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BOFAXE



Unnamed Detainees at Guantanamo; Decision for the Detainees. Score before the District Court now: 2-1 in favour of the Detainees

Replies and Comments

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Focus

The Court

Petitioners have stated valid claims under the 5th amendment to the U.S. Constitution and the procedures implemented by the government **violate due process of law.**

"Nothing in the [3rd] Convention itself or in Army Reg. 190-8 authorizes the President to rule by fiat that an entire group of fighters covered by the 3rd GC falls outside of the Art.4 definitions of POWs. To the contrary [...] **the President's broad characterization [...] cannot substitute for an Article 5 tribunal's determination** on an individual basis of whether a particular fighter complied with the laws of war or otherwise falls within an exception denying him POW status."

The third recent decision of the U.S. District Court for the District of Columbia was rendered on 31 January 2005 and is termed simply "*In re Guantanamo Detainees Cases*". The 11 petitioners/detainees are identified solely by initials. It is the third decision recently rendered by this court but is issued by a third judge, Joyce Hens Green. The first case, decided by Judge Robertson (*Hamdan*, 8 November 2004) found in favour of the detainees. The second case decided by Judge Leon (*Khalid*, 19 January 2005) found in favour of the government.

This case found in favour of the detainees.

The issues are not different from the prior cases, but the reasoning of this judge agrees with that of *Hamdan* and disagrees with that of *Khalid*.

The Court first goes through an exhaustive analysis of the cases interpreting the 'due process clause' of the 5th amendment to the U.S. Constitution for the past 100 years. It adopts the reasoning of the Supreme Court in *Rasul*, in particular that the base at Guantanamo is such that it is tantamount to sovereign territory of the U.S. and holds that the 5th amendment applies there to the detainees held there even though they are aliens (non-U.S. citizens).

The Court also followed the reasoning of the Supreme Court in *Hamdi* and found that the argument of the government that the detainees could be held as long as the 'war against terrorism' continues, could amount to a life sentence and thus the detainees had sufficient interest to litigate their detention, that the detainees must be given notice of the grounds for their detention and a fair opportunity to rebut the government's evidence before a neutral decision-maker.

The Court also found that the CSRT (Combatant Status Review Tribunal) did not grant the detainees such a fair opportunity because: 1. the detainees were not provided assistance of counsel; 2. the detainees were not provided with sufficient notice of the factual basis for their detention because certain evidence was not disclosed to them; and 3. some of the evidence against them may have been obtained by torture or other coercion.

Regarding the GCs specifically, attention was drawn to GC III, Articles 4 and 5. First, the Court found, in agreement with *Hamdan*, that the GCs are self-executing. Next the Court addressed President Bush's early determination that there is no doubt that the detainees are not entitled to POW status. The Court held that such a blanket determination by the president was not proper. "[...] The 3rd GC does not permit the determination of POW status in such a conclusory fashion." The determination must be made on an individual basis and if there is any doubt, it must be resolved by a competent tribunal. "The President's broad characterization [...] cannot substitute for an Art. 5 determination."

The international law commentators and the ICRC have been saying this for several years now and their position has now been voiced by at least two U.S. court decisions.

As mentioned in a recent Bofaxe, the split in decision among the judges of the DC District Court must be resolved by the Court of Appeals and eventually by the U.S. Supreme Court. It is unfortunate that the attempt to do this by bypassing the Court of Appeals and asking the Supreme Court for a final and definitive decision was recently rejected by the Supreme Court in the *Hamdan* case.

Responsibility

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