Spanish High Court), decision (\textit{auto}) of 27 April 2009, Preliminary Investigations (\textit{diligencias previas}) 150/09-N, at 9.
\item In June 2010, Judge Ruz took over this case. \textit{Ibid.} See also, A. Worthington, ‘Spanish Torture Investigation into Gitmo to Continue’, 28 February 2011, available at: http://www.fff.org/comment/com1102n.asp.
\item The ‘Bush six’ are: Alberto Gonzales, former US Attorney General and White House Counsel; John Yoo, of the Justice Department’s Office of Legal Counsel (author of many of the ‘torture memos’); Douglas Feith, former undersecretary of defense for policy; William Haynes II, former general counsel for the Department of Defense (chief counsel to Donald Rumsfeld); Jay Bybee, of the Justice Department’s Office of Legal Counsel (another author of the ‘torture memos’); and David Addington, former Chief of Staff to the Vice President.
\item Response of U.S. Department of State, ‘Re: Request for Assistance from Spain in the Matter of Addington, David; Bybee, Jay; Feith, Douglas; Haynes, William; Yoo, Joohn; and Gonzalez, Alberto; Spanish Reference Number: 0002342/2009-CAP’, 1 March 2011, on file with author.
\item Decision, 13 April 2011 at http://ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture.
\end{enumerate}
\end{footnotesize}
it remains to be seen whether the investigation will be reopened if inactivity persists in the US.\footnote{See challenge to the decision. at http://ccrjustice.org/files/2012-09-25%20CCR%20ECCHR%20Amicus%20Brief. The Judge is free to reopen the case as it was suspended not closed.}


8D CONCLUSION

The anomalous situation in which the Guantanamo detainees are held, without basic legal protections, is not a casualty of any ‘legal limbo’ or ‘black hole’ in international law. The Guantanamo detainees are entitled, under international human rights and humanitarian law, to certain core human rights protections irrespective of who they are, where they are detained, or their nationality.

Guantanamo does not therefore challenge the weakness of the legal framework as such, and nor is it likely to change it. In certain circumstances tolerance or acquiescence by third states may contribute to a shift in customary law – and state reactions are therefore important not only to the enforcement of law, but to the maintenance of international standards. Even if the particular norms at issue in Guantanamo were susceptible to change, the extent of international opposition to the Guantanamo regime, as highlighted above, may well have guarded against the law being directly affected in this way. It is
also doubtful to what degree Guantanamo demonstrates a compelling need for such development of legal standards, though it may, of course, highlight areas where the law could be clarified, developed or at least better understood, to prevent manipulation of the legal framework in the future.

While Guantanamo may not challenge the law, it may challenge its perceived relevance and compelling effect. The continued existence of Guantanamo more than ten years on certainly highlights the weakness of international enforcement. International legal mechanisms have played their part in monitoring, responding and condemning, the cumulative impact of which is difficult to determine. Their role has been curtailed by limited access of victims to the mechanisms (for lack of acceptance of jurisdiction by the US),\textsuperscript{416} and limited access of the mechanisms to detainees. Ultimately their impact depends on political will to stand up for international law (and most critically in this context to stand up to the US). While the Inter-American Commission on Human Rights was prompt to request that the US take precautionary measures to protect the detainees’ fundamental rights,\textsuperscript{417} for example, the US response was predictably dismissive, and little apparent weight was attributed to the decision thereafter. In this respect, Guantanamo serves as a reminder of the need to strengthen those mechanisms enshrined in IHRL and IHL, and the international community’s commitment to them.

