

# The Relevance of the Obligations Flowing from the UN Covenant on Civil and Political Rights to US Courts Dealing with Guantánamo Detainees

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## Abstract

*The US authorities are internationally bound to grant to Guantánamo detainees all the rights provided for in the 1966 UN Covenant on Civil and Political Rights, for those detainees are under US jurisdiction, pursuant to Article 2(1) of the Covenant. The Covenant thus applies to them and US Courts must conform to its provisions. The detainees are, in particular, entitled to the judicial remedies envisaged in the Covenant and may not be subjected to inhuman and degrading treatment, which would be contrary to Article 7 of the Covenant. The declaration made by the US in 1992, when ratifying the Covenant, whereby Articles 1–27 of that treaty are not self-executing, has been interpreted by the US authorities to the effect that, since US domestic law made adequate provision for the requirements of the Covenant, there was no need to adopt special implementing legislation. It follows that US courts are bound to construe US legislation in light and on the basis of the Covenant and, hence, to grant all the rights provided for therein.*

## 1. Introduction

On 10 November 2003, the Supreme Court of the United States granted a petition for writ of certiorari from a group of Kuwaiti, British and Australian nationals, detained

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in the American naval base in Guantánamo, Cuba.<sup>1</sup> By this ruling, the Court affirmed its own competence to decide whether or not US courts have jurisdiction on issues concerning the lawfulness of the imprisonment of the petitioners and on the due process rights to which they are entitled. Importantly, at this point in the proceedings, the Court has declined the request to examine such questions on the merits.<sup>2</sup>

The outcome of this decision is eagerly awaited, given the fierce debates that have surrounded the issue. Should the Court decide in the affirmative, US courts will have jurisdiction over motions challenging the lawfulness, whether under national or international law (treaties binding on the United States), of the treatment received by Guantánamo detainees.

It is well known that a decision of the District Court for the District of Columbia<sup>3</sup> excluded the jurisdiction of US courts on these issues; that decision was subsequently upheld by the Court of Appeals for the District of Columbia Circuit.<sup>4</sup> Both the first instance and the appeal decisions found that the foreign nationals held in Guantánamo had no right to bring a writ of *habeas corpus* or the other procedural guarantees provided for in the US Constitution. The grounds for these decisions were those that the American government had already put forth: as the military base in Guantánamo is not in US sovereign territory, the persons detained there are foreign nationals not present on American territory,<sup>5</sup> and as such they do not enjoy the constitutional rights that are granted exclusively to individuals on US territory. Among these rights are those claimed by the petitioners. In other words, the US courts would have absolutely no jurisdiction over these individuals. These decisions were in line with the judgment handed down in 1950 by the US Supreme Court in *Eisentrager*, a case that has been considered to be similar.<sup>6</sup>

Surprisingly, international human rights law, which is highly relevant to this case, was not considered. In effect, the individual rights at issue (*habeas corpus* and due process of law in criminal matters), to a large extent, correspond to those provided for in Articles 9 and 14 of the International Covenant for Civil and Political Rights (ICCPR or the Covenant). In addition, the Covenant itself defines, in Article 2(1), the territorial scope (*ratione loci*) of the obligations imposed on States Parties.

1 *Fawzi Khalid Abdullah Fahad Al Odah et al v. United States et al* (Case Nos 02–5251, 02–5284, 02–5288), 10 November 2003, available at <http://www.supremecourtus.gov/docket/03–343.htm> (visited 5 December 2003).

2 *Fawzi Khalid Abdullah Fahad Al Odah et al v. United States et al*, Petition for Writ of Certiorari, available at <http://news.findlaw.com/cnn/docs/scotus/alodah90203certpet.pdf> (visited 5 December 2003).

3 See, e.g. *Rasul v. Bush*, 215 *Federal Supplement (F. Supp.)* 2d 55.

4 *Khaled A.F. Al Odah et al v. United States of America et al* (Case No. 02–5251, consolidated with Nos 02–5284 and 02–5288), 11 March 2003, available at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200303/02-5251a.pdf> (visited 5 December 2003).

5 See again *Khaled A.F. Al Odah et al v. United States of America et al*, at 9. The Court of Appeals refers to Guantánamo detainees as ‘foreign nationals’ and not as ‘enemy aliens’. It thus takes a different position to that taken by the US Supreme Court judgment in *Eisentrager* (1950), which is frequently recalled and which dealt with a similar case concerning a group of German nationals detained in a US detention camp in Germany.

6 *Ibid.*, at 17 (at 18 for *Eisentrager* judgment reference); see also *Rasul v. Bush*, 215 *F. Supp. 2d*, at 72–73.

