

## THE GUANTANAMO BAY PRISONERS: ISSUES FOR NEW ZEALAND

### Introduction

1. Since the beginning of the United States of America's "war on terror" prisoners have been detained in the USA military camp in Guantanamo Bay Detention Centre, Cuba. Both the continued detention of prisoners and the mode of trial established for them have raised concerns nationally and internationally. This is of public interest in New Zealand with respect to the international law aspects of the situation, but, more particularly, through the possible involvement with the USA's Guantanamo Bay Detention Centre.
2. The first specific concern for New Zealand is the detention at Guantanamo Bay of any prisoners who might have been captured by members of the New Zealand armed forces and handed over to USA authorities. The second concern is the possible detention of New Zealand citizens or permanent residents in the Guantanamo Bay Detention Centre.
3. Some of the prisoners have been detained for several years, and none can expect to be tried by a civilian court or even by regular court martial while in USA custody. The procedures set in place by the USA involve the use of military commissions, established by presidential executive order.

### Background

4. The detention of prisoners at Guantanamo Bay must be seen in its wider context, both legal and political. This can be traced back to 1991 and the aftermath of the Gulf War. Perhaps more importantly, the 11 September 2001 attacks on USA cities caused a psychological reaction in the USA which was reflected in the actions of its government.
5. The principal actions relevant to the current Guantanamo Bay issue were the more recent USA wars in Afghanistan and Iraq. The USA was engaged in "police" operations against terrorists and their allies in Afghanistan, the al-Qaeda and the Taliban.<sup>1</sup> Frank Taylor, the USA Ambassador at Large and Co-ordinator for Counter-terrorism briefed the North Atlantic Council on 2 October 2001 on the results of investigations into the 11 September 2001 terrorist attacks against the USA. As a result of the information he provided to the Council, it was resolved that the individuals who carried out the attacks belonged to the world-wide terrorist network of al-Qaeda, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan.<sup>2</sup> This regime was therefore a major USA target.
6. Disquiet grew at the uncertain aims of the operations,<sup>3</sup> and the treatment of prisoners by USA authorities, particularly those sent to Guantanamo Bay.<sup>4</sup> The jurisdiction of the military over enemy belligerents, prisoners of war or others charged with violating the law of war is fairly clear.<sup>5</sup> This is not unrestricted however. The USA Government decided that it would apply the rules of the Third Geneva Convention, which governs the treatment of prisoners taken in conflict, to at least some detainees<sup>6</sup> – though not all as international law requires. However, political factors have ensured that the USA authorities have treated prisoners taken during some subsequent operations in Afghanistan in an especially strict manner.<sup>7</sup> The law of war applies if there is an armed conflict and the USA has been reluctantly compelled to acknowledge this, in practice if not officially.
7. Failure to comply with such norms would seriously weaken the claim by the USA to be acting in accordance with international law in its operations in Afghanistan. Either the operation is one in which there is international armed conflict – in which case the detainees are automatically entitled to the protection of the Third Geneva Convention, or it is not. If the detainees are "merely" terrorists, and not entitled to this protection,

then it is not an international armed conflict. The particular difficulty for the USA is that it has treated Taliban members as terrorists, though they represented the de facto Government of Afghanistan at the time that they were captured.<sup>8</sup>

8. The USA President's war powers include the power to capture and detain his enemies.<sup>9</sup> But this power does not exist in a legal vacuum; it is restrained by international legal principles and by the law of the USA itself. This includes the classification and treatment of prisoners of war, and the mode of trial of such individuals. Prisoners captured in Afghanistan and elsewhere as part of the USA war on terror who have been incarcerated in Guantanamo Bay are in a legal blind spot. They are not subject to civil law (because Guantanamo Bay is part of Cuba but Cuban writ does not run within its boundaries). USA military law applies in the base and Guantanamo Bay is controlled by executive order, with only limited – and uncertain – oversight by civilian courts.

### **Legal environment**

9. There have been a number of court cases in which the legality of detention at Guantanamo Bay has been challenged.<sup>10</sup> In *Hamdan*<sup>11</sup> the USA District Court concluded in a judgment released 8 November 2004 that the Third Geneva Convention<sup>12</sup> is applicable to the conflict in Afghanistan, at least while it was characterised as an international armed conflict. Notably, it cites article 102 of the Third Geneva Convention: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Charter have been observed."<sup>13</sup>
10. *Hamdan* was captured in Afghanistan during hostilities. He had asserted his entitlement to prisoner of war status under the Third Geneva Convention. The USA Government had not convened a competent tribunal to determine his status, as was required by article 5 of the Third Geneva Convention.
11. The USA Government had argued that *Hamdan* and other members of al-Qaeda were not entitled to prisoner of war status because they did not satisfy the test of article 4A(2) of the Third Geneva Convention in that they did not carry their arms openly and did not operate under the laws and customs of war. This was rejected by the court. The court cited the International Court of Justice judgment in the *Nicaragua*<sup>14</sup> case that in international armed conflict Common Article Three of the Geneva Convention (CA 3) constitutes a minimum standard. The court also affirmed that CA 3 applies in both international and non-international armed conflict. The Third Geneva Convention applied to all persons detained in Afghanistan during hostilities there. Even if *Hamdan* were not entitled to prisoner of war status he would be entitled to all the protections and rights conferred by CA 3 – which he had been denied.
12. The court held, however, that an enemy combatant could be detained for the duration of hostilities, so the detention of *Hamdan* was not unlawful per se.
13. The judgment was appealed to the Court of Appeals for the District of Columbia Circuit. Argument before the court was set for 8 March 2005.
14. On 19 January 2005 the USA District Court for the District of Columbia (under a different judge) gave a contrary decision in *Khalid v Bush*. This upheld the reasoning of the *Eisentrager* case, excluding the jurisdiction of the courts despite the decision of the USA Supreme Court in *Rasul* in 2004 that federal courts had jurisdiction to hear such cases. No clear guidance is yet forthcoming from the courts.

