

We understand that Mr Abbasi is held under the United States Presidential Order dated 13 November 2001. This advice is based upon the text of the Presidential Order currently (14 February 2002) displayed on the US Government website, [http://www.usdoj.gov/eoir/](#).

The Order does not automatically apply to anyone: it applies only to those individuals who have been determined by the President, in writing, to be a non-US citizen whom there is reason to believe was at the 'relevant times' (and the Order does not define the 'relevant times') a member of al Qaida or engaged in international terrorism aimed at United States interests, or harboured any such person, and whom it is in the interests of the United States to make subject to the Presidential Order (Section 2). We do not know whether such a written determination has been made in respect of Mr Abbasi.

Mr Abbasi's status

As far as Mr Abbasi's status is concerned, as a matter of international law there are only three possibilities: (i) he may be a combatant, now held as a prisoner of war; (ii) he may be a civilian detainee, now interned; or (iii) he may be an unlawful combatant, now detained, either pending trial or simply detained and not pending trial.

If Mr Abbasi is a prisoner of war, his detention is governed by the terms of Geneva Convention III. He could not be required to give any information to the US authorities other than his name, rank, serial number and date of birth. He could not be prosecuted for his involvement in the hostilities: he could be prosecuted only for war crimes and crimes against humanity. He would be entitled to be released and repatriated without delay after the cessation of hostilities. [GCIII, art. 118].

The United States denies that Mr Abbasi is a prisoner of war. As a matter of law that question is regulated by GCIII Article 5 and Article 45 of the 1977 Additional Protocol I to the Geneva Conventions ('API').

The United States has not ratified API. However, in the Operational Law Handbook (JA 422) issued by the Judge Advocate General's School, United States Army, Charlottesville, Virginia, in 1997, it is stated, 'that the US views [among others, Article 45 API] as customary international law' (page 18-2), which would bind the United States along with all other States. The Handbook summarises Article 45 in the following terms: "prisoner of war presumption for those who participate in the hostilities".

This statement is qualified in the 2002 edition of Operational Law Handbook, in which it is now said that the US views Article 45 API as 'customary international law or acceptable practice though not legally binding' (Ch. 2, p. 11). It is practically inconceivable that the customary international law has changed in this way since 1997, In any event it would be arguable before an international tribunal that the United States is estopped from denying that API represents customary international law, particularly given the fact that 159 States have now ratified Additional Protocol I (such an argument would, however, be less likely to succeed before a United States court or tribunal).

API stipulates that if Mr Abbasi 'claims the status of prisoner of war, or if he appears to be entitled to such status, or if the party on which he depends claims such status

war, and retains that status until such time as his status has been determined by a competent tribunal. It is not known whether prisoner of war status has been claimed by or on behalf of Mr Abbasi. In our view, however, such status could be claimed on his behalf, certainly by the British Government, and possibly by his legal representatives. (Some doubt as to the right of his legal representatives to make the claim flows from the fact that API does not expressly give such a right, although earlier US practice has confirmed the role of counsel in proceedings to determine status; see further below). We understand that the United States has not submitted the question of Mr Abbasi's status to a competent tribunal.

In our view, the United States is obliged to submit the question of Mr Abbasi's status to a competent tribunal, which is also consistent with the practice of the United States in other theatres of operations.

During the Vietnam War, the US Military Assistance Command in Vietnam issued comprehensive criteria for classification and disposition of detainees. Annex A of Directive Number 381-46 of December 27, 1967 defined 'detainees' as 'persons who have been detained but whose final status has not yet been determined. Such persons are entitled to humane treatment in accordance with the provisions of the Geneva Conventions.' It further provided for the systematic classification of detainees into 'prisoner of war' and 'non-prisoner of war' categories.

Among the non-prisoner of war class, the directive included civilian defendants liable to trial by the Government of Vietnam for offences under local law, as well as certain categories of 'irregulars', such as guerrillas 'detained while not engaged in actual combat' and a detainee 'suspected of being a spy, saboteur or terrorist'.

