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EMINENT JURISTS PANEL

on

Terrorism, Counter-Terrorism and Human Rights

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USA: Eminent Jurists Panel concludes US hearings

The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, concluded its visit to Washington, D.C., today.

The panel is an independent group of eight jurists appointed by the International Commission of Jurists (ICJ) to conduct a global inquiry on the impact of terrorism and counter-terrorism measures on the rule of law, human rights and humanitarian law. The US hearing was the 7th hearing following visits to Australia, Colombia, East Africa, Britain and Northern Ireland, and North Africa.

During its visit to Washington D.C., the panel heard testimony reflecting a wide range of perspectives, including from family members of victims of the September 11, 2001 attacks, former administration officials, bar associations, leading academics and lawyers, doctors, professional associations, national and international human rights organisations and counter-terrorism experts. The panel also held high-level meetings with government officials, including from the Department of State, the Department of Defence, the Department of Homeland Security, the Office of the Director of National Intelligence, and the National Security Council. The Panel members express their sincere appreciation to all who participated in the hearings and those government officials they met for their cooperation.

The panel wishes to express its sincere gratitude to victims of the September 11, 2001 attacks who appeared before it. The panel was moved by their courage and initiatives to help heal the profound trauma occasioned by the attacks of 9/11 and to reach out to other communities, including to those of other faiths and countries.

Government representatives stressed the unprecedented nature of the attack of 9/11 and contended that these attacks triggered a war between the United States and Al-Qaeda and its global affiliates. They contended also that the measures taken in response were in the circumstances necessary to meet this threat and were consistent with the US's international legal obligations. They categorically rejected any policy of torture, cruel and inhuman treatment. Many persons who testified before the panel disputed these assertions.

The most important concerns raised by those who testified included:

- Serious, detailed and coincident accounts of torture, cruel and inhuman or degrading treatment of detainees and the failure to hold accountable all those responsible for such abuses.
- Notwithstanding the adoption of the new Army Field Manual explicitly prohibiting certain 'coercive interrogation' techniques and the absence of

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any classified annexes thereto, the same prohibitions may not apply to the intelligence services and/or private contractors.

- Doctors gave evidence on the severe impact not only of physical but also psychological torture and expressed concern that psychologists had been asked to advise on the most effective use of coercive interrogation techniques. Some raised concerns as to whether the new Army Field Manual would exclude all forms of psychological torture and ill-treatment.
- There are proposals to water down minimum standards of treatment of detainees, long followed by the United States. Senior former military lawyers told the panel that common article 3 of the Geneva Conventions, as written, is fully understood by the armed forces and does not require any further clarification.
- There was disquiet over secret detentions, illegal under international law, and the possible use of torture in such circumstances. Recent public statements by the administration do not exclude the possibility of future secret detentions.
- The policy of extraordinary renditions to countries known to practice torture and the reliance on diplomatic assurances in such cases, which are not legally binding and do not guarantee that the person so transferred will not be subject to torture. Concern was also expressed over the government's reliance in litigation on the doctrine of state secrets privilege, which effectively prevents redress for victims of extraordinary renditions.
- The possibility of indefinite detention of those held as enemy combatants without charge or trial in Guantanamo Bay. Lawyers for those detainees provided detailed accounts about unreasonable restrictions on access to and communication with their clients.
- The use of secret evidence which detainees cannot see nor rebut in administrative proceedings for status determination as well as in possible trials by military commissions. Grave concerns were also raised about proposals to strip civilian courts of jurisdiction to hear habeas corpus petitions on behalf of persons designated as enemy combatants.
- Terrorist suspects should be brought to justice before ordinary courts. Where the use of military tribunals is appropriate, the existing courts martial provide a tested system. They should be relied upon - if need be with narrow modification - rather than special tribunals not governed by the Uniform Military Court of Justice.
- Increasing interference with the right to privacy, most notably surveillance under the National Security Agency programme outside the existing legal framework, and the reliance on state secret privilege to frustrate legal challenges to such measures.
- The impact of counter-terrorism measures on Arab and Muslim communities, in particular through various watch lists, profiling and the abuse of immigration proceedings.

