



Amnesty International Australia Legal
Group (WA)

Chairman's Introduction to Debate

16 May 2003

***Sovereign Rights v Human Rights: Should
suspected terrorists be entitled to the
protections of international law?***

By the Hon David K Malcolm AC CitWA
Chief Justice of Western Australia

Freehills
St Georges Terrace
Perth, Western Australia



Ladies and Gentlemen

Welcome to the Amnesty International Australia Legal Group (WA) Debate. The topic of today's debate is, "Sovereign Rights v Human Rights: should suspected terrorists be given the protection of international law?"

Sovereign rights are the powers of a State, which allow it to function in the first place. These include the right to enact laws, the right to prosecute and punish infringements of the law, the right to defend itself against attack and the right to raise taxes in order to finance government expenditure.

Human rights are entitlements that humans have simply by virtue of their existence. These include the right to life, the right to health, the right to be treated humanely and the right to be free from arbitrary detention. Human rights are of such fundamental importance that the international community has made them the subject of many international laws and conventions in order to ensure their protection.

The sovereign rights of a State are limited internally by the State's Constitution and domestic laws. They are limited externally by international law. There is consequently a tension between the exercise of sovereign rights and the application of international laws which protect human rights.

This tension is clearly demonstrated in the context of the detention and treatment of suspected terrorists. Countries exercise their sovereign rights by detaining those whom they suspect are terrorists in order to ultimately protect the citizens of their country from terrorist acts. In the process, the human rights of those who are detained may be impinged upon.



The controversy surrounding the Guantanamo Bay detainees is an example of this tension. Since September 11, the United States has transferred about 650 men captured in connection with the Afghan war or who are suspected of links to al-Qaeda to the United States military base at Guantanamo Bay, Cuba. The detainees were originally held in makeshift open-air facilities with chain-link walls until they were moved to a newly constructed facility on 28 April 2002. According to press reports, the detainees spend twenty-four hours a day in small single-person cells, except for two fifteen minute periods of solitary exercise a week, as well as interrogation sessions. About 80 of the prisoners were held in special high security cells with steel walls that prevented them from communicating with other prisoners.

Although the United States has insisted that it treats the Guantanamo detainees humanely, the United States Government has refused to recognize the applicability of the Geneva Conventions to detainees with suspected al-Qaeda links and has refused to permit competent tribunals to determine whether any of the detained combatants are entitled to prisoner of war status. The Guantanamo detainees remain without a legal forum in which they can challenge their detention. A Federal Court Judge ruled on 30 July 2002 that United States Federal Courts do not have jurisdiction to hear constitutional claims brought by aliens held by the United States outside United States sovereign territory. Additionally, the United States denied the request made by the Inter-American Commission on Human Rights to provide for a lawful tribunal or court to determine the status of the detainees.

An initial question that arises in this debate is who is a “suspected terrorist”. As the old adage says, “One man’s terrorist is another man’s freedom fighter”. There is no universally accepted definition of terrorism. However, most definitions usually have common elements, such as the systematic use of physical violence, actual or threatened, against non-combatants but with an audience broader than the immediate victims in mind,



to create a general climate of fear in a target population, in order to effect some kind of political and/or social change.

The next question that arises is whether suspected terrorists should be given the protection of international law. When we speak of the protection of human rights under international law, we are mainly referring to the Geneva Conventions. The Geneva Conventions are a series of treaties that provide international humanitarian legal standards for states parties during armed conflicts. The Geneva Conventions of 1949 and the two Additional Protocols of 1977 are the definitive written sources of international humanitarian law. They codify the standards that countries of the world have set for humane conduct in war. They represent an assertion that even in wartime there are limits to what is acceptable behaviour.

The protection and treatment of captured combatants during an international armed conflict is detailed in the Third Geneva Convention relative to the Treatment of Prisoners of War, which defines prisoners of war (“POWs”) and enumerates the protections of POW status. Persons not entitled to POW status are entitled to the protections provided under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

It has been argued that the Geneva Conventions do not apply to the War against Terrorism. If the United States pursued terrorist suspects by traditional law enforcement means, the Geneva Conventions would not apply. However, the United States engaged in armed conflict in Afghanistan by bombing and undertaking other military operations. Consequently, the Geneva Conventions do apply to that conflict. By their terms, the Geneva Conventions apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”. Both America and Afghanistan are High Contracting Parties.



