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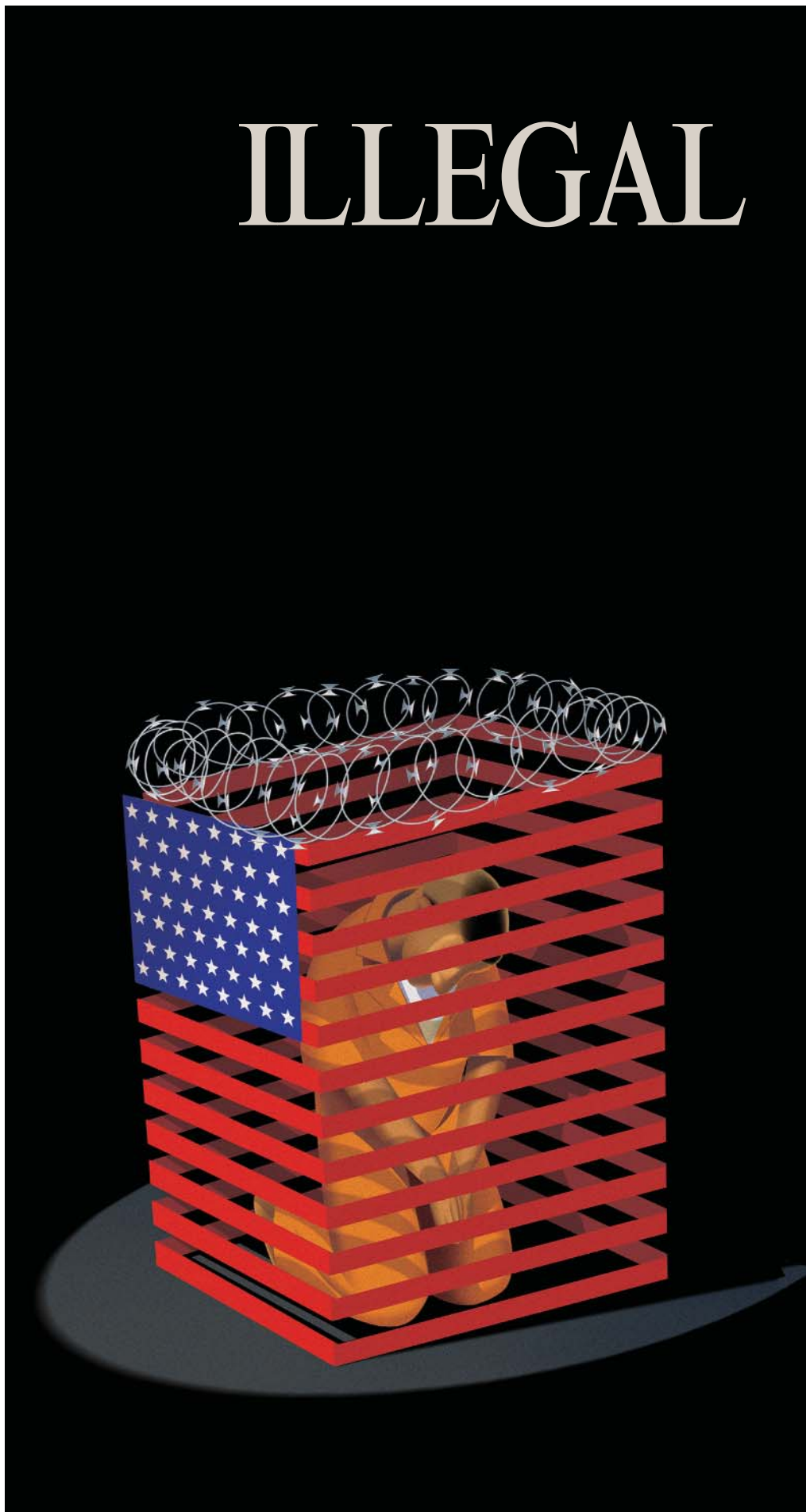
*represents the official position of the ASICJ, whose website is [www.icj-aust.org.au](http://www.icj-aust.org.au).*

The detention of David Hicks and Mamdouh Habib contravenes international law. The proposed US military commission to try the detainees does not offer due process of law.

**I**N LATE 2001, AUSTRALIAN CITIZEN David Hicks was captured in Afghanistan “in a conflict situation. He was with Taliban forces. He was captured by the Northern Alliance Forces and handed over to United States military custody”.<sup>1</sup> There are allegations the Taliban forces, including Hicks, trained with al-Qaeda.