This disregard for international human rights obligations is open to criticism, given that the United States has ratified the Covenant and is thus internationally bound to comply with it. As far as the *Eisentrager* precedent is concerned, its influence should not be overstated, given that the decision was handed down nearly 20 years before the drafting of the Covenant and more than 40 years prior to US ratification. In other words, the principles of the Covenant constitute new legal elements with respect to *Eisentrager* — a real *lex superveniens*, which the judges should have considered. In fact, a correct interpretation of the principle embodied in Article 2(1) of the Covenant, in light of how it has been applied (see below), might have led the US courts to very different conclusions.<sup>7</sup> This will be further discussed in Section 2, below, also with regard to the forthcoming Supreme Court decision.

In Section 3, we provide a concise discussion of some aspects concerning the treatment of the Guantánamo detainees, with reference to international rules on human rights binding on the United States, namely the ICCPR. In Section 4, we sum up our main conclusions. Finally, in Section 5, we demonstrate how the declaration made by the United States at the time of its ratification of the Covenant in no way bars the American courts (and, in particular, the Supreme Court) from adopting solutions consistent with US international obligations concerning this issue.

## 2. The Applicability of the UN Covenant to Persons Subject to the Jurisdiction and Control of the USA

It has already been mentioned that the grounds on which US courts denied to the Guantánamo detainees the right to bring a writ of *habeas corpus* and due process rights lie in the circumstance that the base is not on US territory.

Before evaluating the legitimacy of these grounds in light of the ICCPR, especially with regard to the provisions concerning the scope of its territorial applicability (*ratione loci*), we can already note that the grounds appear highly questionable in light of general international law. In effect, these grounds are contrary to the legal principles concerning the relationship between a state's control over a territory and the ensuing obligations and international responsibilities of that same state.

It is indisputably correct that the territory on which the Guantánamo base is

7 In a judgment of 18 December 2003 (delivered after this article was completed), the US Court of Appeals for the 9th Circuit held that the District Court for the Central District of California had jurisdiction over the *habeas corpus* petition lodged by a Guantánamo detainee (*Falen Gherebi v. G.W. Bush and D.H. Rumsfeld*, No 03-55785); see [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/429E2096892C3D8388256E00005FEB65/\\$file/0355785final.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/429E2096892C3D8388256E00005FEB65/$file/0355785final.pdf?openelement). According to the Court, the US base in Guantánamo is subject not only to US territorial jurisdiction (pp. 14–24), but is also under US sovereignty, for the purposes of habeas jurisdiction (pp. 24–47). This judgment, taken as a whole, may be positively appraised, despite (i) the questionable argument concerning sovereignty over Guantánamo, and (ii) the fact that the Court has not taken into account the international undertakings of the US on human rights and humanitarian law issues. Therefore, the analysis undertaken above in our text remains fully valid. In addition, it also shows that the argument based on the alleged US sovereignty over Guantánamo is not only fallacious, but also pointless. Instead, the arguments based on human rights law, that will be set forth in our text, seem to us far more compelling.

situated is not under US territorial sovereignty. This conclusion is fully congruent with the prevailing opinion, according to which agreements concerning the establishment of a military base on foreign territory, in principle, do not imply that the state occupying that base acquires sovereignty over the territory on which the base is installed.<sup>8</sup> However, while the United States does not enjoy sovereignty over the part of Cuban territory on which their military base is located, there is no question that the United States exercises ‘complete jurisdiction and control over and within said areas’, as stated in the 1903 bilateral agreement with Cuba.<sup>9</sup> The exercise of effective state authority over a certain territory, and not the sovereignty or the legitimacy of the title over the territory, constitutes the basis of the international obligations and responsibilities related to the administration of the territory. This is a well established and accepted principle of international law, clearly affirmed by the International Court of Justice (ICJ) in the well known Advisory Opinion on *Namibia* of 1971.<sup>10</sup> Thus, in contrast to what the US courts have ruled, there is no necessary link between the protection of international human rights guaranteed in a particular territory and the formal exercise of sovereignty over that territory. In other words, that protection is incumbent on the state’s exercising *jurisdiction* and *control* over the territory, even if the territory is not formally under its *sovereign power*.

However, the arguments derived from general international law principles are not sufficient to settle this question. Although these principles provide useful guidance, they do not resolve the question of whether or not the obligation to protect the individual rights provided for in the ICCPR applies to Guantánamo. As this issue concerns *treaty obligations*, one clearly must refer to the provisions of the treaty itself to verify whether its scope could be limited to the territories subject, *stricto sensu*, to the sovereignty of the contracting states. The problem is to establish whether or not the provisions of the ICCPR concerning the scope of application *ratione loci* of the rights set out in the Covenant are consistent with the rules of general international law relating to the international responsibility of states in the administration of territories over which they exercise jurisdiction, but not sovereignty.

What can be generally inferred from Article 2(1) of the Covenant (whereby ‘Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights ...’) is absolutely consistent with general international law, as is apparent from practice and is widely recognized in the legal literature.

On the face of it, one could infer from the provision’s wording that the scope of

8 See C. Rumpf, ‘Military Bases on Foreign Territory’, 3 *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1997) 381.

