ASIL The American Society of International Law

ASIL Insight

October 20, 2009
Volume 13, Issue 18
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Who can be detained in the "War on Terror"? The Emerging Answer

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Introduction

Soon after the United States launched its "war on terror" by attacking the Taliban regime of Afghanistan, U.S. courts were asked to consider who could be detained as part of this conflict. The Supreme Court partially resolved the question in 2004 in *Hamdi v. Rumsfeld*, holding that the government could detain individuals, including US citizens, who were part of or supporting Taliban forces and engaged in armed conflict against the US.[1] It sidestepped the broader question of the outer bounds of the category of people who could be detained as an "enemy combatant," leaving it to the lower courts to define. Four years later, the Court's decision in *Boumediene v. Bush*[2] cleared the way for detainees held at the U.S. Naval Facility in Guantánamo Bay, Cuba, to challenge their detention in U.S. courts – and for federal district court judges in the District of Columbia to grapple with the questions left open by *Hamdi*.[3]

As the Guantánamo cases were winding their way to decision, a new President took office and the government refined its position on who could be detained. The Bush administration had claimed the non-reviewable authority to detain any person it deemed an "enemy combatant" based on the inherent authority of the President as Commander in Chief and, alternatively, on Congress's Authorization for Use of Military Force (AUMF).[4] The Obama administration dropped the label "enemy combatant." Based on the AUMF, it claimed authority to detain those suspected of involvement in the 9/11 attacks and, more broadly:

- those who were part of Taliban or al-Qaeda forces, or associated forces that were engaged in hostilities against the United States or its coalition partners; and
- those who *substantially* supported Taliban or al-Qaeda forces, or associated forces that were engaged in hostilities against the United States or its coalition partners.[5]

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In the government's view, this would cover persons who committed a belligerent act, or directly supported hostilities, in aid of enemy armed forces.

This Insight explores the main issues involved in determining the scope of the category of persons who may be detained in the "war on terror," looking at both recently issued ICRC guidance and key cases in U.S. federal courts.

Recognition of Organized Armed Groups

In May 2009, the International Committee of the Red Cross (ICRC) issued a report defining direct participation in hostilities (ICRC Guidance),[6] in which it recognized for the first time that organized armed groups belonging to a party to the conflict are – like the members of a State's army – legitimate targets of military action.[7] Civilians, on the other hand, remain protected except when they directly participate in hostilities.[8] The ICRC cited to Common Article 3 of the Geneva Conventions to support this position. Common Article 3 provides that "[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause" must be treated humanely.[9] The ICRC reasoned that the reference to "members of armed forces" suggested that Common Article 3 assumed that non-State parties to a conflict would have armed forces that were distinct from the civilian population. The ICRC found further support for this principle in Additional Protocol II to the Geneva Conventions, which recognizes the existence of "armed forces," "dissident armed forces" and "other organized armed groups" fighting on behalf of non-State actors.[10]

The ICRC Guidance emphasizes that its purpose is only to explain who should be considered a protected civilian for purposes of targeting during hostilities. However, as is evident from the discussion below, the distinction between civilians and combatants for targeting purposes is the starting point from which U.S. courts have analyzed whether the law of war allows detention in the "war on terror." In undertaking this analysis, U.S. courts have relied extensively on the ICRC's interpretations of the Geneva Conventions.[11] The ICRC Guidance thus provides a useful yardstick for analyzing the results reached in the Guantánamo cases.

Even though they did not take account of the ICRC Guidance, all Guantánamo cases decided thus far have found that members of organized armed groups in non-international armed conflicts are subject to detention under the laws of war. Judge Walton analyzed the issue at length in his influential opinion in *Gherebi v. Obama*.[12] He noted that the Supreme Court ruled in *Hamdi* that the authorization of the use of force against enemy nations encompassed the right to detain enemy fighters as a fundamental incident of waging war. Given that the AUMF authorized the same use of force against enemy organizations, Judge Walton concluded that "it stands to reason that Congress intended to confer upon the President the same authority to detain individuals fighting on behalf of enemy organizations that it conferred on him with respect to enemy nations."[13] He therefore held that under the AUMF the government could detain individuals fighting on behalf of enemy organizations (i.e., members of organized armed groups), as well as those fighting on behalf of enemy nations.

