



# BULLETIN

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## COMMENTARY

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### USA and Laws of War (*Al-Bihani v. Obama*)

by Rafał Tarnogórski

*On 5 January 2010, the U.S. Federal Court of Appeal rejected an appeal by a Guantanamo detainee, a Yemeni Ghaleb Nassar Al-Bihani, who was challenging the legality of his extrajudicial detention and alleging a violation of the principles of international laws of war. The court found the detention lawful in the light of U.S. law.*

Al-Bihani based his petition on the *habeas corpus* principle, which prohibits detention without indictment and trial, and he alleged the violation of the international laws of armed conflict. He claimed that “support” of the Taliban regime or of Al-Qaeda as an independent basis for his detention at Guantanamo was unlawful. Not having been a member of Afghan armed forces but merely a cook in a paramilitary group known as the 55<sup>th</sup> Arab Brigade, which was a not part of the Taliban armed force, he should have been treated as a civilian. He could have been detained only for a direct armed attack on U.S. armed forces or on those of coalition allies. Upon his capture he was entitled to the prisoner of war status, and as a POW he should have been released, because the conflict had ended and the Taliban had been defeated.

The trial court rejected his arguments on the grounds that his detention as a member of a force supporting the Taliban regime and Al-Qaeda—evidence of which was drawn from his own admissions during interrogations—was lawful. When hearing the appeal, the Court of Appeal acted on the premise that U.S. law rather than “vague treaty provisions and amorphous customary principles” was the sole appropriate standard by which to judge the facts of the case. The detention was lawful because the government acting within the bounds of domestic law, rather than international law, is the agency determining the terms and the legal criteria for the identification and detention of suspects. The international laws of war are not a source of authority for U.S. courts; their significance is ancillary and limited. In this context the court found the citing of international law without purpose and effect.

The significance of this appellate ruling extends beyond one specific case of a Yemeni petitioner kept in detention. Firstly, it could sway the direction of judicial decisions in similar cases—though this seems rather unlikely in view of the shift of the Obama administration’s stance on the treatment of enemy combatants and Supreme Court’s *Hamdi v. Rumsfeld* (2004) and *Boumediene v. Bush* (2008) decisions. Secondly and more importantly, the court took a position on the powers of the U.S. president as the commander-in-chief under the 18 September 2001 Authorization for Use of Military Force against states, organizations and persons responsible for the terrorist attacks of 11 September 2001. The court found that these presidential prerogatives were not limited by the international laws of war, which had not been transposed as a whole into the domestic law. It is for the legislative branch, not for international law, to delineate the limits of the president’s constitutional powers to use armed force. These powers extend to leaving at the president’s discretion the detention of persons deemed to be enemy belligerents or supporters thereof.

The *Al-Bihani v. Obama* decision is consistent with the U.S. dualist stance on international law, as reflected, for instance, in the Supreme Court’s *Medellin v. Texas* ruling (2008). The United States respects binding international laws, but the extent of its commitment is at all times determined by the American sovereign. The ruling on Al-Bihani’s appeal does not amount to a permission to violate international law; it only means that international law does not constitute the basis for judicial decisions of a U.S. court. This judgment is without prejudice to the binding power of international humanitarian law, yet it effectively restricts the application of international public law and contributes to cementing a negative image of the U.S. as a power given to opportunistic treatment of international standards.