The level of protection that captured combatants, such as the suspected terrorists held at Guantanamo Bay, will receive depends on their legal status under the Geneva Conventions. Under the Convention, a captured combatant can have prisoner of war status. If this is the case, they will be given the full protections of the Third Geneva Convention. Persons not entitled to POW status, are entitled to the protections provided under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. There is argument as to whether Guantanamo detainees should be given prisoner of war status or in fact any coverage by the Geneva Conventions.

In January 2002, shortly after people were detained at Guantanamo Bay, United States Secretary of Defence, Donald Rumsfeld labelled the Guantanamo prisoners “unlawful combatants” who “do not have any rights under the Geneva Conventions”. He indicated that the prisoners would be treated “for the most part...in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate.” Other governments and human rights groups condemned the United States for failing to respect human rights and humanitarian law. In February 2002, the United States changed its position and said that the Geneva Conventions would apply to Taliban members. Although the United States acknowledged the general applicability of the Conventions to the Taliban detainees, the government unilaterally decided to deny all detainees POW status. Further, the United States government excepted al-Qaeda detainees from any coverage by the Conventions. Humanitarian groups and legal scholars maintain that in taking this stance, the United States has improperly interpreted its legal obligations under the Conventions.

Article 5 of the Third Geneva Convention requires the establishment of a “competent tribunal” to determine individually whether each detainee is entitled to POW status “should any doubt arise” as to whether a detainee meets the requirements for POW status contained in Article 4. The United States has not provided Guantanamo Bay detainees with a hearing before such a tribunal. It has been argued that a competent tribunal is



unnecessary because there is no “doubt” that the detainees fail to meet the requirements of Article 4(A)(2) for POW status. These requirements are that they have a responsible command, carry their arms openly, wear uniforms with distinct insignia, and conduct their operations in accordance with the laws and customs of war. However, it has been argued that under the terms of Article 4(A)(2), these four requirements apply only to militia operating independently of a government’s regular armed forces – for example, to those members of al-Qaeda who were operating independently of the Taliban’s armed forces. However, under Article 4(A)(1), these four requirements do not apply to “members of the armed forces of a Party to the conflict as well as members of militia...forming part of such armed forces.” That is, the four-part test would not apply to members of the Taliban’s armed forces since the Taliban, as the de facto government of Afghanistan, was a Party to the Geneva Convention. The four-part test would also not apply to militia that were integrated into the Taliban’s armed forces, such as, the Taliban’s “55th Brigade” which we understand is to have been composed of foreign troops fighting as part of the Taliban.

Administration officials have repeatedly described the Guantanamo detainees as including both Taliban and al-Qaeda members. A competent tribunal is thus needed to determine whether the detainees are members of the Taliban’s armed forces or an integrated militia, in which case they would be entitled to POW status, or members only of al-Qaeda, in which case they probably would not be entitled to POW status because of their likely failure to meet the four-part test. However, until a tribunal makes that determination, Article 5 requires all detainees to be treated as POWs.

It has been argued that members of the Taliban’s armed forces should not be entitled to POW status because the Taliban was not recognised as the legitimate government of Afghanistan. In response to this, human rights groups argue that Article 4(A)(3) of the Third Convention makes clear that recognition of a government is irrelevant to the determination of POW status. It accords POW status without qualification to “members of regular armed forces who profess allegiance to a government or an authority not



recognized by the detaining power”. That is, the four-part test of Article 4(A)(2) applies only to militia operating independently of a government’s armed forces, not to members of a recognised (Article 4(A)(1)) or unrecognised (Article 4(A)(3)) government’s armed forces. Thus, whether a government is recognised or not, members of its armed forces are entitled to POW status without the need to meet the four-part test.

Some argue that treating the detainees as POWs would force the United States to repatriate them at the end of the conflict rather than prosecuting them for their alleged involvement in terrorist crimes against the Americans. For this reason, many are against treating the detainees as POWs.

POW status provides protection only for the act of taking up arms against opposing military forces. If this is the only act that a POW has done, then repatriation at the end of the conflict would be required. However, Article 82 explains that POW status does not protect detainees from criminal offences that are applicable to the detaining powers’ soldiers. That is, if appropriate evidence can be collected, the United States would be perfectly entitled to charge the Guantanamo detainees with war crimes, crimes against humanity, or other violation of United States criminal law whether or not a competent tribunal find some of the detainees to be POWs. As Article 115 of the Third Geneva Convention explains, POWs detained in connection with criminal prosecutions are entitled to be repatriated only “if the Detaining Power consents”.

