The Guantanamo Bay scandal*

By Ian Barker QC

He who sacrifices freedom for security is neither free nor secure
Benjamin Franklin

For parts of this article I have drawn on papers delivered by two American lawyers at The Hague in August 2003. The occasion was the 17th Annual Conference of the International Society for the Reform of Criminal Law[1].

There has been a sustained indifference by Australian government politicians, in particular the former attorney-general, Darryl Williams AM QC, and the present Attorney – General Mr Ruddock, to the plight of two Australian citizens amongst those held by the US military in the infamous concentration camp established at Guantanamo Bay, Cuba. The manner of detention is in defiance of international and domestic US law, and the proposed 'trials' by military tribunals will pay no more than a passing nod and wink to accepted legal procedures in civilised countries, whether common law countries or otherwise.

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The US Government, followed by our own government, seeks to justify the process by invoking President Bush's *Military Order* of 13 November 2001[2] by which any foreign national designated by the President as a suspected terrorist, or as aiding terrorists, can potentially be detained, tried, convicted and executed without a public trial or adequate access to counsel, without the presumption of innocence, without proof beyond reasonable doubt, without a judge or jury, without the protection of reasonable rules of evidence and without a right of appeal. Whether or not a person detained is tried, he can be held indefinitely, with no right under the law and customs of war, or the US Constitution, to meet with counsel or be told upon what charges he is held.

Violation of the 1949 Geneva Conventions and their additional protocols of 1977 is immediately apparent.[3] The Conventions provide rights to prisoners of war in armed conflict, including the right not to be secretly and indefinitely detained and the right not to be subject to excessive or inhumane interrogation. It is not possible for the public to know what methods of interrogation are employed upon prisoners in the US concentration camp. Secrecy is one of the obvious evils of the process.

Detention of prisoners of war, subject to protection against gross violations of human rights such as those inflicted on prisoners in World War II, is obviously justifiable, provided it is limited to the duration of the war. There is no such limitation on the detention of Hicks and Habib, or the others at Guantanamo Bay. The 'War on Terrorism' is incapable of definition or even conceptual boundary and is an expression so vague, and deliberately so, that it will mean whatever any Government wants it to mean from time to time. To quote

Al-Qaeda and Taliban detainees at Camp X-Ray, Guantanamo Bay, Cuba.
Photo: US Department of Defense / News Image Library

Cowdery QC, it seems to be a declaration of war against an abstract noun[4].

Prisoners of war are entitled by the Conventions to be defined as such by a competent tribunal. International law requires a clear definition of the enemy, its territory, and the duration of hostilities, after which detention becomes illegal. Article 9 of the Universal Declaration of Human Rights of 1948 proscribes arbitrary arrest detention or exile, and Principle 18 of the United Nations' *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment* requires access to legal counsel by those detained. The US Government ignores all this at Guantanamo Bay. The prisoners are held outside the USA, in a legal vacuum, upon the basis, so it is said, that they are not prisoners of war, but 'enemy combatants'. The expression 'enemy combatants' seems to be used interchangeably with 'unlawful enemy combatants' and is accepted without question by the Australian Government as a legal justification for the imprisonment of Hicks and Habib. The US Government claims that once a person is designated an 'enemy combatant' he can be detained indefinitely with none of the rights accorded by the Geneva Conventions, the Universal Declaration of Human Rights or the International Convention on Civil and Political Rights (which became effective in 1976) or the United Nations' *Body of Principles*. In their brief in *Padilla v Rumsfeld* pending in the USA in the Second Circuit, the attorneys for the US Government submitted 'the laws and customs of law recognise no right of enemy combatants to have access to counsel to challenge their wartime detention'[5].

Editor's note:

This article, and the following response by the Attorney-General, the Hon Philip Ruddock MP, was written before 25 November 2003, when it was announced that the Australian Government had 'reached an understanding with the US concerning procedures which would apply to possible military commission trials of the two Australians detained at Guantanamo Bay, David Hicks and Mamdouh Habib'.

