



INTERNATIONAL
COMMISSION
OF JURISTS

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NEWS RELEASE

Human Rights Damaged by Australian Government Stance on Guantanamo Bay

“The use of Military Commissions for Afghani prisoners of war held at Guantanamo Bay will be used in future as a precedent by military regimes to justify further abuses of human rights. The failure of the Australian Government to condemn the proposed Military Commissions proposed by the US is a further serious erosion of human rights,” said Steve Mark, Chairman of the Council of the Australian Section of the International Commission of Jurists.

“The United States of America cannot avoid its responsibility to persons who are clearly prisoners of war under the 1949 Third Geneva Convention. Even if there were a doubt about that status, the United States is bound to apply that Convention in the meantime and must establish a tribunal under Article 5 to determine the status of combatants and thus, treat them as prisoners of war until so determined,” said Mr Mark.

“In any event, there is no reason why Afghani military prisoners held should not be accorded the same conditions as other prisoners of war. Just calling them by another name such as “detainee” or “unlawful combatant” and holding them outside the boundaries of the United States or any other State’s direct jurisdiction does not entitle the US to avoid the Geneva Conventions which apply from the instant of capture under international law,” said Mr Mark.

“Any inquiry by a Military Commission, not staffed by legally trained personnel and with no judicial appeal, is clearly a breach of the right to a fair trial under the International Covenant on Civil and Political Rights (ICCPR) to which Australia and the United States are parties. It is a hearing by military personnel who are under the direct command of their chief, the head of the army, the President of the United States, who has already expressed views on the character of the six persons from outside the US who are likely to be subjected to some sort of hearing,” said Mr Mark.

The Military Commissions provide for a system of hearing and appeals entirely within the military command structure. Any 'appeal' will be heard by a special panel of military officers appointed by the Secretary of Defence who is responsible for subsequent review, with a final review by the President as Commander-in-Chief. This is to be contrasted to procedures involving US military personnel, who appear before Courts Marshall and have a right of appeal to a civilian judicial body.

"This trial by the Executive avoids the constitutional guarantees of the United States and breaches the doctrine of separation of powers applied in Australia, the United States and all democratic societies. This also breaches Article 14(1) of the ICCPR to which Australia and the US are parties," said Mr Mark.

The military order setting up the Military Commission provides that defence counsel will be assigned and supervised by a chief defence counsel who is appointed by the Department of Defence. If an Afghani prisoner of war instructs civilian counsel there is no legal aid. Counsel will not be subject to confidentiality but will be subject to monitoring of communications with clients and will probably be excluded from those parts of any hearings of "protected evidence" where it is held necessary to protect the interests of the United States. The hearing will not be subject to the normal rules on evidence.

"The military order covers conduct taking place in the context and associated with armed conflict which is a broadening of the definition of 'armed conflict' covered by the 1949 Geneva Conventions. Australia's following of the United States' proposals without question is a total abrogation of its responsibilities to Australian citizens both now and in the future, and not only to those citizens presently held at Guantanamo Bay. There is no valid reason why trials could not occur under the judicial system of the United States," said Mr Mark.

"A person held in a cage with sensory deprivation and without access to family and to lawyers in all likelihood will not be capable of making admissions or pleading to any charges. There may also be issues about fitness to stand trial, but without outside access, there is no way of determining their state of health. We do not at this stage know what, if any, offences are alleged to have been committed. Furthermore, there is a real likelihood that the alleged acts which will constitute the crimes these prisoners will ultimately be charged with, were even offences under existing law at the time the acts were allegedly committed. Retrospective creation of offences is prohibited under United States', Australian and international law," said Mr Mark.

"Prisoners of war should be treated as such and not subject to ad hoc trials with rules or procedure designed to provide an unfair advantage to the prosecution," said Mr Mark.

[Extracts of ICCPR attached](#)

Extracts from the International Convention of Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. 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.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 14

1. 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 in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) 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;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.