9 See Art. III of the Bilateral Agreement between Cuba and The United States of 16 February 1903 according to which the Republic of Cuba ‘... consents that during the period of occupation by the United States of said areas ... the United States shall exercise complete *jurisdiction and control over and within said areas*’ (192 *Consolidated Treaty Series*, at 429; emphasis added).

10 *Legal Consequences for States of the Continuous Presence of South Africa in Namibia*, ICJ, Reports, 1971, 16, at 54 (para. 118). On this question, see I. Brownlie, *System of the Law of Nations, State Responsibility*, vol. I (Oxford: Oxford University Press, 1983) 165.

application of the obligations (and the corresponding individual rights) provided for in the Covenant is limited exclusively to the sovereign territories, *stricto sensu*, of the States Parties. Among other things, the preparatory works of Article 2 show that the decision to retain in the text the explicit reference to the ‘territory’ of states was not unanimous and was adopted despite the opposition of some participants in the negotiations.<sup>11</sup> Such a strictly ‘territorial’ construction of the scope of application of the Covenant’s obligations should clearly be rejected, and three points can be made to support this rejection.

First, the wording of the provision, as interpreted in light of the relevant preparatory works, should be stressed. Although the final wording of Article 2(1) of the Covenant does contain the above-mentioned reference to the ‘territory’ of States Parties, which differentiates it from Article 1 of the European Convention of Human Rights (ECHR),<sup>12</sup> such wording was advocated by various states in order to make it clear that the Covenant in no way authorized coercive intervention abroad to protect the human rights of one’s own citizens.<sup>13</sup> As this interpretation is not contradicted in the preparatory works, it seems perfectly plausible to hold that, on the basis of the Covenant’s text, the rights set out in the Covenant must be conferred both on individuals on the sovereign territory of the States Parties, as well as on individuals who are *otherwise* subject to their jurisdiction or control, as in the case of the Guantánamo base.<sup>14</sup>

Secondly, and more decisively, the Human Rights Committee’s (HRC) practice that has developed in the application of the Covenant merits attention. From the outset, this practice has been consistent in maintaining that each State Party is obliged, on the basis of the Covenant, to protect the human rights, not only of individuals under its own territorial sovereignty, but also of individuals who are subject to its power or authority, wherever that power or authority is exercised. The views on this issue adopted by the HRC are well known, particularly those concerning the so-called

11 See, for instance, the position adopted by the French government and shared by the Lebanese government. For further analysis and references, see P. De Sena, *La Nozione di Giurisdizione nei Trattati sui Diritti dell’Uomo* (Torino: Giappichelli, 2002), at 16–17 (notes 6–7).

12 Under this provision: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’.

13 With the exception of the US delegation – which was concerned with not extending the Covenant to territories still subject to occupation at the end of the war – the reference to ‘territory’ was held to be useful by some states, e.g. the Belgian and Chilean delegations, in order to avoid the obligation to protect their own citizens abroad which could conflict with the principle of non-interference in the internal affairs of other states.

14 T. Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’, in L. Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), at 74; T. Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius Publications, 1987), at 42.

*Passport Cases*,<sup>15</sup> as well as *Lopez Burgos* and *Celiberti de Casariego*.<sup>16</sup> All relate to violations of the Covenant by organs of States Parties acting in *foreign territory, with or without the consent of the territorial state*.<sup>17</sup> This situation of extraterritoriality did not prevent the HRC from pronouncing on the above-mentioned violations, with an interpretation of the obligations and responsibilities under the Covenant that is *not* strictly territorial.<sup>18</sup> Moreover, it is clear that such interpretation, which relates to a provision of the Covenant (Article 2(1)) and not the First Optional Protocol (concerning the competence of the HRC to hear individual communications), is fully applicable to the US with regard to the situation in Guantánamo, although the US has not ratified the First Protocol.

Thirdly, the interpretation advanced by the HRC is fully reflected in the practice which has developed concerning this issue in connection with other human rights treaties. For example, the obligations laid down in the Torture Convention of 1984 or the Convention against Racial Discrimination of 1965 have been extended to the Israeli-occupied territories in Palestine. This extension has been consistently upheld by the monitoring bodies established by those treaties.<sup>19</sup>

The case law of both the European Commission of Human Rights and the European Court of Human Rights consistently upholds the same interpretation. Even under this case law, which preceded the above-mentioned practice of the HRC, the fact that the violations were due to the exercise of states' power in foreign territory has not prevented the European Commission and Court of Human Rights from pronouncing on those violations in a number of cases. The first decisions on consular activities or on 'abductions' perpetrated in foreign territory with the consent of the territorial state are examples.<sup>20</sup> There are also the many decisions concerning the situation in northern

15 In these cases, acts concerning the issue or the revocation of passports performed by consular agents of the defendant states were considered as a breach of the Covenant (Art. 12, para. 2 or Art. 19), see *Guillermo Waksman v. Uruguay*, 28 March 1980, Comm. 31/1978, UN doc. CCPR/C/OP/1 (1984) 9; *Samuel Lichtensztein v. Uruguay*, 31 March 1983, Comm. 77/1980, UN doc. Supp. 40 (A/38/40) (1983) 166.