At around the same time, fellow Australian Mamdouh Habib was arrested in Pakistan on suspicion of association with a terrorist organisation. He was not part of a State’s armed forces and claims he was

# ILLEGAL



# IMPRISONMENT at Guantanamo Bay

By NICHOLAS McNALLY

in Pakistan merely to find a school for his children.

Two and a half years have passed, yet neither of them has been charged. The US claims they are 'enemy combatants' and no established regime of international law applies to them. The Australian Section of the International Commission of Jurists (ASICJ) argues that Hicks is a prisoner of war (POW) under the Third Geneva Convention, and Habib is a suspected criminal who should be dealt with under the International Covenant on Civil and Political Rights (ICCPR). The ASICJ says there is no category of 'enemy combatant' under international law and that labelling the prisoners such does not get around existing law in respect of their treatment.

## What law applies in Guantanamo Bay?

Following the Spanish-Cuban-American war, the Cuban Constitution of 1901 was adopted which restricted Cuba's ability to run its own affairs and allowed the USA to intervene directly in Cuban affairs.

In February 1903, the US signed a lease covering Guantanamo Bay with the US-supported Cuban president for use as "coaling or naval stations only and for no other purpose".<sup>2</sup> The lease was varied in 1906 and again in 1934, to add a requirement preventing termination of the lease without mutual consent, unless the USA abandoned the base. The US occupation of the Bay survived the 1959 Revolution and remains a significant bone of contention with the Castro regime, which refuses to accept lease payments from the US.

The lease provides: "While on the one hand the United States recognises the

continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas..."<sup>3</sup>

The US Supreme Court has agreed to consider the issue as to whether prisoners at Guantanamo Bay are entitled to the rights under various US Constitution Amendments. They provide, inter alia, for protection against self-incrimination and cruel and unusual punishment, for equal protection under the law, the right of people not to be deprived of liberty without charge or due process of law, to be informed of allegations against them, to a speedy and public trial by jury, to call and to cross-examine witnesses, and to retain counsel of their own choosing.

US State courts have already considered the issue and denied these protections to non-US citizens held at Guantanamo Bay. They rejected the argument that a person, of whatever nationality, deprived of liberty by US officials, is necessarily entitled to the Constitutional rights. They concluded foreign nationals held outside the USA are not protected by the Constitution, and despite America's "complete jurisdiction and control" over Guantanamo Bay, Cuba's "ultimate sovereignty" is preserved in the 1903 lease and therefore it is not US territory. No prisoner has embarked on the futile exercise of a habeas corpus application in Cuba's courts.

The main authority cited is a 1950 US

Supreme Court decision, *Johnson v. Eisen-trager* 339 U.S. 763, which related to German POWs captured in Japan during World War II. The Supreme Court rejected the application of the Fifth Amendment to foreign nationals overseas, stating "if the Fifth Amendment confers its rights on all the world ... (it) would mean that during military occupation, irreconcilable enemy elements ... could require the American judiciary to assure them" of the fundamental rights in all of the amendments to the Constitution. That was regarded as untenable in 1950.

ASICJ hopes this year's review by the US Supreme Court will take into account the evolution of international law and principles of justice and administrative accountability, to conclude it is time to change the *Eisen-trager* principle such that prisoners detained and tried by the US ought to be afforded the protections espoused in the US Constitution. The Court should also look beyond the Constitution to questions of natural justice and other established grounds for judicial review of State action.

Bearing in mind that the International Criminal Court has no application to the US government or military, if the *Eisen-trager* principle is upheld, then Guantanamo Bay is in effect the only jurisdictional void on the planet, and the prisoners there are completely subject to the whims of the US administration. The proposed military commission established for prisoners who are charged comes nowhere near a system of justice contemplated by the US Constitution or international law, and is a perfect example of that abject vulnerability.



**Australian citizen David Hicks has been detained by the US military at in Guantanamo Bay, Cuba, for two and a half years without charge.** AAP PHOTO/HO

#### **David Hicks as a POW**

Article 2 of the Geneva Convention Relative to the Treatment of POWs (The Third Geneva Convention) provides that the Convention applies to all cases of declared war or of any other armed conflict between two or more States. It also applies to all cases of partial and total occupation of a State. It is binding on all high contracting parties, even if the relevant conflict is with a State that is not a party. The USA and Australia are parties to the Convention.