It is however the role of states that is critical. States have been unusually condemnatory, at least eventually, and international reactions perhaps serve to clarify that Guantanamo has no place within a rule of law approach, and to resist the erosion of legal standards through practice. The reaction of states may also have contributed to making Guantanamo so unsustainable, a recognised international affront. While not all ways in which states exert influence are public and readily assessable, it is must be asked whether enough was done to ensure the basic rights of all detainees in a timely manner. Many were tortured during the years it took for states to overcome their hesitation to condemn the arbitrariness of Guantanamo. The following has been said of Guantanamo Bay:

\begin{quote}
At present we are not meant to know what is happening at Guantanamo Bay. But history will not be neutered. What takes place there today in the name of the United
\end{quote}

\textsuperscript{416} See Chapter 7A1 on mechanisms, and Chapter 11 on human rights litigation for victims. The US has not ratified the ICCPR Optional Protocol on which the right of individual petition to the Human Rights Committee depends, nor accepted the jurisdiction of the IACHR. However, the Inter-American Commission on Human Rights has jurisdiction in respect of the American Declaration on the Rights and Duties of Man, binding on the US.

\textsuperscript{417} See IACHR, Precautionary Measures, supra note 181. While the potential impact was undermined by the refusal of the US to do as requested by the Commission, it remains significant as a reassertion of the role of international law in this context. It has followed up since with statements of concern that the situation has not been remedied. IAHCR Press Release, supra note 38.
States will assuredly, in due course, be judged at the bar of informed international opinion.418

The US may well be judged harshly. But it will not be judged alone. Other states, and the international community more broadly, stand to be judged for their determination, or their failure, to protect not only their own nationals, but other Guantanamo detainees and the rule of law.

To paraphrase the Nuremberg judgment, it may be that international law will only be given meaningful effect in relation to Guantanamo when the individuals who ordered and gave effect to these violations, and not only the ‘abstract entities’ through which they act, are held to account.419 Accountability may yet arise in respect of Guantanamo Bay for crimes of torture and inhuman treatment, wilfully depriving prisoners of war of fair trial rights, or arbitrary prolonged detention.420 While legally possible on the international level, the more conceivable prospect is of individual accountability enforced nationally, if not in the state of territory, in the courts of another state exercising universal jurisdiction or passive personality jurisdiction.421 It remains to be seen whether there will be, in the fullness of time, any meaningful individual or state accountability in respect of the Guantanamo situation.

The implications of Guantanamo detentions for detainees held without legal protection, and without a remedy, and for their families, are immediate and apparent. Less so perhaps are the broader long-term implications for the rule of law and its respect in the future. While as noted above the widespread condemnation of Guantanamo as unlawful minimises the risk of a shift in legal standards, the Guantanamo experiment may give credence to the insidious notion of legal limbo (that certain persons fall entirely outside the framework

420 The crimes may be war crimes for those detained in relation to a conflict, or crimes against humanity given the nature of some of the wrongs, and the widespread and systematic nature of Guantanamo, detentions and ill-treatment. Wilfully depriving a prisoner of war of fair trial rights is a grave breach of the Geneva Conventions. Arbitrary detention was not included, for example, in the ICC Statute, though it may amount to a crime against humanity.
421 On the national level, states may exercise universal jurisdiction or passive personality jurisdiction for those states with such bases of jurisdiction in their domestic systems. As noted, the conferral of jurisdiction (unlike criminal responsibility) can be ex post facto. ICC jurisdiction is unlikely as most detentions were before its entry into force and, in any event, it would only have jurisdiction if a national of a state party to the ICC Statute (not an American) was responsible, or the offences arose on the territory of a state party, or a state decided to accept jurisdiction over the offences retroactively. An ad hoc tribunal could be set up, but the Security Council route would be vetoed leaving the Nuremberg model of several states collectively establishing a body. While this may be legally possible, it is hardly conceivable politically, at least at this stage.
of international legal protection) or contribute to the perceived inevitability of human rights as the first casualty of counter-terrorism, conflict and security-sensitive situations. It may give cover to other states detaining arbitrarily, seeking to circumvent basic legal obligations by crude manipulation of the principle of territoriality or applying the law only ‘to the extent appropriate.’ Evidence already exists of the practice of other states, many of whom are not new to human rights repression, relying on Guantanamo to justify arbitrary detention of alleged terrorists or resort to military commissions to try civilians.