16 *Sergio Euben Lopez Burgos v. Uruguay*, 29 July 1981, Comm. R.12/52, UN doc. Supp. 40 (A/36/40), 1981, 176; *Lilian Celiberti de Casariego v. Uruguay*, 29 July 1981, Comm. R.13/56, UN doc. Supp. 40 (A/36/40), 1981, 185. These cases concerned actions performed by Uruguayan policemen respectively in Argentina and Brazil.

17 In contrast, the so-called *Passport Cases* concerned authorized activities as did *Lopez Burgos* (*supra* note 16, para. 2.2). In contrast, in *Celiberti de Casariego*, *supra* note 16, forcible abduction was at issue.

18 L. Condorelli, 'L'Imputation à l'Etat d'un Fait International Illicite: Solutions Classiques et Nouvelles Tendances', *Hague Recueil (HR)* (1984–VI), at 91.

19 For the Committee against Torture, see *Conclusions and Recommendations of the Committee against Torture, CAT K/XXVII/Concl. 5*, 23 November 2001, para. 7, letters *d* and *e*; for the Committee on the Elimination of Racial Discrimination, see *CERD/C/304, Add. 45*, 30 March 1998, para. 10. On this practice, see also J.A. Frowein, 'The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation', *28 Israel Yearbook on Human Rights* (1998) 5.

20 As regards consular activities, see, e.g. the decision of the European Commission of Human Rights in the case *X v. Federal Republic of Germany*, 8 March 1957 (Application no. 182/56), *Yearbook of the European Convention of Human Rights, 1956–1957*, at 167; for a case of non-forcible abduction, see *Freda v. Italy*, 7 October 1980 (Application no. 8916/80), *15 Decisions and Reports of the European Commission of Human Rights*, at 259.

Cyprus since 1974, among which the judgments in *Loizidou* and *Cyprus v. Turkey* (fourth interstate application)<sup>21</sup> particularly stand out. In these decisions, Turkey has invariably been found responsible for violations of human rights, perpetrated in a territory outside Turkish sovereignty.

Furthermore, there have been many other important decisions in which, though the state has not been held responsible for human rights violations, the principle that the obligations provided for in the European Convention on Human Rights apply, even to the exercise of extraterritorial state power, has been upheld.<sup>22</sup> Among these decisions, the recent judgment of the European Court in *Banković* is particularly significant. In this case, the Court refused to apply the Convention to the bombing of Radio Televizije Srbijre (the Serbian Radio Television company) by some NATO Member States during the armed intervention in Yugoslavia, on the grounds that the air strikes against Yugoslavia did not amount to an effective exercise of state jurisdiction by NATO Member States over that territory. In spite of this judgment, the Court expressly held that the European Convention obligations are applicable in *all* circumstances in which extraterritorial state activities are performed under international law. According to the Court, these circumstances include not only the military occupation of foreign territories, but also state activities performed on foreign territory with the consent of the territorial state.<sup>23</sup> This finding is highly relevant here, given that US jurisdiction and control over the Guantánamo base are grounded in the original agreement made by the United States with Cuba.

### 3. The Relevance of the UN Covenant to the Condition of the Guantánamo Detainees

#### A. General

Unlike the question of US courts' jurisdiction, which, until now has not received much attention, the problem of whether or not the United States has violated international law in its treatment of the Guantánamo detainees has been the object of close scrutiny. A number of scholarly inquiries have followed the adoption of the Military Order of 13 November 2001.<sup>24</sup> Many of these have been highly critical of the US legislation and the US Administration's practice.

21 *Loizidou v. Turkey (merits)*, 18 October 1996 (Application no. 15318/89), 26 *European Court of Human Rights Reports*, 1996-V, at 2216; *Cyprus v. Turkey*, 10 May 2001 (Application no. 25781/94).

22 See, e.g. *Drozd and Janousek v. France and Spain*, 27 May 1992 (Application no. 12747/87), 40 *Publications of the European Court of Human Rights*, Serie A, 46, at para. 91.

23 *Banković et al v. Belgium et al*, 12 December 2001 (Application no. 52207/99), at paras 71–73.

24 *Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 *Federal Register*, at 578,33, n. 22 (Nov. 16, 2001). For the implementing legislation, see *U.S. Department of Defense, Military Commission Order No 1, Procedures for Trials by Military Commissions on Certain Non-United States Citizens in the War Against Terrorism* (21 March 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (visited 5 December 2003).

