Gherebi v Obama 609 F Supp 2d 43 (2009)

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Introduction

Gherebi v Obama[1] is the first case since the inauguration of President Obama to explore the scope of presidential authority to detain terrorist suspects. The fourteen applicants, who sought writs of habeas corpus, were all in detention in Guantánamo Bay.

The central issue before the District Court of the District of Columbia was the scope of the *Authorization for Use of Military Force Against Terrorists* ('AUMF'),[2] passed by Congress exactly one week after the attacks against the United States on 11 September 2001, ('September 11') to allow detention of suspected terrorists. Determining the scope of this authority encompassed two questions. First, the Court had to determine whether the AUMF authorised the President to detain an individual incidental to the Government's conflict with any *organisation* (as opposed to nation) responsible for the September 11 attacks. Second, if such authority existed, the Court was required to ascertain the strength of the connection between an individual and a terrorist organisation that must exist to permit the Government to detain that individual.

Throughout the judgment, the Court referred to international humanitarian law ('IHL') as informing the AUMF. The Court principally relied on the *Geneva Convention Relative to the Treatment of Prisoners of War* ('*Third Geneva Convention*'), the *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* ('*Fourth Geneva Convention*'), and the two *Additional Protocols*; all of which regulate the conduct of armed conflict.[3] Unfortunately, it failed to consider other more relevant and equally applicable international human rights law. As such, the legality of the detention of terrorist suspects pursuant to the AUMF remains at issue.

1. The Court's analysis

A. Does the AUMF authorise the President to detain individuals incidental to the Government's conflict with terrorist organisations?

The AUMF allows the President to:

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1 609 F Supp 2d 43 (2009) ('*Gherebi*').

2 *Authorization for Use of Military Force Against Terrorists*, Pub L No 107-40, § 2(a), 115 Stat 224, 224 (2001).

3 *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), art 2 ('*Third Geneva Convention*'); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Fourth Geneva Convention*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('*Additional Protocol II*').

> use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorized, committed, or aided the September 11 attacks] to prevent any future acts of international terrorism against the United States by such nations, organizations[,] or persons.[4]

The applicants argued that the President's power to detain was necessarily limited to situations of international armed conflict. They submitted that the conflict between the United States and 'any organisation' was not an international armed conflict for the purposes of IHL and, thus, the AUMF did not reach individuals fighting on behalf of those organisations. The applicants sought to distinguish the earlier case of *Hamdi v Rumsfeld*,[5] where the detainee had been captured while fighting as a member of the Taliban, and not for an organisation such as al-Qaeda. The applicants drew a distinction between the conflict between the United States and the Taliban, which was characterised as international for the purposes of the *Geneva Conventions*, and the conflict between the United States and al-Qaeda, which was not international. Following on, the applicants argued that the decision in *Hamdi* could not be held to apply in the context of a non-international armed conflict.

The Court rejected this submission, finding that the Court in *Hamdi* gave no indication that it intended to limit the authorisation to cases of international armed conflict. The Court concurred with Traxler J in *Al-Marri*:

> it strains reason to believe that Congress, in enacting the AUMF in the wake of the [9/11] attacks did not intend for it to encompass al-Qaeda operatives standing in the exact position as the attackers who brought about its enactment.[6]

The applicants' argument was based on a technical interpretation of the *Geneva Conventions* and *Additional Protocols*. It is well established that the distinction between international and non-international armed conflict has its roots in the *Third* and *Fourth Geneva Conventions* and *Additional Protocols I* and *II*. Common article 2 of these Conventions states that they apply to 'all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties'.[7] International armed conflict is also governed by the subsequently adopted *Additional Protocol I*. Non-international armed conflict is governed by common article 3 of the *Geneva Conventions*, as well as *Additional Protocol II*.

This distinction was also relevant for the specific authority to detain individuals. Article 21 of the *Third Geneva Convention* authorises a High Contracting Party to 'intern' a person qualifying as a prisoner of war under that Convention. There is no similar authorisation in the provisions governing non-international armed conflict. Common article 3 and *Additional Protocol II* afford certain humanitarian protections to those detained, such as the right to food, clothing and appropriate medical care, but provide no

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4 *Authorization for Use of Military Force Against Terrorists*, Pub L No 107-40, § 2(a), 115 Stat 224, 224 (2001).
5 *Hamdi v Rumsfeld* 542 US 507 (2004) ('*Hamdi*').
6 *Al-Marri v Pucciarelli* 534 F 3d 213 (4th Cir, 2008).
7 *Third Geneva Convention* art 2.

authorisation or political/procedural restrictions on detention in the context of a non-international armed conflict. The applicants, therefore, argued that the omission of comparative language meant that detention in the context of a non-international armed conflict was not authorised under IHL.

