

ARE CANADIAN SOLDIERS BEING ORDERED TO COMMIT WAR CRIMES?

The Red Cross says Taliban and Al-Qaida fighters must be considered prisoners of war.

On January 22, 2002 Defence Minister Art Eggleton admitted that Canadian soldiers had turned over captives arrested by the Canadian special forces unit JTF-2 to the U.S. military and that these captives were then transferred to Guantanamo Bay Cuba. These arrests and transfers occurred in the midst of international controversy over the treatment of other Afghan prisoners by the Americans.

"The ICRC stands by its position that people in a situation of international conflict are considered to be prisoners of war unless a competent tribunal decides otherwise," says ICRC spokesperson, Kim Gordon Bates. The International Commission of Jurists (ICJ) backed the ICRC saying Bush is 'incorrect in law'.

Are Canadian soldiers being properly advised by their officers and superiors?

The transfer of prisoners to the U.S. military by Canadian soldiers appears to be a crime pursuant to Canadian law and a violation of international law. The transfer of prisoners to the U.S. military is illegal in three key respects:

- The transfer violates prisoners' right to have their status determined by a competent tribunal, pursuant to Article 5 of GC III, [Box I] and
- The transfer violates Canada's responsibility, pursuant to Article 45 of Protocol I [Box II] to ensure that prisoners are presumed to be and treated as prisoners of war until their status has been otherwise determined by an independent tribunal, and
- The transfer deprives prisoners of rights to a 'fair and regular trial' (*Crimes Against Humanity and War Crimes Act* Section 24) to which they are entitled pursuant to the UDHR, ICCPR, the Geneva Conventions and Protocol I.

The transfer by Canadian soldiers effectively deprives transferred prisoners their rights and leaves the determination of their status, treatment, trial and punishment subject solely to the arbitrary standards President Bush and his advisors determine.

Those potentially liable under this statute include the person committing the offence(s), his/her military commander(s) and his/her superior(s). Superior is defined in this statute as a 'person in authority other than a military commander.' Both offences carry penalties of up to life in prison. Clearly the interests of Canadian soldiers and prisoners alike require that the legality of prisoner transfer be determined before further transfers occur. In view of the U.S. demonstrated refusal to afford prisoner of war status to the prisoners pending determination, Canada is obliged by Article 12 to request the return of prisoners transferred by Canadian soldiers. The legality of the transfers ought to be referred immediately to the Supreme Court of Canada.

Box I

Geneva Convention relative to the Treatment of Prisoners of War (GV III)

Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in

Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Box II

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)

Article 45

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal. (underlining added)

3. Any person who has taken part in hostilities, who is not entitled to prisoner of war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, such a person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

The relevant international conventions and declarations that bind Canada and Canadians include the three Geneva Conventions of 12 August 1949 (entry into force 21 October 1950), *Protocol 1*, the *International Convention on Civil and Political Rights* (ICCPR), the *Universal Declaration of Human Rights* (UDHR) and the United Nations Charter. Although the U.S. and Afghanistan are parties to the three Geneva Conventions and signatories to the ICCPR, neither has ratified Protocol 1 to the Geneva Conventions. However, that does not affect their liability under the Canadian Crimes Against Humanity and War Crimes Act.

The UDHR provides for all people, an unqualified guarantee to a fair and public hearing by an independent and impartial tribunal to determine rights (such as the right to be presumed or designated a prisoner of war) and to determine criminal charges.

ARTICLE 10

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

As all other rights rely on this safeguard, it is not surprising that all of the Geneva Conventions contain the dual requirements that: (a) prisoners' status and rights be determined by a competent tribunal and (b) criminal charges be determined by regularly constituted courts in accordance with internationally accepted fair trial standards.

Article 3 of all three Conventions reflects the importance of fair trial standards and seems to provide that all prisoners are absolutely entitled to a trial before a regularly constituted court. Article 3 prohibits, [see Box III] the sentencing and executing of people who have laid down

their arms and those removed from combat by detention "without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people."

Because the extent of prisoner's rights depend on the prisoner's status and because particular rights and restrictions apply to prisoners of war a prisoner whose status is in doubt is presumed to be a prisoner of war until his status is otherwise determined by a competent court.