These inquiries mainly focused on the sensitive issues of international humanitarian law arising from the establishment of Military Commissions, as well as, more generally, on the legal status of the Guantánamo detainees in light of the Geneva Conventions.<sup>25</sup> Moreover, the United States' compliance with international human rights standards, binding on the United States in its treatment of the detainees, has also been discussed, though to a lesser extent. In particular, it has been questioned whether the limitations of individual rights imposed by the above-mentioned Military Order and its implementing regulations are consistent with the provisions of Article 4 of the ICCPR, which only allows States Parties to derogate from their obligations under the Covenant, 'in time of public emergency which threatens the life of the nation ...'. The reply to such a question has been generally in the negative, both on the grounds that the procedural requirements have not been satisfied — lacking a specific communication by the United States to the UN Secretary-General, as is mandatory under Article 4(3) of the Covenant — and on the grounds that the substantive criteria laid down in Article 4(1) and (2) have not been met.

The criticisms regarding the violation of these latter criteria are well founded. First, since the detainees have not so far been charged or brought to trial,<sup>26</sup> and since the US authorities retain full discretion in granting them procedural rights,<sup>27</sup> it is doubtful whether these derogations from the Covenant are proportionate. Secondly, the criticisms concerning the violation of Article 6(2) are well-founded, given the power of the Military Commissions and, ultimately, of the US president, to impose the death penalty without ensuring the guarantees of a fair trial required by that treaty provision for the lawful imposition of the death penalty.<sup>28</sup>

There are three other aspects which have received less attention but which are worthy of consideration in light of the internal judicial situation in the United States. First, there are three problems relating to the right to an effective remedy (Article 2(3) of the ICCPR). Second, there is the right to judicial scrutiny of the detention (Article 9 of the ICCPR). Third, there is the issue of whether the treatment of the Guantánamo detainees could be characterized as a breach of the prohibition against torture, and inhumane or degrading treatment (Article 7 of the ICCPR).

### ***B. The Right to Judicial Remedies***

The first two problems are highly relevant to the case at issue, in light of the fact that section 7(b)(2) of the Military Order excludes any form of judicial remedy for individuals who are subject to the Order. In addition, the above-mentioned decision of the Appeals Court of the District of Columbia has confirmed such exclusion, with

25 See *supra*, M. Sassòli. 'The Status of Persons Held in Guantánamo under international humanitarian law', at 96–116.

26 J. Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism', 96 *American Journal of International Law (AJIL)* (2002) 345, at 351.

27 E. Sciso, 'La Condizione dei Detenuti di Guantánamo fra Diritto Umanitario e Garanzie dei Diritti Umani Fondamentali', in 86 *Rivista di Diritto Internazionale* (2003) 111, recalling (at 119) s. 5 of the US *Department of Defense Order*, *supra* note 24.

28 See, again, Fitzpatrick, *supra* note 26, at 351–352 and Sciso, *supra* note 27, at 116.

specific reference to the right to bring a writ of *habeas corpus*.<sup>29</sup> It is clear that this is a serious violation of the Guantánamo detainees' right to an effective judicial remedy against denial of their rights arising out of the ICCPR, a violation which is not justified under the terms of Article 4 of the Covenant.

Given the close dependence of the Military Commissions on the Executive Power, and leaving aside the insufficient judicial guarantees available to defendants in trial proceedings before such Commissions, it is clear that the exclusive jurisdiction enjoyed by the Commissions leads to an effective denial of the above-mentioned principle. Although Article 2(3) of the Covenant is not expressly included among the Covenant's provisions from which no derogation is permissible, clearly the absolute unavailability of judicial remedies prejudices the very essence of the right laid down in that provision, and thereby goes beyond the bounds set out in Article 4 of the Covenant.

In this connection, mention should be made of what the Human Rights Committee pointed out in its recent 'General Comment No. 29' on 'States of Emergency'. Although the Committee recognized the states' power to curtail the right to an effective remedy — though only when strictly necessary in cases of emergency — it vigorously emphasized that respect for the essence of the right must, in any case, be safeguarded.<sup>30</sup> The European Court of Human Rights in *Brannigan and McBride* has taken the same approach, although with reference to the right to bring a writ of *habeas corpus* (Article 5 of the ECHR).<sup>31</sup> The rationale behind this approach is clear: it is sufficient to consider the enormous importance which attaches to the right to an effective remedy in a time of public emergency, that is, in situations where violations of fundamental human rights are most likely to occur, and where, consequently, the existence of judicial remedies constitutes the principal safeguard for such fundamental rights.

Furthermore, the US authority's denial of the right to bring a writ of *habeas corpus* to Guantánamo detainees may, in itself, be considered to be a violation of Article 4 of the Covenant, in spite of the lack of any textual elements banning possible derogation from Article 9 of the Covenant (the provision laying down *habeas corpus* rights). The Human Rights Committee, in its aforementioned 'General Comment No. 29', has taken a similar stance. It has stated 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 detention, must not be diminished by a State party's decision to derogate from the Covenant'.<sup>32</sup> In other words, according to the Committee, the right to bring a writ of *habeas corpus* may not be derogated from in time of emergency, to the

29 *Supra*, at para. 1; moreover, as Fitzpatrick rightly points out, judicial review of detention 'assumes growing importance, as it appears increasingly likely that few will be charged with crimes or brought to trial', *supra* note 26, at 352.

