

BAR HUMAN RIGHTS COMMITTEE OF ENGLAND and WALES

30th September 2003 – European Parliament

PRISONERS AT GUANTANAMO BAY

The Bar Human Rights Committee considers that detention of the prisoners without trial or the right of legal redress is in contravention of international law. We further take the view that trial by military tribunal in accordance with the Rules of Procedure published by the US Administration will necessarily entail the contravention of fundamental rights for those accused of criminal offences.

Capture and continued detention in the circumstances in which the prisoners are held in Guantanamo Bay and elsewhere outside the USA contravenes the Geneva Conventions as well as other international humanitarian instruments.

The UK Attorney General, Lord Goldsmith, has obtained a number of concessions for UK nationals to be tried. Of course we welcome and applaud his efforts to ensure that any trial of UK citizens currently held at Guantanamo Bay meets international standards of fair trials. However, no concessions can alleviate the contravention of fundamental rights which trial by military tribunal in accordance with the Rules of Procedure published by the US Administration will necessarily entail. Sadly, the concessions made so far fail to bring these proceedings anywhere near international minimum standards.

In addition, these concessions raise the question of how it can be compatible with principles of a fair trial that defendants of one nationality are treated more favourably than others?

One of the main problems preventing these tribunals from reaching a standard of acceptable fairness is the undertaking civilian counsel must make before that civilian counsel can act for one of the accused. He/she must agree the declaration affidavit attached to the Rules. It prevents the lawyer from acting freely and fairly in his client's interests. As you will be aware, the American Bar Association is highly critical of the tribunals and the limitations imposed on lawyers, and the National Association of Criminal Defence Lawyers have declared it unethical for any US lawyer

to appear at these tribunals (see NACDL Ethics Advisory Committee, August 2nd 2003). Both those professional bodies consider that counsel cannot act consistently with his/her professional duties if counsel complies with the restrictions imposed in the declaration by affidavit.

The military commission gives rise to the following breaches of fair trial standards as recognised in the Universal Declaration of Human Rights, the American Declaration of the rights and Duties of Man and the International Covenant on Civil and Political Rights: -

- (1) Impartiality – The commission consists of commissioned officers of the United States armed forces appointed by the President, the Secretary of Defence, or someone they delegate to the task. They report to the President or the Secretary of Defence or the appropriate delegate. They cannot be seen as impartial.
- (2) The Chief defence counsel will be a judge advocate of the US armed forces. All defence counsel reports to the Chief defence counsel who reports to the Secretary of Defence.
- (3) An accused may retain civilian counsel – but only at his own expense and only someone who is approved by the commission: -

“Favorable adjudication of the applicant's personnel security investigation must be completed before an applicant will be qualified for membership in the pool of Civilian Defense Counsel”

[14.3(iv)(b) of the Rules of Procedure]

Even such a counsel (together with the accused) may be excluded from parts of the evidence if it involves sensitive matters relating to security. So both accused and his counsel may be unable to answer some of the most critical parts of the evidence relied upon by the commission in reaching its verdict and sentence. Communication by defence counsel with any other person (e.g. an observer, co-defending counsel or consultant) about details of the case is prohibited.

- (4) Communications between civilian counsel and the accused will be monitored, in breach of the principle of confidentiality.
- (5) There is no right of appeal. The decision on guilt and sentence is automatically reviewed by a review body – again not independent, although it may include a civilian judge. A convicted accused may make written representations to the review body, but that review body does not have to take them into account. In any event, the Secretary of Defence and the President can ignore any recommendation that review body makes when they decide to approve the verdict and sentence.

- (6) There is no right to seek review before any domestic or international forum. In the US, as in the UK, miscarriages of justice have sometimes been unmasked only after protracted appeals. This prohibition on access to justice seems to indicate an unwillingness to submit these procedures to the scrutiny of domestic US courts or an international body which would rule upon whether they infringe the constitutional rights of the accused or represent an unacceptable breach of the standards of fair trial and treatment in international law.
- (7) Conditions of detention – the disgraceful and humiliating conditions of detention are well documented. The accused have had no access to a lawyer. Any confessions which may be used in evidence must be considered in the light of admissions made by some US servicemen that “torture lite” is regarded as acceptable. Torture is prohibited under international law in all circumstances.
- (8) There has been a persistent infringement of the right to consular access under the Vienna Convention on Consular Relations. As you will be aware, judgment was given against the US by the International Court of Justice for precisely such an infringement in *Germany v. U.S. (LaGrand)* 27th June 2001, a case in which the US defied the Court which had made an order for provisional measures in a capital case.
- (9) Delay – how now are the accused supposed to marshal any evidence they need to prove their innocence?
- (10) In the event of an acquittal, there is nothing to prevent the President returning the accused to detention, and no judicial process available to challenge such an act.
- (11) The death penalty. The procedures at the military tribunals – including the review – fails to satisfy the minimum protection for those facing sentence of death in international law.

The proposed military commission is an affront to civilised standards of fair trial and undermines the very values the US claims to promote. There is a very real risk that any trials will be unfair and any convictions correspondingly unsafe. Guantanamo Bay presents a spectacle incompatible with the standards of a democratic society.

Peter Carter QC

Chairman