Directive Number 20-5 of March 15, 1968 made extensive provision for the determination of eligibility for prisoner of war status applicable, among others, to 'non-prisoners of war and doubtful cases who are captured by or are in the custody of United States forces.' The Directive relied expressly on Article 5 GCIII. It provided that 'All United States military and DOD civilian personnel who take or have custody of a detainee will... (2) Afford to each detainee in their custody treatment consistent with that of a prisoner of war, unless or until it has been determined by competent authority in accordance with this directive that the detainee is not a prisoner of war.'

The Directive provided further in relation to the rights of the detainee that, 'No person may be deprived of his status as a prisoner of war without having had an opportunity to present his case with the assistance of a qualified advocate or counsel', and that, 'The Detainee shall have the right to be present with his counsel at all open sessions of the tribunal.'

The Directive made extensive provision for the 'Rights of Counsel for the Detainee', including 'a period of at least one week before the hearing in order to prepare his case', free access to visit the detainee and interview him in private', a 'reasonable opportunity to confer privately with essential witnesses, including prisoners of war', and rights of cross-examination and presentation of witnesses and testimony.

It is unclear whether Mr Abbasi is or is not a prisoner of war, but this is clearly a question appropriate for inquiry by a competent tribunal. The answer would depend upon the precise facts of his case, and in particular upon the exact relationship between the

Afghanistan, even though it was not recognised by the United States as such) and any organisation in which he was an active participant in Afghanistan. We understand that it is said that Mr Abbasi was a member of Al Q'aida, but we are not aware of any proof that this is the case, or of any proof of the nature of the relationship between Al Q'aida. This point is important because the definition of a 'combatant' in international law may be wide enough to embrace Al Q'aida fighters if, as a matter of fact, they were integrated into the Taliban command structure.

If Mr Abbasi were a civilian detainee, his internment would be governed by the terms of Geneva Convention IV. He would be entitled to visits, communications, and other privileges, and to be released as soon as the reasons, which necessitated his internment no longer, exist [GCIV, art. 132].

Even if the exceptional provisions of Article 5 GCIV apply and a person is detained in the territory of a Party to the conflict/occupied territory 'as a person under definite suspicion of activity hostile to the security of the Occupying Power', such he or she shall be treated with humanity and, 'in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.'

Internees in the territory of a Party to the conflict against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until he completion of the penalty: Art. 133, GCIV. However, the provisions of Articles 71-76 GCIV inclusive shall apply by analogy to proceedings against internees who are in the national territory of the Detaining Power: Art. 126 GCIV.

Among others, Article 72 provides for rights of defence, including assistance by a qualified advocate or counsel of their choice, 'who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.'

We understand that the United States does not regard Mr Abbasi as an internee within the terms of GC IV.

The third possibility is that Mr Abbasi is an unlawful combatant, entitled to treatment neither as a combatant prisoner of war nor as a civilian internee. This appears to be the status that the United States regards him as having.

Unlawful combatants are not without rights. They are entitled to the minimum standard of treatment set out in API article 75. Article 75 is among those recognized by the United States in 1997 as representing customary international law. Article 75 reads as follows:-

Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on

tions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

(i) murder;

(ii) torture of all kinds, whether physical or mental;

(iii) corporal punishment; and

(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form or indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. 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.

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

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

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right 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;

in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

- (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
- (j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.

[5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.]

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

- (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

- (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

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

Article 75 represents the minimum standard of treatment to which Mr Abbasi is entitled. That is so regardless of whether he is a prisoner of war, civilian internee, or unlawful combatant.

Mr Abbasi's detention

In so far as Mr Abbasi's detention is concerned, the entitlement of the United States to detain him without proceeding to try him for any offence is limited. It was noted above that prisoners of war and civilian internees must be released as soon as possible after the end of hostilities or the cessation of the circumstances that warranted their detention.