30 CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 14.

31 *Brannigan and McBride v. United Kingdom*, 26 May 1993 (Application nos 14553/89 e 14554/89), *Publication of the European Court of Human Rights, Serie A*, no. 258-B. In this case, the Court asserted that the essential content of Art. 5 was to be respected, notwithstanding its derogable nature (at paras 63–66).

32 *Supra*, note 30, at para. 16.

extent that it proves *instrumental* in effectively protecting non-derogable rights. One of these rights is the right not to be subjected to torture.

Although the Committee has not provided illustrations of the application of this principle, it clearly applies to the condition of Guantánamo detainees. It is true that judicial review of the legality of detention is *not* a legal remedy directly related to the safeguard of life and limb, or to protection from torture. Nonetheless, the fact that detained individuals may initiate such judicial review represents a significant safeguard of those rights. The practice concerning the application of the American Convention on Human Rights clearly suggests that this is the case. Reference can be made to the Advisory Opinion on *Judicial Guarantees in States of Emergency* that the Inter-American Court of Human Rights delivered in 1987. There, the Court compellingly emphasized the central role which the right to bring a writ of *habeas corpus* plays in a time of public emergency and, in particular, its preventative function for the protection of life and limb, as well as for protection against torture and forced disappearances.<sup>33</sup>

### ***C. The Right Not to be Subjected to Inhuman or Degrading Treatment***

The third element to be considered is the question of whether the treatment of the Guantánamo detainees may be regarded as amounting to a breach of the prohibition against torture or cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR).

The copious legal literature concerning the conditions of Guantánamo detainees has dealt with individual aspects of the detention at the military base. For example, it has been pointed out that some features of the cells in which persons are being held, and some practices such as hooding or forced head shaving, would amount to inhuman or degrading treatment.<sup>34</sup> Of course, the authors of this paper are not in a position to verify those facts. It is well known that the findings of the independent inquiries made by the International Committee of Red Cross, during its periodic visits to Guantánamo, are not made public on account of the principle of confidentiality upheld by this humanitarian body.<sup>35</sup> Nevertheless, it is a fact that, so far, no criminal charge against the detainees at Guantánamo has been laid out or any trial proceedings initiated.<sup>36</sup> Likewise, it is certain that the conditions of total psychological uncertainty brought about by the attitude of the US authorities has led to a very high number of attempted suicides among detainees.<sup>37</sup>

33 *Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency*, 9 HRLJ 204, at paras 35–36 and 40. Article 27 of the Convention against torture includes the right to bring a writ of *habeas corpus* as one of the non-derogable rights.

34 See, Sciso, *supra* note 27, at 120 and D.A. Mundis, ‘The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts’, 96 *AJIL* (2002) 320, at 325.

35 On this point, see Guantánamo Bay: Overview of the ICRC’s work for Internees, 6 November 2003, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList454/951C74F20D2A2148C1256D>.

36 *Ibid.*

37 According to the declarations of an ICRC official, there have been 32 attempted suicides in 18 months; see ‘Red Cross Criticizes Indefinite Detention in Guantánamo Bay’, in *The New York Times*, 10 October 2003, available on the website of the NY Times at <http://www.nytimes.com>.

We should therefore consider whether this condition of uncertainty, looked at either *per se* or within the general context of detention at Guantánamo, may amount to inhuman or degrading treatment.

The practice relating to the ICCPR can provide elements for an affirmative answer to the first of these two issues. Although there are no cases dealing with the exact point, the statement of the HRC in *Quinteros v. Uruguay*<sup>38</sup> may prove of some relevance. In the 'views' that it set out in that case, the Committee expressly admitted that the Uruguayan authorities' withholding of information from the mother of a female detainee about her daughter caused her psychological suffering that amounted to a breach of Article 7 of the ICCPR.<sup>39</sup> Although this case concerned forced disappearance, the HRC's emphasis on suffering as inhuman and degrading treatment (or, as the Committee viewed it, as a form of torture, which was probably an over statement in that case) warrants the contention that, in principle, the anxiety of the Guantánamo detainees about the uncertainty of their own situation may also be considered as a form of inhuman and degrading treatment. This conclusion seems to be all the more plausible because the aforementioned lack of any judicial remedy taints that detention with a shade of arbitrariness.