Finally, many witnesses stressed that effectively securing the homeland against future terrorist attacks and upholding human rights and the rule of law are not mutually exclusive. A common theme articulated during the hearings was that policies on detention, treatment of prisoners and military trials have compromised the moral leadership of the United States, severely limited its ability to raise human rights violations in other countries and eroded rule of law at home and abroad.

The panel recognizes the strong legal tradition in the United States and its solid and tested constitutional system of checks and balances protecting against abuse of power. It also recognizes the indispensable role of lawyers, bar associations and civil society organisations in upholding human rights and the rule of law.

The members of the panel were, however, taken aback by the testimony they had heard concerning inroads into fundamental rights and freedoms and the cumulative impact that such inroads could have on the legal system and the rule of law.

The US visit of the panel came at a time of intense debate five years after September 11, 2001 and coincided with a number of legislative proposals and the banning of certain interrogation techniques in the Field Army Manual. In the opinion of the panel:

- There is no circumstance where a person, however classified, can be placed outside the protection of international human rights or humanitarian law.
- No person should be convicted on the basis of evidence obtained by torture or cruel, inhuman or degrading treatment or punishment.
- No person should be convicted on the basis of secret evidence that the accused can neither see nor rebut.
- There should be no departure from minimum standards for the treatment of detainees under international law, including those contained in common article 3 of the Geneva Conventions.
- There should be no impunity for serious violations of international human rights or humanitarian law.
- All detainees should be entitled to have the legality of their detention determined by an independent court and effective remedies for serious human rights violations, such as torture or ill-treatment.
- All persons convicted of crimes should have a right to full judicial review before an independent and impartial court.

The Panel will consider and take into account the evidence received during its visit to the United States for the preparation of its final report. The panel wishes to thank the American University Washington College of Law in Washington D.C. for hosting the public hearing. A transcript of the hearings will be made available in due course.

Background

The Panel was convened in 2005 by the International Commission of Jurists to carry out a study on the global impact of terrorism and counter-terrorism measures on human rights and the rule of law. The Panel will issue a global report on terrorism, counter-terrorism and human rights based on the hearings and other information received in 2007.

The Panel exercises its mandate independently, with the logistical support of the ICJ Secretariat and its network of organizations. Arthur Chaskalson, former Chief Justice and first President of the Constitutional Court of South Africa, chairs the Panel. The other members are Georges Abi-Saab (Egypt), former Judge of the Appeals Chamber at the International Criminal Tribunals for the former Yugoslavia and for Rwanda; Robert K. Goldman (United States), Professor of Law at American University's Washington College of Law, a former President of the Inter-American Commission on Human Rights and former UN expert on counter-terrorism and human rights; Hina Jilani (Pakistan), human rights advocate and UN Secretary General's Special Representative on Human Rights Defenders; Vitit Muntarbhorn (Thailand), Professor of Law at Chulalongkorn University in Bangkok and UN expert on human rights in North Korea; Mary Robinson (Ireland), now Head of the Ethical Globalization Initiative, and former UN High Commissioner for Human Rights and former President of Ireland; Stefan Trechsel (Switzerland), former President of the European Commission on Human Rights, and Judge at the International

Criminal Tribunal for the former Yugoslavia; Justice E.Raúl Zaffaroni (Argentina), a Judge at the Supreme Court of Argentina.

The Panel is holding hearings around the world to study the experiences with terrorism and counter-terrorism. Previous hearings were held in Australia, Colombia, East Africa, the United Kingdom and North Africa. Future hearings include South America, South East and South Asia, the Russian Federation, Canada, the Middle East and Europe.

For further information on the Eminent Jurists Panel and the hearings in the United States please contact Ana Arana at + 1 347 255 8691 or Isabelle Heyer at +41 78 680 0118 or at + 41 22 979 38 00 and consult <http://ejp.icj.org>.