### **Prisoners captured by New Zealand armed forces**

15. Some prisoners held by the USA in Guantanamo Bay were captured in Afghanistan and elsewhere by the armed forces of USA allies. This potentially has included prisoners captured by members of the New Zealand armed forces.
16. The conduct of members of armed forces is subject to strict limitations. One of these is a prohibition on the ill-treatment of prisoners. If the USA treatment of prisoners is contrary to international law – or of USA civil law – it may be illegal for New Zealand soldiers to hand over prisoners to the USA authorities in the knowledge that they would then be subjected to unlawful detention.
17. Members of the New Zealand armed forces may hand over prisoners they have taken to the armed forces of the USA despite knowing that those prisoners might then be incarcerated at Guantanamo Bay contrary to international law. New Zealand commanders would be in an invidious position, subject to international law, yet co-operating closely with USA forces. Failure to hand over prisoners would strain New Zealand-US relations, and may be contrary to the agreement under which New Zealand forces are assigned to USA command in Afghanistan and elsewhere.
18. Unlike USA soldiers, New Zealand commanders – and soldiers – are liable to prosecution in the International Criminal Court for war crimes. The USA is not a party to the Rome Statute under which the Court was established.

### **New Zealand citizens and permanent residents held prisoner**

19. There have been Australians detained at Guantanamo Bay, but no known New Zealanders. Most UK and Australian prisoners have been released or promised “speedy trials”, but they have still been subject to several years’ detention. Doubts also remain as to the legality of the proposed trial procedures.
20. In the event that any New Zealand citizens or permanent residents were held prisoner at Guantanamo Bay the New Zealand Government would be in a difficult position. While ostensibly similar to that of Australia or the United Kingdom, New Zealand’s more dis-engaged policy over Iraq might leave this country in a much weaker bargaining position with respect to any nationals held captive by USA authorities.

### **Conclusion**

21. The detention of suspects by the USA in its Guantanamo Bay Detention Centre is a matter of public concern for New Zealand. The detention of any prisoners who might have been or may be captured in the future by members of the New Zealand armed forces and handed over to USA authorities may result in criminal liability for members of the New Zealand armed forces. There remains the possibility of detention of New Zealand citizens or permanent residents in Guantanamo Bay at some time in the future.

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<sup>1</sup> The Taliban movement was formed in Kandahar in 1994 by Islamic students who take a radical approach to interpreting Islam. The Taliban captured Kabul in September 1996 from Majaheedeen regime. The government of Burhan-ul Din Rabani was ousted. The Taliban government in Kabul was recognised only by Pakistan, Saudi Arabia and United Arab Republic – all of whom withdrew recognition following 11 September 2001 <<http://www.afghan-info.com/TALIBAN.HTM>>.

<sup>2</sup> NATO Update (3 October 2001) <<http://www.nato.int/docu/update/2001/1001/e1002a.htm#FN1>>.

<sup>3</sup> Ewen MacAskill, “Legal warning on war aims”, *The Guardian* (London), 4 October 2001.

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<sup>4</sup> Alexandra Poolos, “Afghanistan: Treatment Of Prisoners At Guantanamo May Injure US-British Alliance”, 21 January 2001 (Radio Free Europe/Radio Liberty); “White House Debates Status Of Detainees”, 29 January 2002 (Reuters).

<sup>5</sup> *Johnson v Eisentrager*, 339 US 763, 70 S Ct 936 (1950).

<sup>6</sup> “US will apply Geneva rules to Taliban fighters”, *Los Angeles Times*, 8 February 2002.

<sup>7</sup> For a failed attempt to apply for a writ of *habeas corpus* on behalf of the prisoners, see *Coalition of Clergy, Lawyers and Professors v Bush*, unreported, USA District Court for the Central District of California, A Howard Matz J, February 2002. The application failed on procedural grounds for lack of standing and jurisdiction.

<sup>8</sup> “The president has ... determined that the Geneva Convention does apply to the conflict with the Taliban in Afghanistan. It does not apply to the conflict with al Qaeda, whether in Afghanistan or elsewhere. He also determined that under the Geneva Convention, Taliban detainees do not meet the criteria for prisoner of war status”: Secretary of Defence Donald Rumsfeld and General Richard Myers, USA Department of Defence, News Briefing. News Transcript (8 February 2002) <[http://www.defenselink.mil/news/Feb2002/t02082002\\_t0208sd.html](http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html)> at 29 May 2002.

<sup>9</sup> *Hamdi v. Rumsfeld*, USA Supreme Court, N 03-6696, judgment delivered 28 June 2004.

<sup>10</sup> This includes a number of cases heard before the United States Supreme Court. See Diarmuid O’Scannlain, “*Habeas Corpus* and the Powers of the Commander-in-Chief in Time of War” [2004] *New Zealand Armed Forces Law Review* 33-35.

<sup>11</sup> DC, Civil Action Nr 04-cv-1519.

<sup>12</sup> Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

<sup>13</sup> Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

<sup>14</sup> *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), Merits, Judgment, ICJ Reports 1986, p 14.