Similar conclusions may be reached if one considers another aspect of their detention, i.e. the possibility of being sentenced to death after being denied the usual safeguards of a fair trial before the Military Commissions. This circumstance, in addition to being, as stated above, a breach of the 'inherent right to life' conferred by Article 6(1) of the ICCPR,<sup>40</sup> may also amount to a form of inhuman or degrading treatment pursuant to Article 7 of the ICCPR. The practice of the Human Rights Committee does not offer any indication to this effect. However, the European Court of Human Rights has recently provided interesting indicators in its important judgment in *Öcalan v. Turkey*.<sup>41</sup> In this judgment, the Court held that to sentence a person to death after an unfair trial 'is to subject that person wrongfully to the fear that he will be executed', and that to bring about this anxiety amounts to inhuman or degrading treatment pursuant to Article 3 of the European Convention of Human Rights.<sup>42</sup>

It cannot be argued that, in the case of the Guantánamo detainees, the principle operates with regard to individuals against whom the death penalty has already been pronounced, as was the case in *Öcalan*. But, neither within the European Convention nor under the UN Covenant can one find elements limiting the relevance of anxiety about the death penalty to those cases where sentence had already been passed. It is comparable with the judicial practice of forbidding the extradition or expulsion of individuals who, risking the death penalty in the receiving country, would be likely to spend many years on 'death row'. This practice, both under the UN Covenant and the

38 *Quinteros v. Uruguay*, 21 July 1983, Comm. 107/1981, UN doc. CCPR/C/19/D/107/1981.

39 *Ibid.*, para. 14.

40 *Supra* in this section, especially note 28.

41 *Öcalan v. Turkey*, 12 March 2003 (Application no. 46221/99); for a comment, see A. Clapham, 'Symbiosis in International Human Rights Law: the *Öcalan* Case and the Evolving Law on the Death Sentence', 1 *Journal of International Criminal Justice* (2003) 475.

42 *Öcalan*, at para. 207.

European Convention, has also emerged with reference to cases where the death sentence had not yet been passed.<sup>43</sup>

The *Öcalan* judgment, although delivered by the European Court, may also be highly relevant within the framework of the UN Covenant on two grounds. First, this judgment ultimately specifies a principle of customary law, namely the principle prohibiting inhuman or degrading treatment. Second, there is nothing to prevent an application of the principles stated in the judgment to the UN Covenant, given that the symbiosis between principles and rules emanating from different sources is an increasing phenomenon in the field of human rights.<sup>44</sup>

#### 4. The Conflict of the Current Attitude of US Courts with the International Obligations of the United States

In summary, the following observations have been made: First of all, the US courts' decisions denying jurisdiction over Guantánamo detainees are in clear contrast both with the principles of international law imposing obligations and responsibilities on states over territories under their jurisdiction or control and with the provisions of the UN Covenant on the *ratione loci* scope of the obligations laid down in that Covenant. These provisions are in line with the well established trend that has emerged in the application of human rights treaties: the substantive provisions of such treaties apply both within the territory *stricto sensu* of the contracting states and in all those situations where contracting states exercise stable extraterritorial powers affecting the enjoyment of human rights set out in those treaties, regardless of the legal nature of those powers and whether they are lawful or unlawful.<sup>45</sup>

Secondly, the US courts' refusal to exercise their jurisdiction over Guantánamo detainees objectively, implicitly legitimizes a condition that, in many respects, is contrary to the human rights laid down in the UN Covenant. This judicial attitude, which amounts to a denial of the right to bring a writ of *habeas corpus*, contributes to keeping those detainees in a condition in which they have no judicial remedy available for asserting their fundamental rights. This is all the more troubling if one considers the prohibition against inhuman and degrading treatment, laid down both in the UN Covenant and in customary international law.

On all of these grounds, it appears absolutely necessary for the US courts to be in a position to reclaim their natural powers and exercise their jurisdiction.

43 For HRC practice, see *Cox v. Canada*, 31 October 1994, Comm. 539/1993, UN doc. CCPR/C/52/D/539/1993, at paras 16.1–16.7; as to the ECHR, see *Einhorn v. France*, 16 October 2001 (Application no. 7155/01), at para. 126. (The complaint was rejected, but the ECHR dealt with the possible imposition of a penalty in the country of destination and not with a penalty already imposed.)

44 On this trend, see Clapham, *supra* note 41, at 481.

45 The observations made in the text above may obviously also be applied to the obligations derived from the UN Convention against Torture, ratified by the United States on 21 October 1994. There is no doubt about the applicability, *ratione loci*, of this Convention to the Guantánamo base, given that Art. 2 expressly provides that States Parties must adopt measures for the prevention of torture and inhuman and degrading treatment 'in any territory under its *jurisdiction*' (emphasis added).