The United States may claim that they are entitled by the right of self-defence to detain Mr Abbasi, in order to avert a real and imminent threat to the United States. The generally-accepted statement of the criteria of self-defence appears in the correspondence concerning the Caroline incident, where it was said that there must be shown "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation", and further that the State invoking self-

necessity of self-defence, must be limited by that necessity, and kept clearly within it." [British & Foreign State Papers, vol. 29, p.1137]. Article 51 of the UN Charter recognizes that the right of self-defence may be exercised by any single State, and also by States acting in exercise of the right of collective self-defence. That might be said to warrant Mr Abbasi's detention in order to avert a threat to any of the United States' NATO allies.

It is a question of fact whether the circumstances warrant the exercise of a right of self-defence by the United States. Mr Abbasi might have presented a danger to the United States immediately after September 11, 2001. He might have presented such a danger when he was in Afghanistan, and would clearly have done so if he were engaged in hostilities against United States or other NATO forces operating lawfully in Afghanistan (and for present purposes we assume that the United States action in Afghanistan was, as a matter of international law, lawful). But he plainly cannot be held indefinitely without trial on this basis.

If Mr Abbasi is facing prosecution by the United States, his detention for a reasonable period pending trial will be lawful. If he is a prisoner of war he could be prosecuted only for war crimes and crimes against humanity. If he is an unlawful combatant he could be prosecuted for his involvement in hostilities: for example, he could be prosecuted for the attempted murder of any United States soldiers against whom he fought.

Mr Abbasi's right of access to a lawyer

If Mr Abbasi is or may be facing prosecution, API Article 75(4)(a), set out above, expressly entitles him to 'all necessary rights and means of defence'. That must include a right of access to a lawyer. That right is reinforced by similar provisions in other international agreements. Two instruments, to both of which the United States is a party, are particularly significant. The American Declaration on the Rights and Duties of Man sets out various entitlements to equality before the law (Article II), resort to the courts (Article XVIII) to submit petitions to competent authorities (Article XXIV), and to be presumed innocent until proven guilty (Article XXVI).

The International Covenant on Civil and Political Rights sets out the right of every person to life (Article 6), the right to liberty and freedom from arbitrary detention (Article 9), to treatment with respect for their humanity and inherent dignity (Article 10) and to equality before the law and to adequate facilities for the preparation of his defence (Article 14).

In our opinion, those instruments all establish a right of access to a lawyer, for any person facing possible prosecution. Moreover, in the particular circumstances of this case the right of access arises in two ways. First, Section 2 (a) (1) of the United States Presidential Order indicates that the President has already determined in writing that he has reason to believe that Mr Abbasi has committed one or more of the offences set out thereafter at (i), (ii) and (iii). These are similar offences to those faced by John Philip Walker Lindh in the criminal proceedings he faces in the US District Court of Virginia, having been detained, it will be remembered, in Afghanistan. Mr Abbasi plainly faces the real prospect of prosecution. There would otherwise be no reasonable basis to detain him. Whether in due course he is actually prosecuted is a different question and one that does not affect the issue of legal access. Mr Abbasi is enti-

prosecuted. English jurisprudence is clear upon the point, as is European Strasbourg jurisprudence. Secondly, access might arise in the context of proceedings before the 'competent tribunal' that would determine Mr Abbasi's right to the status of a prisoner of war. The international instruments do not explicitly establish such a right for persons who are detained without facing prosecution, but in our view such a right is implicit in all of the instruments cited.

These rights may be the subject of derogations where, broadly speaking, it is necessary to do so in order to preserve public safety in time of public emergency: see American Declaration on the Rights and Duties of Man, Article XXVIII, International Covenant on Civil and Political Rights, Article 4. Any such derogation must be limited to what is necessary to preserve public safety. Again, there is no evidence to suggest that the denial of access to a lawyer is strictly necessary in order to protect public safety.

No derogation from its obligations under the International Covenant on Civil and Political Rights has been declared by the United States, or communicated to any of the other 144 States Parties through the intermediary of the UN Secretary-General, as required by Article 4(3).