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DOCUMENTS OF NOTE

Authorization for Use of Military Force

Military Commission Act of 2006 (MCA)

ICRC Guidance on Direct Participation in Hostilities

Hamdi v. Rumsfeld

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In considering whether this holding comported with the laws of war, Judge Walton rejected the argument that these laws supported detention as an incident of war in international armed conflicts (such as that at issue in *Hamdi*), but not in non-international armed conflicts (such as that at issue in *Gherebi*).[14] Judge Walton concluded that the Geneva Conventions did not authorize detention in either type of conflict. Rather, they pre-supposed that such detention would occur and regulated its conditions.[15]

Turning to the scope of the government's detention authority, Judge Walton rejected the argument that the Geneva Conventions recognized only two categories of people in non-international armed conflict: members of the State's armed forces and civilians (with the latter permissibly subject to attack only when directly participating in hostilities). Like the ICRC, Judge Walton relied upon Common Article 3 and Additional Protocol II to recognize a third category: the "armed forces" of non-State actors who are actively participating in hostilities. He further held that, because Common Article 3 required a State to treat humanely "members of armed forces...placed *hors de combat* by...detention," it implied that the State could detain such persons.[16]

A month later, in *Hamlily v. Obama*, Judge Bates canvassed the laws of war and reached a similar conclusion.[17] These two cases have been enormously influential and have been followed by several judges in reviewing later cases.[18]

Chain of Command v. Combat Function

Several Guantánamo cases have held that a person who takes orders from an al-Qaeda or Taliban command is a member of one of those groups and can be detained. In *Gherebi*, the court held that 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."[19] It further held that an al-Qaeda member whose job was to house, feed or transport fighters could be detained as part of the enemy armed forces regardless of his involvement in actual fighting. On the other hand, an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who sheltered his son out of familial loyalty, could not be detained.[20] The Guantánamo cases that have not followed this approach have also accepted that a person's support of al-Qaeda or the Taliban would be a sufficient basis for detention (see discussion below).[21] They have therefore not examined the criteria for membership in an armed group, but have instead looked broadly at the individual's behavior vis-à-vis the relevant armed group.[22]

Both approaches clash with the ICRC's position that organized armed groups "consist[] only of individuals whose continuous function it is to take a direct part in hostilities."[23] Under the ICRC's view, persons who perform political and administrative functions, individuals who accompany or support armed groups, but whose function is not direct participation in hostilities (e.g., recruiters, trainers, financiers, propagandists), weapons support specialists and those who collect intelligence would not be considered as members of an armed group. Many of these people would, however, fall within US courts' definition of members of an armed group.

Substantial Support

Perhaps the most controversial element of the detention authority claimed by the U.S. is the right to detain those who "substantially supported" enemy forces. While some Guantánamo cases have unquestioningly accepted this standard, several have indicated deep discomfort with importing what is essentially a domestic criminal law standard into the law of war. i explicitly rejected detention on the basis of substantial support.[24] *Gherebi* defined the problem away. It accepted the "substantial support" standard, but interpreted it as equivalent with being "part of" the "armed forces" of an enemy organization.[25] Two additional judges have adopted the *Hamlily* approach and rejected "substantial support" as a basis for detention.[26]

Although the ICRC did not address the issue of "substantial support," the concept appears to be at odds with its limited definition of "armed groups." Also, the ICRC has emphasized that only the armed forces of a non-State party – and not the political and administrative apparatus of the non-State party – are subject to military action.[27] This distinction would be undermined if "substantial support" of al-Qaeda or the Taliban was considered as sufficient to allow detention under the AUMF.

Conclusion

The Guantánamo cases present an interesting microcosm for studying the development of the laws of war, as applied in the context of the "war on terror." The recognition of "organized armed groups" as permissible objects of hostilities in non-international armed conflicts by both the ICRC and U.S. courts is an important step forward in the clarification of the law. On the other hand, as demonstrated above, there are some fundamental inconsistencies in approach amongst the decisions rendered thus far. There are also questions as to whether these decisions are consistent with applicable international law.