## 5. US Courts Must Apply the Covenant Notwithstanding the US Declaration about its Non-Self-Executing Nature

It is apparent from the above that the United States is under an international obligation to ensure that respect for the human rights enshrined in international treaties and, in particular, the UN Covenant may become the subject of domestic judicial review. It follows that if the US Supreme Court upholds the US Court of Appeal's ruling that US courts lack jurisdiction and cannot therefore undertake that judicial review, the United States would incur international responsibility for breach of the aforementioned obligation. If, instead, the Supreme Court holds that US courts have jurisdiction to consider respect for the UN Covenant to the benefit of Guantánamo detainees, it will prevent the United States from incurring international responsibility.

However, it is questionable whether the Supreme Court may legally take the latter position, given that the US government, upon ratification of the UN Covenant, made a declaration whereby, for the United States, Articles 1–27 are not self-executing.<sup>46</sup> This declaration may impact on the power of American courts to take the Covenant's provisions into account, with a view to seeking guidance from them.

The complex problems relating to non-self-executing treaties are outside the ambit of this paper. For these purposes, it may suffice to recall an elementary notion: a non-self-executing treaty rule is a rule that may not be applied by national courts before the appropriate implementing legislation is passed by the competent law-making bodies. However, even if such implementing legislation is not adopted, the international obligations laid down in the treaty rule are binding upon the state. It follows that the state incurs international responsibility whenever national courts are unable to act upon the treaty rule at issue. If, instead, the relevant national authorities recognize that national law is already in keeping with the treaty rule under discussion, no specific implementing legislation is required; consequently, national courts are not barred from deciding on the merits of any question brought before them based on the treaty rule at issue.

This is precisely what has happened in the case of the UN Covenant. The US government has officially stated, in its 'First Report to the UN Human Rights Committee', that:

... the United States does not believe it necessary to adopt implementing legislation when domestic law already makes adequate provision for the requirements of the treaty. .... because the basic rights and fundamental freedoms guaranteed by the Covenant on Civil and Political Rights (other than those to which the United States took a reservation) have long been protected as a matter of federal constitutional and statutory law, *it was not considered necessary*

<sup>46</sup> See the US Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Congress Record 8070 (1992). The Resolution reads 'The Senate's advice and consent is subject to the following declarations: (1) that the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing'.

*to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law*<sup>47</sup> [emphasis added].

In turn, the Committee, in its Concluding Observations of 1995, took note of the US government's official statement and pointed out the following:

The Committee takes note of the position expressed by the delegation that, notwithstanding the non-self executing declaration of the United States, American Courts are not prevented from seeking guidance from the Covenant in interpreting American law.<sup>48</sup>

In summary, the public position taken by the competent US authorities is that US legislation is fully consistent with the Covenant provisions binding upon the United States. Therefore, it is not necessary 'to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law'. This position must have a direct bearing on US courts, including the Supreme Court. The latter Court must take that position into account and, consequently, interpret and apply US rules on *habeas corpus* and due process in light of the Covenant's provisions. In particular, the US Supreme Court must construe those US rules in such a way that the UN Covenant provisions are not breached. The Court is under the obligation to 'seek guidance from the Covenant in interpreting American law'. It is only in this way that the US Supreme Court may prevent the United States from incurring responsibility under international law.<sup>49</sup>

47 *First U.S. Report under the International Covenant on Civil and Political Rights (July 1994)*, CCPR/C/181/Add.4 and HRI/CORE/1/Add.49.

48 *Concluding Observations of the Human Rights Committee*, 3 October 1995 (CCPR/C/79/Add.50; UN doc. A/50/40, paras 263–304), at para. 276. See also L. Henkin, 'International Human Rights Standards in National Law: the Jurisprudence of the United States', in B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (Dordrecht: Nijhoff, 1997) 189, particularly at 194, note 23: 'The Bush Administration did not seek implementation of the ICCPR apparently because it considered that the Covenant, with US reservations, created no obligation for the US to do more than was already provided in US law'. The US commitment to enforce human rights law is expressly restated, on the level of domestic law, in s. I(a) of the Executive Order 13017, 10 December 1998, 38 *ILM* (1999) 493–495, at 493.

49 Once more, the same considerations apply to the Convention on torture. Although the US ratification of 21 October 1994 is accompanied by a declaration (similar to that concerning the UN Covenant) expressly designed to exclude the self-executing character of articles 1–16 of this Convention, and although the contents of this declaration were restated in the *Report* submitted by the US to the Committee against Torture on 15 October 1999 (*CAT/C/28/Add.5*, 9 February 2000, para. 60; see also *Annex I* for the above said declaration), in the same *Report*, it is pointed out that: a) the Convention on Torture is constantly referred to in US Case Law (para. 61); b) the ban on torture and inhuman or degrading treatment is laid down in a *rule of customary international law*, and, *as such*, the *customary rule is normally applied by US courts* (para. 62). The UN Committee took account that the ban on torture is operative in the US legal system: see *Conclusions and Recommendations of the Committee against Torture*, 19 May 2000, U.N. Doc. A/55/40, para. 178(a) (see however also para. 180(a), where the Committee recommends the adoption of a domestic criminal provision specifically addressing torture).