Further, it has been argued that the detainees should not be accorded POW status because it would preclude the interrogation of people alleged to have information about possible future terrorist acts.

Article 17 provides that POWs are obliged to give only their name, rank, serial number, and date of birth. Failure to provide this information subjects POWs to “restriction” of their privileges. However, nothing in the Third Geneva Convention precludes



interrogation on other matters. The Convention only relieves POWs of the duty to respond. Whether or not POW status is granted, interrogators still face the difficult problem of encouraging hostile detainees to provide information, with only limited tools available for the task. Article 17 states that torture and other forms of coercion cannot be used for this purpose in the case of POWs. But the same is true for all detainees, whether held in time of peace or war. This is a requirement under Article 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States has ratified. Articles 4 and 5 of the Convention make violation of this rule a criminal offence of universal jurisdiction.

Article 17 of the Third Geneva Convention provides that POWs shall not be “exposed to any unpleasant or disadvantageous treatment of any kind” for their refusal to provide information beyond their name, rank, serial number and date of birth. That would preclude, for example, threats of adverse treatment for failing to cooperate with interrogators, but it would not preclude classic plea bargaining – that is, the offer of leniency in return for cooperation – or other incentives. Plea bargaining and other related incentives have been used repeatedly with success to induce cooperation from members of violent criminal enterprises such as the mafia and drug traffickers. These would remain powerful tools for dealing with the Guantanamo detainees even if a competent tribunal finds some of them to be POWs.

Another argument often put forward for denying detainees the protection of international law is that detainees are highly dangerous and should consequently not be entitled to the more comfortable conditions of detention required for POWs.

It is very likely that at least some of the Guantanamo detainees are highly dangerous. However, nothing in the Geneva Conventions precludes appropriate security precautions. The Conventions do not allow detainees to be deprived of POW status because of their feared danger. Introducing unrecognised exceptions to POW status, particularly by the



world's leading military power, would undermine the Geneva Conventions as a whole. That would not be in the interest of any Detaining Power, in this case, the United States, as it is easy to imagine how that precedent could come back to haunt the Detaining Power in future wars. Enemy forces which might detain United States or allied troops would undoubtedly follow the United States lead and devise equally creative reasons for denying POW protections.

It is yet to be seen whether the United States government will establish a "competent tribunal" as required in Article 5 of the Third Geneva Convention for the purpose of determining on a case-by-case basis whether each detainee in Guantanamo is entitled to POW status. Such a decision would further U.S. national interests and would not impede legitimate efforts to curtail acts of terrorism.

There are many other issues which are relevant to today's debate. These will be covered by our six speakers who I will now introduce. We are honoured to have as members of the Affirmative Team, Dr Fernand de Varennes, Senator Brian Greig and Ms Julie Taylor.

Dr Fernand de Varennes is a former Director of the Asia-Pacific Centre for Human Rights and the Prevention of Ethnic Conflict and the founding Editor-in-Chief of the Asia-Pacific Journal on Human Rights and the Law.

Dr de Varennes is recognised as one of the world's leading legal experts on minority rights and has written two seminal works on this topic: *Language, Minorities and Human Rights* (1996) and *A Guide to the Rights of Minorities and Language* (2001). His teaching experience covers topics such as international law, human rights in Asia, rights of minorities and indigenous peoples. He was the first to set up a regular law course on Asia-Pacific human rights in an Australian law school and established the then first LL.M. in human rights in Australia. Dr de Varennes has taught students from a variety of cultural backgrounds in Europe, Asia, North America and Australia. He also has extensive



international recognition for his research work on international law, human rights, minorities and ethnic conflicts and has worked with numerous international organisations such as the United Nations' Working Group on the Rights of Minorities, UNESCO and the OSCE's High Commissioner on National Minorities on these issues.

