

Australia Day 2009

Mr Joel Fitzgibbon
The Queen's Minister of State for Defence
PO Box 6022
House of Representatives, Parliament House
Canberra ACT 2600

Dear Minister

The new US Administration acknowledges some inappropriate behaviour of its forces and its agencies in relation to detention and torture of captives from Iraq and Afghanistan, and the rendition of those and other people to US detention sites throughout the world. It is also planning to close the Guantanamo Bay military detention centre.

With that as background, several questions arise in relation to Australia's forces, and the possible involvement by Australia in detention and rendition in the past, and in the future.

- How many people have Australian forces captured during their time operating in Iraq and Afghanistan? Have those captives been handed over to the US forces, or to the forces or authorities of another nation? And if so, to which nation or nations? Are there any MoUs in place for such handovers, and what are they?
- If no-one has been taken captive by Australian forces, has there been a policy or practice to stop Australian troops taking captives? If so, what is the policy/practice?
- If Australia has taken captive(s), does Australia have any responsibility for their ongoing fate? In particular, are there any detainees in Guantanamo Bay or other American detention centres for which Australia bears some responsibility?
- Have any checks or follow-ups been done on the fate of detainees handed over by Australian forces; if so, what have been the findings? If not, will you undertake follow-up checks?
- Has Australia provided any support to flights or ship movements to the US base/detention facility on Diego Garcia, the British possession in the Indian Ocean? Has Australia provided any other support to the US or UK forces or other personnel on the Diego Garcia base or travelling to/from the base?
- Given that, when the Guantanamo Bay facility is closed, the Diego Garcia facility may be used more frequently, is there an Australian Government policy to not facilitate rendition flights or other movements by US authorities to that location, or to provide any logistical support to the US or UK on Diego Garcia?

Yours sincerely,

Dr Kristine Klugman
President

BACKGROUND:

In November 2008, CLA sent you the following information:

“This is an alert, just in case no-one else has drawn your attention to this article, and the underlying legal opinion, in relation to UK troops handing captured personnel over to the Americans. The opinion and article would seem to have implications for Australia,” CLA emailed to the Defence Minister, with the following links:

<http://www.guardian.co.uk/uk/2008/sep/29/military.law/print>

http://www.extraordinaryrendition.org/index.php?option=com_docman&task=cat_view&gid=30&

Extracts from the above-referenced legal opinion:

Mr Andrew Tyrie. The British Secretary of State for Defence has stated, for instance, that,

“Whenever we have passed an individual from UK jurisdiction into the jurisdiction of the Iraqi, Afghan or US authorities, we have had in place an understanding that they would not transfer that individual to a third country without first seeking our consent or at least informing us of their intention.”²

In the case of hand-overs in Afghanistan, an MOU between the Government of the UK and the Government of the Islamic Republic of Afghanistan, signed on 30 September 2006, has been disclosed concerning transfer by the UK armed forces of persons detained in Afghanistan. This MOU states (amongst other things):

“The Afghan authorities will be responsible for treating ...individuals [transferred by UK Armed Forces] in accordance with Afghanistan’s international human rights obligations including prohibiting torture and cruel, inhuman and degrading treatment, protection against torture and using only such force as is reasonable to guard against escape. The Afghan authorities will ensure that any detainee transferred to them by the UK AF will not be transferred to the authority of another state, including detention in another country, without the prior written agreement of the UK.”³

² The Rt. Hon Des Browne, Secretary of State for Defence, letter dated 31 January 2008; also see the letter dated 19 March 2008. See further HC Written Answers, 5 December 2007, Col. 1224-5W; 14 January 2008, Col. 885W, 31 January 2008 Col. 524W, and 20 March 2008 Col. 1310W.

³ Para. 3.2.

The position is reinforced by international law, which informs the interpretation of the ECHR: *Al-Adsani v United Kingdom* (2002) 34 EHRR 11. That makes it relevant to consider the UK’s obligation under international law not to aid or assist another State, for example, to commit torture. Aiding or assisting internationally wrongful acts can itself violate international law: see Article 16 of the UN International Law Commission’s Articles on State Responsibility for Internationally Wrongful Acts. Thus, the International Court of Justice recognised the obligation on States not to render aid or assistance in maintaining the human rights violations created by Israel’s Wall. This judgment was cited by approval by Lord Bingham in the House of Lords who stated that, “the jus cogens erga omnes nature of the prohibition of torture requires member states to do more than eschew the practice of torture.”⁸

⁸ *A (No. 2) v Secretary of State for the Home Department* [2005] UKHL 71 at [34].