Article 14 ICCPR66, it will be recalled, requires adequate facilities for the preparation of a defence, and declares that 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'

In the present case, it is difficult to see how it can be argued that the denial of access to a lawyer is strictly necessary in order to defend the United States. The question is whether the prisoner is any more of a threat to the United States if he has access to a lawyer than he is if he does not. It is very difficult to see that this could be so. Only if there were a reasonable fear that Mr Abbasi's contact with a lawyer might enable items or communications prejudicial to public safety in or out of the prison could this be maintained. Moreover, that fear would have to be one arising in the specific case of Mr Abbasi and his lawyers. Mr Abbasi's right may not be suspended because there is a reasonable fear that lawyers visiting other prisoners might constitute such a danger. In any event, no argument to this effect has been made out by the United States.

It might be argued by the United States that access to a lawyer would impede the process of interrogation. Even if, as a matter of fact, this were true, it would be relevant only in so far as the interrogation was the only means available to enable the United States to defend its vital interests, in accordance with the circumstances in which derogations from human rights instruments are permitted. There is no evidence to suggest that this is the case; and given the length of time for which the prisoner has already been available for questioning, it is difficult to believe that any such case could be made out. Moreover, this argument would be relevant only in so far as the interrogation did not involve the application of internationally unlawful force or pressure to the prisoner: international law does not permit States to suspend their basic humanitarian duties, and self-defence would not operate so as to permit the use of torture or other internationally unlawful pressure to the prisoner. Even if a State had a right not to have lawful interrogations impeded, that right could not extend to unlawful interrogations.

There is a further and important reason why the United States may not suspend the right of access to a lawyer in this case. The Presidential Order of 13 November 2001 specifically excludes from its scope US nationals. Non-US prisoners are as a matter of law thus discriminated against in relation to their access to lawyers and to right to petition courts in the United States or other countries and international tribunals. This is objectionable on three grounds.

First, Guantanamo Bay is Cuban territory, currently leased by the United States: see Article 3 of the Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations; February 23, 1903. The apparent claim in the 13 November 2001 Presidential Order that the United States may forbid foreign nationals outside United States territory to petition non-United States courts is entirely without foundation as a matter of international law. The United States has no competence to give any such order: it lies beyond the reach of United States' jurisdiction.

Second, by discriminating between the Cuban prisoners on the basis of their nationality, the United States is violating its international legal duties to maintain the equality of all persons before the law, without discrimination. That duty is set out in the American Declaration on the Rights and Duties of Man (Article II), the International Covenant on Civil and Political Rights (Article 2), and API (Article 75(1)). The United States is not entitled to deny to British nationals right that it gives to its own nationals. In this regard it is important to note that John Philip Walker Lindh was read his constitutional "Miranda" rights before interview by the FBI, according to paragraph 5 of the affidavit in support of his charges sworn by Special Agent Anne E. Ashbury. [USA v Walker, US District Court for the Eastern District of Virginia]

Third, notwithstanding its characterisation under US law, Guantanamo is clearly a place for which the United States is responsible and in respect of which the international obligations of the United States apply.

Consular access

We note also that the United Kingdom is entitled to insist upon consular access to Mr Abbasi. That right is set out in Article 36 of the Vienna Convention on Consular Relations, which provides:-

"Communication and contact with nationals of the sending state.

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph:

who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”

Remedies

There are three main approaches through which Mr Abassi’s rights might be enforced. First, there may be an appeal to the United States’ courts. We understand that such an application has already been lodged. We are not experts in United States law; but it seems reasonable to suppose that, given the terms of the Presidential Order, it is not probable that a United States’ court will rule that the detention of the prisoners at Guantanamo Bay is entirely unlawful, although it may be more likely to uphold claims to humane treatment and to access to lawyers for those detained.

Second, the British Government should make diplomatic representations to the United States Government, requiring that Mr Abbasi and other British nationals held at Guantanamo Bay be treated in accordance with the United States’ obligations under international law, and in particular at the very least have immediate access to legal assistance.

Third, a petition might be lodged on Mr Abbasi’s behalf with the Inter-American Commission on Human Rights. Article 1 of the Statute of that Commission gives it jurisdiction over matters arising under the American Declaration of the Rights and Duties of Man. Article 25 of that Statute empowers the Commission to adopt precautionary measures to prevent irreparable harm to persons. This is a case in which it would be appropriate for the Commission to order precautionary measures, as a matter of urgency.

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