He is Senior (Non-Resident) Research Associate at the European Centre for Minority Issues in Flensburg, Germany, on the advisory board of numerous research centres and journals around the world and has taught in numerous institutions around the world, including at the European Academy in Bolzano, Italy, the University of Deusto in Bilbao, Spain, the South Asian Human Rights and Peace Studies Orientation Course in Kathmandu, Nepal, Sam Ratulangi University in Manado, Indonesia, the University of Pécs in Hungary, the Cornell University - Université Paris I Panthéon Sorbonne Summer School in Paris, France, the European Politics Programme at the University of Pécs, Hungary, Turku Law School and Åbo Akademi Institute for Human Rights in Finland, and Seikei University in Tokyo. He recently held the prestigious Tip O'Neill Peace Fellowship at INCORE (Initiative on Conflict Resolution and Ethnicity) in Derry, Northern Ireland. He has published five books and over fifty scientific articles and reports. His most recent publications include a two-volume series on human rights documents on Asia and a UNESCO report on the rights of migrants. He is currently working a three-volume book series on ethnic and internal conflicts worldwide. His research has appeared in fifteen languages (English, Farsi, French, Georgian, German, Hungarian, Indonesian, Irish, Japanese, Latvian, Romanian, Russian, Slovenian, Spanish and Swedish).

Senator Brian Greig is a Senator for Western Australia and was elected in 1998. He was the youngest male in the Senate (37). He was the Democrats' spokesperson for Law & Justice and served as Interim Leader of the party in August and September of last year. He was also the Democrats' representative on the Senate's Legal & Constitutional References and Legislation Committees and on the Joint Parliamentary Committee on the Australian Crime Commission (ACC).



Prior to being in Parliament worked on my father's crayboat as a deckhand, managed an art gallery specialising in West Australian artworks, and served as a researcher and electorate officer to several members of State and Federal Parliament. He was the Local Government Councillor (Town of Vincent) 1995-1998. Senator Greig has also been a long time campaigner for gay and lesbian rights, and was Spokesperson for Gay & Lesbian Equality (GALE), and the Australian Council for Lesbian & Gay Rights (ACLGR), at various times during the 1980's and 90's.

Ms Julie Taylor graduated from UWA last year with first-class honours in Law. Julie's interest in international law was fostered in the summer of 2001 and 2002 when she participated in the Jessup International Law Moot Competition. Julie's team were the runners-up in the grand final in Washington. Not content as a runner-up, Julie returned to Washington this year as the coach of the 2003 team, which went on to win the world competition. Outside of Law School, Julie has been a member of the Coalition Assisting Refugees After Detention for two years and has worked for CASE for Refugees, a community legal centre helping refugees renew their temporary protection visas. Julie is now an articled clerk at the Crown Solicitor's Office and the Law Society Council articled clerk representative. She will take up a position as an Associate to His Honour Justice Dyson Heydon in Canberra next year.

I am pleased to introduce as members of the Negative Team, Dr James Edelman, Mr Ben Clarke and Mr Chris Williams.

Dr James Edelman practises as a barrister and teaches part-time at the University of Western Australia including lectures in the Masters course Contemporary Issues in International Law. He has also been involved for many years with the largest legal mooted competition in the world, the Jessup International Law Mooting team including as a mooter in 1996 when the UWA team were ranked third in the World rounds, as coach in



2001 when the team finished runners-up to South Africa in the World Final and as Faculty Advisor in 2002 when the team won the World Championship. While undertaking a Rhodes Scholarship at Oxford University between 1999 and 2001, Dr Edelman was a member of the Human Rights Legal Group which assisted in several Privy Council appeals from death sentences in Caribbean countries.

Mr Ben Clarke is Senior Lecturer in Law at the University of Notre Dame, Fremantle Campus. He has taught International Law, Tort Law, Criminal Law, Human Rights Law and Social Justice - all of which are pertinent to today's discussion. He is the author of a text on International Law, and a number of published articles in the abovementioned areas of law. Ben is enrolled in a PhD on The Rule of Law and Peace Operations through Melbourne University, and is Vice President of the WA Red Cross International Humanitarian Law Committee. He is a member of the Criminal Lawyers Association and Secretary of the WA Branch of the International Commission of Jurists, a body that monitors state compliance with the rule of law and international human rights law.

Mr Chris Williams is a Crown Prosecutor at the Office of the Director of Public Prosecutions, Perth and President of the Australian Red Cross, WA Division, International Humanitarian Law Unit. He graduated from The University of Western Australia in 2000 and was the recipient of the Criminal Law Association Prize. In 2000 he presented a paper at the Australia and New Zealand Society of Criminology Conference at Melbourne University relating to crimes by the sovereign state entitled: "Protector and Perpetrator: A Dangerous Contradiction - The Intersection of Criminology, International Human Rights and Humanitarian Law". Most recently, he presented a paper on child soldiers for the Red Cross 'Even Wars Have Limits' lecture series and is currently a tutor and guest lecturer in Criminology for the Law and Arts Faculty at The University of Western Australia.