The Court rejected the applicants' argument, finding that it depended on the 'suspect notion' that IHL, and particularly the *Third Geneva Convention*, did not just regulate the conditions of detention in an international armed conflict, but actually authorised such detention. The Court held it was wrong to equate the absence of regulations regarding detention in common article 3 with a lack of authorisation for a State engaged in non-international armed conflict to detain individuals at all.[8] The Court noted that it was important to distinguish between the terms 'internment' and 'detention': prior to internment, '[p]risoners of war are [already] in the power of the [s]tate which has captured them'.[9]

B. What connection is required between an individual and a terrorist organisation to permit the detention of the individual? Combatants, non combatants and civilians

It is well known that the United States Government has long defined its right to detain terrorist suspects in terms of 'enemy combatants' or 'unlawful combatants'. This language is a modification on the categorisation of individuals according to IHL as 'lawful combatants' or 'civilians'. Article 4 of the *Third Geneva Convention* provides that prisoner of war privileges apply to individuals who satisfy certain criteria, making them 'lawful combatants'. Those individuals involved in armed conflict who do not satisfy the 'lawful combatant' criteria, automatically fall into the alternative category of 'civilian'.[10] The requirements for detention differ between the two categories. 'Combatants' — usually the members of a nation's armed forces — may be detained by an enemy nation until the end of hostilities, without any individualised requirement of necessity.[11] 'Civilians', on the other hand, may only be 'interned' without trial 'if the security of the Detaining Power makes it absolutely necessary,' or for 'imperative reasons of security', and must be released 'as soon as the reasons which necessitated his internment no longer exist'.[12]

Prior to the inauguration of the Obama administration, the United States had sought to identify a third category, the 'unlawful combatant', who was subject to detention based on membership much like the traditional 'combatant', but not entitled to the accompanying prisoner of war privileges. The United States Supreme Court accepted this approach in *Hamdi v Rumsfeld*,[13] although there is a general consensus among international law

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[8] But see John Cerone, 'Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict' (2007) 40 *Israel Law Review* 396, 402.

[9] *Gherebi* 60.

[10] See Antonio Cassese, *International Law* 409–10 (2nd ed 2005); Knut Doorman, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 *International Review Red Cross* 45; Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 *American Journal of International Law* 48.

[11] *Third Geneva Convention* art 4.

[12] *Fourth Geneva Convention* arts 42, 132, 78.

[13] 542 US 507, 518 (2004) (plurality) (quoting *Ex parte Quirin*, 317 US 1, 28, 30 (1942)).

commentators that there is no such third category.[14] Soon after the inauguration of President Obama, the Government modified its standard for detaining individuals, no longer defining its policy in terms of 'enemy combatants' or 'unlawful combatants'.[15] Despite this labelling alteration, the administration has continued to claim the right to treat the members of a terrorist organisation as 'combatants' rather than 'civilians'.[16] The applicants in the present case mounted their defence on the basis of the two-category approach. However, the Court once again affirmed the existence of a third category.

The Court noted that a prisoner — at least one detained due to their associations with terrorist organisations like al-Qaeda — could *not* be classified as a combatant.[17] The term 'armed forces' is defined broadly in the *Third Geneva Convention*. However, the 'non-recognized government or authority' sponsoring the 'armed forces' in question must represent, or claim to represent, a subject of international law recognised as such by the other party to the conflict. Further, '[a]nyone who participates directly in hostilities, without being subordinate to an organised movement' that 'enforces compliance with [IHL], is a civilian'.[18]

However, the Court found that the absence of language regarding 'combatants' and 'prisoners of war' in relation to non-international armed conflicts, only meant that no individual who fought in a non-international armed conflict was entitled to the protections of such a status. It did, not mean that every signatory of the *Geneva Conventions* must treat the members of an enemy force in such a conflict as civilians 'no matter how important the members in question might be to the command and control of the enemy force or how well organised and coordinated that force might be'.[19]

The Court went on to consider the terms 'substantial support' and 'associated forces'. While it agreed that it was not desirable to define too precisely the meaning of those terms, it applied a minimum standard on the 'substantial support' requirement, interpreting it to mean individuals who were members of the enemy armed forces.[20] In order to determine whether an individual was a member of the enemy armed forces, the Court decided that the criteria set out in article 4 of the *Third Geneva Convention* should be used as a template. Using such reasoning, the Court noted that a distinction should be made between members of a terrorist organisation on the one hand and civilians who may have tangential connections to such organisations on the other. Sympathisers, propagandists and financiers who have no involvement with the 'command structure' of the organisation should not be considered members of the armed forces. However, membership necessarily extended

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[14] Cerone, above n 8.

[15] Del Quentin Wilber and Peter Finn, 'US Retires "Enemy Combatant", Keeps Broad Right to Detain' Washington Post, (Washington), 14 March 2009 <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/13/AR2009031302371.html>.

[16] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay (13 March 2009), [8]; *In Re Guantánamo Bay Detainee Litigation* (DDC, 2009) <www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>.

[17] *Gherebi*.

[18] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 1949* (International Committee of the Red Cross, 1987), 530.

[19] *Gherebi*, 65.