The extension to non-international armed conflicts of the detention power recognized in *Hamdi* for inter-State conflicts is an area in which there could be a divergence between the two regimes. Although the *Gherebi* and *Hamlily* courts provided convincing arguments for the proposition that the Geneva Conventions did not authorize detention in any type of conflict but that detention was simply a normal incident of inter-State conflict, they did not fully address whether detention in a non-international armed conflict was authorized as an incident of war rather than under domestic law (for example, by examining state practice). Such analysis would seem to be required by the Supreme Court's decision in *Hamdi*, which interpreted the authorization to use force to encompass detention authority based on "longstanding law-of-war principles."[28] The *Hamdi* Court explicitly cautioned that "[i]f the practical circumstances of a given conflict are entirely unlike those that informed the development of the law of war that understanding may unravel."[29] The non-international aspects of the "war on terror" undoubtedly present practical circumstances that are very different from the context in which the laws of war evolved. In particular, the geographical and temporal boundaries of the conflict are so much more malleable than those of all previous wars that there is ample room for appellate courts to come to

a different view than that taken thus far in the Guantánamo cases.

The differences between the ICRC and U.S. courts on how to determine who is "part of" an armed group are also striking. The ICRC model is narrower than even the narrowest model adopted by the U.S. courts. This discrepancy may be explained by the timing of the issuance of the ICRC Guidance. More importantly, the ICRC's "continuous combat function" model was developed for purposes of distinguishing who is a combatant in the conduct of hostilities, and perhaps membership in an organized armed group would be construed more widely in the context of detention. At the same time, U.S. courts have consistently relied on Geneva Convention principles of distinction – which apply to targeting – for understanding who can be detained in the "war on terror," and have been respectful of the ICRC's views on this question. This suggests that, at the very least, the ICRC Guidance should inform the analysis of detention authority in future decisions.

Although progress in this complex area has been slow, the decisions already rendered in the Guantánamo cases reveal the outlines of the categories of people who, at least according to domestic US law, can be detained in the "war on terror." As these cases make their way through the appellate process, these outlines will no doubt become clearer.

About the Author

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Endnotes

[1] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

[2] Boumediene v. Bush, _US_, 128 S. Ct. 2229, 2262, 171 L. Ed. 2d 41 (2008).

[3] The Guantánamo *habeas* cases have all been brought before the federal district courts of the District of Columbia.

[4] Authorization for Use of Military Force, Pub. L. No. 107-40, SS 1-2, 115 Stat. 224 (2001).

[5] *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 53 (D.D.C. 2009). In addition to dropping the label "enemy combatant," the principal change made by the Obama Administration was to add the qualifier "substantially."

[6] International Committee for the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities, available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf (last visited Sept. 14, 2009) [hereinafter ICRC Guidance].

[7] *Id.* at 27. The "organized armed groups" recognized by the ICRC are exclusively "the armed or military wing of a non-State party: its armed forces in a functional sense." *Id.* at 32. Other types of affiliation or support for a non-State party to a conflict would not lead to membership of an organized

armed group.

[8] *Id.*

[9] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (emphasis added); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 286 (same).

[10] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609.

[11] *Gherebi*, 609 F. Supp. 2d at 63-67; Hamlily v. Obama, 616 F. Supp. 2d 63, 73-74 (D.D.C. 2009). In *Hamlily*, the District Court specifically noted, as part of its consideration of the detention issue that the ICRC had stated that the definition of "direct participation in hostilities" was unsettled. *Id.* at 74, n.14. *See also* Hamdan v. Rumsfeld, 548 U.S. 557, 619, n.48 (noting that the ICRC is "referred to by name in several provisions of the 1949 Geneva Conventions" and that, "[t]hough not binding law," its commentary on the Geneva Conventions is, "as the parties recognize, relevant in interpreting the Conventions' provisions").

[12] *Gherebi*, 609 F. Supp. 2d at 55.

[13] *Id.*

[14] It had been argued by petitioner Khan that the conflict between the United States and the Taliban government, which was at issue in *Hamdi* was international, while the conflict between the United States and organizations like Al Qaeda was non-international. *Id.* at 56. The court did not take a position on the character of the conflict. *Id.* at 55, n.7, but rather rejected the idea that the difference in the character of the conflict was relevant for purposes of deciding who could be detained under the Geneva Conventions. *Id.* at 60-61.