On 20 September 2001 in a joint session of Congress, US President George W. Bush demanded that the Taliban surrender al-Qaeda leaders based in Afghanistan, saying, "the Taliban must act and act immediately. They will hand over the terrorists or they will share their fate". The Taliban did not comply and on 7

October 2001 President Bush announced the commencement of hostilities in Afghanistan. He described the action as "carefully targeted" and stated its aims were to "cut the military capability of the Taliban regime" with attacks on military installations of the Taliban and al-Qaeda training camps. Al-Qaeda was sponsored and supported by Afghanistan and its leader, Osama Bin Laden, was based there.

There is no multilateral treaty or convention defining "war" under international law. The leading scholarly definition by L. Oppenheim is: "War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."<sup>4</sup>

The 7 October 2001 declaration by President Bush constituted the commencement of a state of war within the scope of Article 2, but in any event, the action constituted armed conflict between States which is sufficient for the Convention to apply.

Article 4 of the Convention defines POWs to include:

□ Members of the armed forces who are party to the conflict, including members of other militias or volunteer corps.

□ Members of other militias or volunteer corps, including organised resistance movements belonging to a party to the conflict, provided that they are commanded by a person responsible for his or her subordinates, that they have a fixed distinctive sign recognisable at a distance, that they carry arms openly and that they conduct their operations in accordance with the laws and customs of war.

□ Members of regular armed forces who profess allegiance to a government or an authority not recognised by the detaining power.

There are further categories not relevant to Hicks. Clearly, his capture with Taliban forces falls within one or more of these categories and he is therefore a POW at international law. Any alleged offences he has committed through training with Taliban forces in accompaniment with al-Qaeda members must be dealt with under the Convention.

Article 5 of the Convention provides

that if any doubt exists as to whether a person is a POW "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal". Until a tribunal is properly constituted under Article 5, Hicks must be treated by the US as if he is a POW.

#### **General treatment of POWs**

The Third Geneva Convention requires that the treatment of POWs must be on the basis that their detention is not punitive, and is permitted merely to remove them from the conflict zone, and cannot be used to undertake interrogations. POWs must be respected and provided beneficial treatment in conditions rendering their removal from the conflict as comfortable as possible until it is over. The motivation for these international laws of war were the atrocities against POWs in World War II.

Part II of the Convention requires POWs be humanely treated and protected, particularly against violence, intimidation, insults and public curiosity. Reprisals against POWs are prohibited, and they are entitled to respect for their persons and honour. POWs retain the full civil capacity they enjoyed at the time of their capture and the detaining power may not restrict the exercise of the rights such capacity confers, except insofar as the captivity requires. The fact that prisoners at Guantanamo Bay have been removed to a place where seemingly no court can test the lawfulness of their detention, demonstrates an intention by the US to ignore this requirement.

Part III provides that every POW need only give their name, rank, serial number and date of birth, and must be given ID tags containing that information. Article 99 further provides "No moral or physical coercion may be exerted on a POW in order to induce him to admit himself guilty of the act of which he is accused". However, Hicks has been interrogated using psychological and physical coercion in clear breach of the Convention, and he is referred to only by his prisoner number.

Article 21 states: "POWs may not be held in close confinement except where necessary to safeguard their health...". Article 25 requires POWs be quartered in conditions as favourable as those for the forces of the detaining power. In clear breach, Hicks is reportedly held in solitary confinement in a cage, without an adequate toilet, exposed to floodlights 24 hours per day, without adequate exercise or recreation periods.

Article 70 requires that without delay after arrival at camp, every POW may inform their family of their capture, location and state of health. POWs may receive parcels of foodstuff, clothing and other various items. By contrast, prisoners are held at Guantanamo Bay without

their families knowing their whereabouts. Hicks was not allowed to correspond with his family until many months after his captivity.

The laws regarding treatment of POWs go into detail that cannot be outlined in this report. Clearly, the treatment of prisoners at Guantanamo Bay falls far short of these minimum standards.

Part IV of the Convention deals with the termination of captivity. Article 118 states that "POWs shall be released and repatriated without delay after the cessation of active hostilities". There is no qualification of that requirement in the Convention, unless the POW is under prosecution for alleged offences. That issue is dealt with below.

Article 118 raises the question as to whether active hostilities have ceased in Afghanistan. Despite the US Government's announcement of the end of major hostilities, it is arguable hostilities are ongoing. There is little doubt, however, that the USA has succeeded in its objective to "cut the military capability of the Taliban". That regime no longer rules Afghanistan, and the ongoing skirmishes are more in the nature of an armed assault on US forces still in occupation there.