Box III

Geneva Conventions

Article 3

3.1 Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Article 5 of the *Geneva Convention relative to the Treatment of Prisoners of War* (GC III) ensures that all persons detained who have committed a belligerent act shall have the rights of prisoners of war until a competent tribunal has determined their status. The terms of Article 12 of GC III prohibit Canadians from turning over prisoners until being satisfied that the U.S. is willing and able to apply the Convention. Applying the GC means treating prisoners as prisoners of war until a competent tribunal has determined another status. [see Box IV]

Box IV

Article 12

...

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protection Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with. (underlining added)

Protocol 1 clearly provides these two rights to all prisoners. Rights to a fair trial in accordance with internationally accepted standards is of such importance that Protocol 1 Article 45 guarantees where there is any doubt about the definition of any prisoner who has 'taken part in

hostilities' that prisoner will be presumed to be a prisoner of war and have all rights of a prisoner of war until such time as his status has been otherwise determined by a competent court. Article 85 of Protocol 1 defines war crimes as including 'depriving a person...of the rights of fair and regular trial.' [Box V]

Box V

Article 85. Repression of breaches of this Protocol

Acts described as grave breaches in the Conventions are grave breaches of the Protocol if committed against persons in the power of an adverse Party Protected by Articles 44, 45 and 73 of this Protocol,

In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions of the Protocol;

(d) Depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial. The transfer by the Occupying Power of...all or parts of the population of the occupied territory

Transfer to U.S. custody, in the absence of guarantees that the prisoners will be treated as prisoners of war pending another determination of status by a competent tribunal clearly appears to be a war crime. Rights attaching to prisoners of war include the freedom from interrogation [See Box VI] and the right to a public trial before a regularly constituted court in accordance with internationally accepted fair trial standards. Minimum fair trial standards, as set out in Article 45 include: the right to be presumed innocent, informed of the particulars of the charge, remain silent, cross-examine witnesses, present evidence, to be afforded the means to present a defence and to appeal.

Box VI

Geneva Convention relative to the Treatment of Prisoners of War

Article 17

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information...

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

Article 102

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 Chapter have been observed.

Canadian politicians have intimated the CAF turnover is legal if Canada receives assurances that prisoners will be treated humanely. The Minister of Defence says he has received this assurance although published photographs demonstrate the falsity of these assurances. The fact that the public has not been informed of any formal request for such assurances or of the wording of any

assurances received is another factor indicating a lack of adequate enforceable assurances. Clearly the Minister is, as the ICF said of President Bush, "incorrect in law."

It is also important to note that pursuant to the Canadian Charter, the Minister of Defence is constitutionally bound to ask for and obtain as a condition of transfer to the U.S. custody, assurances that the death penalty will not be imposed. Receipt of such an assurance, like the assurance of 'humane treatment' will not render the transfer legitimate or legal because the prisoners will be deprived of other rights to which they are entitled as presumed prisoners of war such as freedom from interrogation, the rights to a fair trial.

Canada's *Crimes Against Humanity and War Crimes Act* 2000 c. 24 defines 'grave breaches of the Geneva Convention' as war crimes. Acts specified as war crimes include the offence of unlawful deportation or transfer and confinement and the offence of willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial..

The requirements of the ICCPR regarding treatment and trial must also be met. By article 2, the Canadian government is bound to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." The ICCPR forbids cruel, inhuman or degrading treatment and requires that a detained person be informed promptly of the reason for arrest and the charges against him. Fair trial requirements under the ICCPR include the right to counsel, to cross-examine the presumption of innocence, opportunity to prepare a defense, a trial before a competent court and the right to appeal.

Action Requested of Members of Parliament and Senators:

A. TO CALL FOR A REFERENCE TO THE SUPREME COURT OF CANADA IN ACCORDANCE WITH ARTICLE 5 TO DETERMINE:

- **THE LEGALITY OF THE TRANSFER OF PRISONERS BY MEMBERS OF THE CANADIAN ARMED FORCES TO THE CUSTODY OF THE U.S. MILITARY, and;**
- **WHETHER CAPTIVES ARRESTED IN AFGHANISTAN MUST BE AFFORDED PRISONER OF WAR STATUS UNTIL A COMPETENT COURT DETERMINES OTHERWISE, and;**
- **THE STATUS OF INDIVIDUAL CAPTIVES**

B. TO DEMAND THERE BE NO TRANSFERS OF CAPTIVES TO THE CUSTODY OF THE U.S. UNLESS AND UNTIL THE SUPREME COURT OF CANADA OR SOME OTHER COMPETENT TRIBUNAL AUTHORIZES THE TRANSFERS AS LEGAL.

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