[20] Ibid 69.

beyond those who take a direct part in hostilities. The Court decided the key question was 'whether an individual "receive[s] and execute[s] orders" from the enemy force's combat apparatus, not whether he is an al-Qaeda fighter'.[21] On this reasoning, an al-Qaeda member charged with housing, feeding or transporting al-Qaeda fighters could be detained as a member of the enemy force, despite his lack of involvement in the actual fighting. However, an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter that shields his son out of familial loyalty, could not be detained unless he or she had an independent role in the chain of command.

2. Legal analysis

It is disappointing that the Court failed to consider properly the real implication of characterising the armed conflict between the United States and al-Qaeda as non-international. The matter bears greatly on the question of applicable law.

The Government's position was that detention pursuant to the AUMF in the context of non-international armed conflict should be informed by IHL. The Court appeared to adopt this view without question or comment, as is illustrated by its willingness to adopt article 4 of the *Third Geneva Convention* (relevant to international armed conflicts) as a template for determining the members of the enemy armed forces. However, IHL only articulates meaningful limitations on detention in the context of international armed conflicts and was never intended to cover situations arising in non-international armed conflicts. Common article 3 affords certain humanitarian protections to detainees,[22] as does article 5 of *Additional Protocol II*.[23] However, these articles do not articulate the grounds or procedures for detention. States have long resisted such an extension on grounds of national sovereignty.[24]

Instead, another body of law fills the gap: international human rights law. The International Court of Justice has held that where IHL does not provide specified regulation, or where international human rights law provides a higher standard of protection, the latter is to be preferred.[25] This is reinforced by the preamble to *Additional Protocol II* (relating to non-international armed conflicts), which states that 'international instruments relating to human rights offer a basic protection to the human person'.[26] The authoritative commentary by the International Committee of the Red Cross provides that

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[21] Ibid at 68.

[22] The article prohibits violence to life and person, the taking of hostages, outrages on personal dignity, and the passing of sentences or carrying out of executions before the judgement of a regularly constituted court, the detainee being permitted all the judicial guarantees considered indispensable by ordinary civilised peoples.

[23] The article provides that '[p]ersons whose liberty has been restricted' shall be provided with, among other things, food, drinking water and appropriate medical attention.

[24] International Committee of the Red Cross, *Humanitarian Law: Protected Persons and Property* (1 January 2004) <http://www.icrc.org/web/eng/siteeng0.nsf/html/5KZK2Z>.

[25] *Palestinian Wall*, Advisory Op. 2004 ICJ Rep 136, [106]; see also Douglas Cassell, 'Pretrial and Preventative Detention of Suspected Terrorists: Options and Constraints Under International Law' 98(3) *The Journal of Criminal Law and Criminology* 811.

[26] *Additional Protocol II* [2].

the relevant human rights law instruments include the *International Covenant on Civil and Political Rights*,[27] the *Convention Against Torture*,[28] and regional human rights treaties.[29]

A consensus of the norms from these instruments provides a minimum core protection to detained terrorist suspects. Those norms provide that:

- detention must not be arbitrary;
- detention must be based on grounds and procedures previously established under law;
- reasons for the detention must be given;
- the detainee must have access to a fair judicial review mechanism; and
- compensation must be afforded the detainee in case of a breach.[30]

The Court in the present case failed to test the AUMF against any of the above criteria. Of particular concern is the potential arbitrariness of the detention. In the past, the term 'arbitrary' has been found to include 'elements of injustice, unpredictability, unreasonableness, capriciousness, disproportionality, as well as the Anglo-American principle of due process'.[31] It is of note that the detention of certain suspected terrorists, both on United States soil and in Guantánamo Bay, has previously been found arbitrary, by the United Nations Working Group on Arbitrary Detentions, for being procedurally deficient.[32]

As a result of the deficiencies in this case, the legality of the detention of terrorist suspects and the scope of the presidential authorisation remains at issue. It is possible the case will be appealed to the Court of Appeals for the District of Columbia Circuit, although no appeal was pending at time of writing. Otherwise, the case may continue to be important as courts build on the definition of 'substantially supported'.

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[27] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14.

[28] *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[29] Sandoz, Swinarski and Zimmermann, above n 18. Regional instruments may include: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 232 (entered into force 3 September 1953); *American Convention on Human Rights, Organization of American States Treaty*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978); *American Declaration of the Rights and Duties of Man*, OAS Res XXX, Int'l Conference of American States, 9th Conference, OEA/SerL/V/I 4 Rev XX (2 May 1948); *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, 1989 Inter-American Ct HR (Ser A) No 10, [43] (14 July 1989).

[30] UN Committee on Human Rights, *General Comment No. 8 Right to Liberty and Security of Persons*, UN GAOR, 37th sess no 40, Annex V (30 June 1982).

[31] Manfred Nowak, *UN Covenant on Civil and Political Rights:* CCPR Commentary 233 (N P Engel, 2nd revised ed, 2005), 225.

[32] UN Committee on Human Rights, *Report of the Working Group on Arbitrary Detention*, UN Doc E/CN 4/2003/8 (16 December 2002), [64].