Whether or not active hostilities are continuing, Hicks is an Australian national, and if he were to be repatriated, he would not be sent back to the conflict zone. His immediate release to Australia is entirely consistent with the spirit and purpose of the Convention, and in the absence of his being charged with any offences, he ought to be repatriated immediately.

#### **Prosecution of Hicks as a POW**

Regarding the prosecution of Hicks as a POW, Article 82 of the Third Geneva Con-

be judicially prosecuted by the US merely for membership of the enemy's forces, nor for participation in the conflict, unless the manner in which he did so was in breach of a law of the US applicable to its own soldiers.

Article 103 requires that judicial investigations be conducted rapidly so the trial can take place as soon as possible. Article 84 states: "In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognised, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105".

The military commission in Guantanamo Bay is not independent or impartial because it will be presided over by the military officer who approved any charges at first instance and who is under the control of the Commander-in-Chief, President Bush. Hearings and appeals remain entirely within the military command structure.

Further, Article 105



**Another Australian citizen, Mamdouh Habib, seen here with his family, has been held by US military forces since his arrest in Pakistan in October 2001.** AAP IMAGE

**“ASICJ rejects the contention that the only way to respond to terrorism is to abandon fundamental human rights standards, and to depart from well-established principles of justice and civil liberty.”**

vention states that a POW is subject to the laws in force in the armed forces of the detaining power, and that it is justified taking judicial or disciplinary measures for offences committed by a POW. If the relevant actions of a POW would not also be punishable against a member of the detaining power's forces, they should entail disciplinary punishment only and cannot result in a judicial prosecution. Accordingly, it is not lawful for Hicks to

requires that in the conduct of judicial prosecutions, POWs are entitled to a range of rights very similar to the US Constitutional protections discussed above. With the military commission, prisoners cannot choose their own lawyer. One is appointed from the ranks of the US military, which clearly creates a conflict of interest. The lawyers cannot confer with their clients without being monitored and will not have full access to other witness-

es at Guantanamo Bay. They will not be able to cross-examine all witnesses against their clients.

Article 106 of the Convention provides "every POW shall have, in the same manner as the members of the armed forces of the detaining power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial". In the case of the military commission, there is no right of appeal to the civil court system, despite US soldiers having that right in court martial prosecutions. Appeals will be heard by a panel of military lawyers appointed by the Secretary of Defence, Donald Rumsfeld, and the final avenue of appeal is to President Bush, who has already expressed negative views about Hicks and Habib.

On 19 July 2003, Minister for Foreign

Affairs Alexander Downer said, "We obviously have a view that, if David Hicks is to be charged and brought before a military commission, the equivalent of a court martial, that the proceedings should be fair and consistent with the types of proceedings that we would have here with a court martial law, some similar kind of judicial process". The government's view appears to have changed; it now supports the military commission which does not comply with such standards.

**Prosecution of Habib and other non-POWs**

The 'war on terror' does not constitute war in terms of international law. It is more a figure of speech than a legal term of art. It is more accurately described as a non-State-specific campaign against global organised crime.

The ICCPR, to which the USA and Australia are parties, provides for the treatment of people suspected of criminal offences. Mamdouh Habib falls into this category. For the sake of argument, if the US is correct in its assertion that Hicks is not a POW, then the ICCPR would apply to his case too.

Under Article 9 of the ICCPR everyone has the right to liberty and security of person, and no one may be arbitrarily arrested or detained. "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law ... Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him" and "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release".

Further, Article 9 provides "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