Unsurprisingly, an additional by-product of this role for the US is that its credibility to act as the restraining force it once was on human rights issues is seriously undermined, with its condemnation of military commissions, arbitrary detentions or impunity ringing hollow and hypocritical when juxtaposed alongside the notoriety of Guantanamo Bay.

While numbers are dwindled, Westerners are gone, and the public perception may be of a Guantanamo-era drawing to a close, that is far from the case. Much remains uncertain as to the nature of the long term impact of Guantanamo. Will the ad hocary and violations of the military commissions give way to a reinforcement of the importance of regular criminal law and

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422 Presidential Memo of 7 February 2002, supra note 194 ‘As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessary, in a manner consistent with the principles of Geneva.’ See also, G. W. Bush, ‘Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate’, supra note 216.

423 See, e.g., statement by President Mubarak of Egypt that resort to military commissions ‘prove[s] that we were right from the beginning in using all means, including military tribunals’ to curb terrorism, in J. Stork, ‘The Human Rights Crisis in the Middle East in the Aftermath of 11 September’, paper presented at the Symposium on Terrorism and Human Rights, Cairo, 26-28 January 2002, on file with author.

424 Guantanamo is the most flagrant example of US exceptionalism on human rights issues. Others include the increased resort to targeted killings and other counter-terrorism measures highlighted in this book, the position on establishment of an ICC, banning of child soldiers, creation of mechanisms for individual redress for torture, environmental protection that had already diminished the standing and authority of the US internationally.


mechanisms,\textsuperscript{427} or will death sentences executed absent fair trial guarantees darken the \textquote{stain} on American justice?\textsuperscript{428} Will the US judiciary be able to deliver on the Supreme Court\textquotesingle s promise of \textquote{meaningful} judicial oversight and ensure effective implementation?\textsuperscript{429} What will be the long term fate of those slated for indefinite detention?\textsuperscript{430} Will Guantanamo close in form and substance, and with it a chapter of arbitrariness, or will it metamorphose into new ways of achieving the same thing – military commission on US soil or arbitrary detention by proxy, further off-shore and under the radar?\textsuperscript{431} Will policy in other areas, such as targeted killings, recognise and avoid the many errors of mistaken identity, and dangers of discarding the rule of law, that Guantanamo illustrates? Will states which have negotiated the release of nationals continue to insist respect for international law for all detainees? Will the principle of non-cooperation with Guantanamo and military commissions extend to other states and other contexts? Will they recognize as victims the detainees emerging from Guantanamo, provide them necessary assistance and a measure of justice? Will the violations of the past be ignored, or will accountability be pursued, as the law requires and the years and lives lost in Guantanamo deserve? What measures will be taken to ensure that the violations, much lamented across political and national barriers, will not happen again? What will the world have learned from Guantanamo, and at what cost?

\textsuperscript{427} President Obama indicated the possibility of moving military tribunals to US soil in May 2013, supra note 7.

\textsuperscript{428} Steyn, \textquoteleft Guantnamo Bay: The Legal Black Hole	extquoteright, supra note 5.

\textsuperscript{429} On meaningful opportunity to challenge the lawfulness of detention and practice, see Bozinski, supra note 15; \textquoteleft A state of war is not a blank check for the President\textquoteright. Hamdi v. Rumsfeld, supra note 175, p. 28. Although perhaps somewhat less robustly, it reached the same conclusion in respect of non-citizens at Guantanamo Bay in Result. Rasul, supra note 15. On non-implementation, see \textquoteleft A.1.X Limbo within Limbo\textquoteright, above.

\textsuperscript{430} Forty-eight detainees were determined by the 2010 Guantanamo Review Task Force to be too dangerous to transfer but not feasible for prosecution. \textquoteleft Guantanamo Review Task Force\textquoteright, supra note 43. Obama announced a lifting of the moratorium on transfers to Yemen in May 2013 but there was no clear plan for their release.

\textsuperscript{431} See also Chapter 10 on detention and torture \textquoteleft by proxy\textquoteright at the hands of other states. As oversight of Guantanamo (and other sites) increased in the course of the habeas litigation, some detainees were moved on to alternative sites.