[15] *Id.* at 61.

[16] *Id.* at 65.

[17] *Hamlily*, 616 F. Supp. 2d at 74 .

[18] *See* Mattan v. Obama, 618 F. Supp. 2d 24, 26 (D.D.C. 2009); Al Mutairi v. United States, No. 02-828, 2009 U.S.Dist. LEXIS 66868, at *17 (D.D.C. July 29, 2009); Al Odah v. United States, No. 02-828, 2009 U.S.Dist. LEXIS 78222, at *14 (D.D.C. Aug. 24, 2009); Al Rabiah v. United States, No. 02-828, 2009 U.S.Dist. LEXIS 88936, at *18-19 (D.D.C. Sep. 17, 2009). Judge Leon of the D.C. District Court has followed a different approach. He decided the first of the Guantánamo cases before the government revised its proposed standard. At that time, he accepted the standard applied in the Combatant Status Review Tribunals under the Military Commissions Act of 2004. Under this view, an enemy combatant subject to detention was "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." Boumedienne v. Bush, 583 F. Supp. 2d 133, 135 (D.D.C. 2008). He has continued to follow this approach, which is not dissimilar from the one proposed by the US government. Gharani v. Bush, 593 F. Supp. 2d 144, 147 (D.D.C. 2009); Al Bihani v. Bush, 594 F. Supp. 2d 35, 38 (D.D.C. 2009); Hammamy v. Obama, 604 F. Supp. 2d 240, 243 (D.D.C. 2009). One judge of the D.C. District Court, Judge Kessler, has accepted, without discussion, the government's proposed standard. Ahmed v. Obama, 613 F. Supp. 2d 51, 54 (D.D.C. 2009).

[19] *Gherebi*, 609 F. Supp. 2d at 69; *accord Hamlily*, 616 F. Supp. 2d at 75; *Al Mattan*, 618 F. Supp. 2d at 26 (adopting *Hamlily*); *Al Odah*, 2009 U.S.Dist. LEXIS 78222, at *14. *See also Al Bihani*, 594 F. Supp. 2d 35 (upholding detention of a cook in the 55th Arab Brigade because he followed orders of al-Qaeda commander).

[20] *See Hamlily*, 616 F.Supp.2d at 75; *Al Mattan*, 618 F. Supp. 2d at 26 (adopting *Hamlily*); *Al Odah*, 2009 U.S.Dist. LEXIS 78222, at *14. See also *Al Bihani*, 594 F. Supp. 2d 35.

[21] *Al Mattan*, 618 F. Supp. 2d at 26 (adopting *Hamlily*); *Al Odah*, 2009 U.S.Dist. LEXIS 78222 at *14. *See also Al Bihani*, 594 F. Supp. 2d 35.

[22] *See Gharani*, 593 F. Supp. 2d at 147-149; *Hammamy*, 604 F. Supp. 2d at 243-244; *Ahmed*, 613 F. Supp. 2d at 59-66.

[23] ICRC Guidance, *supra* note 6, at 33.

[24] *Hamlily*, 616 F. Supp. 2d at 76. Since *Hamlily* rejected the substantial support standard, it also rejected the government's view that persons who directly supported hostilities in aid of enemy armed forces were subject to detention under the laws of war.

[25] *Gherebi*, 609 F. Supp. 2d at 70.

[26] *Mattan*, 618 F. Supp. 2d at 26; *Al Mutairi*, 2009 U.S.Dist. LEXIS 66868, at *17-18; *Al Odah*, 2009 U.S.Dist. LEXIS 78222, at *16; *Al Rabiah*, 2009 U.S.Dist. LEXIS 88936, at *18-19. On the other hand, as discussed previously, *see*, *supra* note 17, Judge Leon has adopted the Combatant Status Review Tribunal, which includes the concept of support.

[27] ICRC Guidance, *supra* note 6, at 32.

[28] *Hamdi*, 542 U.S. at 594.

[29] *Id.*