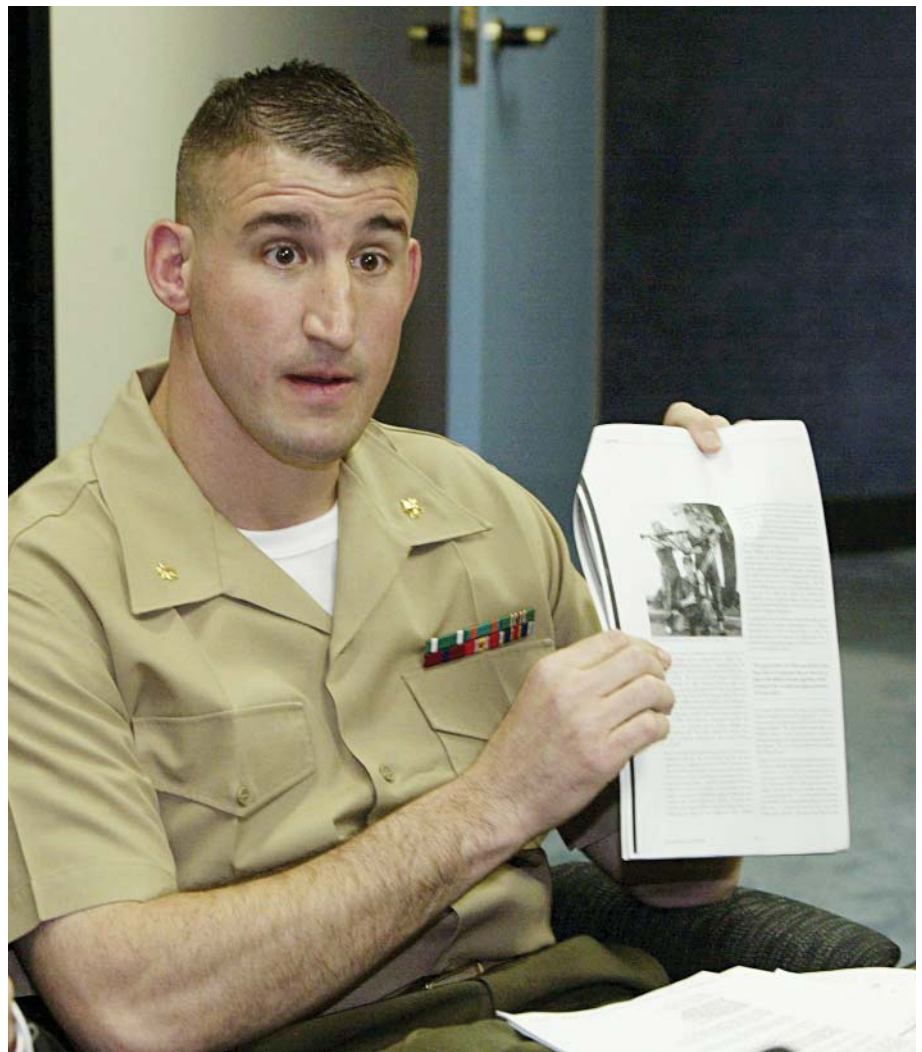
If the US State courts were correct that they have no jurisdiction to deal with Guantanamo Bay prisoners, then the USA is in breach of the ICCPR by not providing an alternative mechanism through which the lawfulness of their detention can be tested.

Article 14 requires a fair and public trial with minimum protections similar to the US Constitutional rights discussed above.

The observations above in relation to the military commissions and their non-compliance with the Third Geneva Convention apply equally in relation to the ICCPR.

**Summary of prosecutions in the proposed military commissions**

The military commission is not a court



**At a recent press conference in Adelaide, US defence counsel Major Michael Mori expressed his concern about the media's frequent use of a posed photo showing Hicks holding a weapon.** PHOTO: AAP IMAGE/ROB HUTCHISON

subject to the rule of law. It is not even a court martial subject to US, Australian or international law. The procedures do not allow for a fair trial, and its set-up is not in compliance with the separation of powers doctrine preventing executive control over what clearly ought to be judicial proceedings.

The inherent unfairness of the military commission is well documented by legal bodies around the world. Military lawyers appointed to represent prisoners by the US administration have bravely raised similar objections to those outlined here.

Major Mori, appointed to advise Hicks, has been strident in his objections to the military commissions. A fact that has not been widely reported is that Mori is part of the second batch of lawyers appointed, and that the first batch was sacked after raising concerns about the military commission set-up and procedures.

**Conclusion**

The indefinite imprisonment of people by the US without charge or trial at Guantanamo Bay is clearly illegal at international law. In the absence of any court through which the prisoners can judicially assert their rights, test the lawfulness of their detention, and (if charged) be tried

through due process of law, the prisoners are completely subject to the whims of the US administration. Such a situation is completely unsatisfactory and indefensible on any accepted legal grounds.

Australia's Attorney-General, Philip Ruddock, is reported as having said that Australia's opponents in the 'war on terror' do not respect the Geneva Conventions and international law and that as a result, we face a 'war' of a different nature requiring new rules and standards. ASICJ rejects the contention that the only way to respond to terrorism is to abandon fundamental human rights standards, and to depart from well-established principles of justice and civil liberty. To do so would be to attack the very foundation of our society, and may destroy the very fundamental freedoms we are eager to protect. If we proceed along that path, our adversaries will have already won. □

**ENDNOTES**

1. Daryl Williams MP, then Attorney-General for Australia, 17 January 2002.
2. Article II, Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, 23 February 1903.
3. Ibid, Article III.
4. L. Oppenheim, *International Law*, II, 202 (H. Lauterpacht ed., 1952). □