David Hicks whilst fighting in Kosovo. Photo: News Image Library

The expression 'enemy combatant' as now used by the US Government seems to be a compound of 'lawful' and ' unlawful' combatants, deriving from a judgment of the US Supreme Court, in 1942, in *Ex parte Quirin* Et Al, 317 U.S. 1, 63 S.Ct 2 (1942). The case involved the legality of trial by a military tribunal of eight German saboteurs who were captured upon secretly entering the USA after the declaration of war between the USA and the German Reich. The men were German soldiers taken to America in two submarines. Their orders were to destroy war industries and war facilities in America. They were charged with specific offences against the *Articles of War*. The prisoners' contention was that the President's order requiring trial by military tribunal was unconstitutional and they were entitled to trial by jury. Relevant to present discourse is the court's holding (at p.30) that

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

The circumstances of *Quirin* are far removed from the present cases. Nothing in the judgment provides support for the creation of a class of prisoners captured on the battlefield outside America categorised as 'unlawful enemy combatants', nor any support for secret indefinite detention, without access to counsel, by those captive. The reasoning used to justify the incarceration of prisoners at Guantanamo Bay is that the invasion of Afghanistan was not an act of war against a nation. It was part of a wider 'war' against an undefined (and undefinable) enemy, apparently being a conflict outside the previously understood definition of war, and therefore no rules govern the treatment of prisoners.

In making the order the President claimed the authority of a joint resolution of Congress: *Authorization for Use of Military Force* Pub L. No. 107 – 40, 115 Stat 224 (Sept. 18, 2001). The Act was a response to the atrocity of 11 September 2001, its constitutional underpinning being US Constitution Article 1, section 8 and Article II, section 2.

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On 8 January 2003 the US 4th Circuit Court of Appeals in *Hamdi v Rumsfeld* considered the position of an American citizen captured in Afghanistan and held by the military as an 'enemy combatant'. The court upheld Hamdi's right *as an American citizen* to require the government to justify his continued detention, then held that the government's evidence was sufficient. The court looked at *Quirin* and said, amongst other things, at page 13:

> Hamdi and the amici make much of the distinction between lawful and unlawful combatants, noting correctly that lawful combatants are not subject to punishment for their participation in a conflict. But for the purposes of this case, it is a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case. It is true that unlawful combatants are entitled to a proceeding before a military tribunal before they may be punished for the acts which render their belligerency unlawful… But they are also subject to mere

detention in precisely the same way that lawful prisoners of war are.

But a lawful prisoner of war is entitled to the protection of international law. The great problem for Hicks and Habib is that those held at Guantanamo Bay are there for as long as the military chooses, regardless of the duration of the so-called war against terrorism (if it ever ends). In *Hamdi* the court (at page 19) noted the difficulty in attempting to adjudicate on the length of a war. But the war against terror (or terrorism) may well be a war without end, having the potential to become no more than a war of political opportunism, revived from time to time as it suits the government of the USA.

The President's intention is to hold prisoners who are not US nationals outside the USA so they are beyond the reach of the US judiciary; therefore, so the intention seems to be, they have no right to seek *habeas corpus*. They have been unilaterally categorised as 'unlawful combatants', therefore having no rights at all, notwithstanding that many of them were captured on the battlefield. No enquiry can be made as to their true position because the executive government of the USA has decreed to the contrary. This is made crystal clear by the US Ambassador who said in a letter on 14 February 2002 that 'the US has determined that the Taliban detainees being held at Guantanamo base do not fall within any of the categories of persons set forth in Article 4 of the Geneva Convention who qualify for prisoner of war (POW) treatment. Therefore neither the Taliban detainees nor the al-Qaeda detainees at Guantanamo are entitled to POW status'[6].

Mamdouh Ahmed Habib, wife Maha and two of their children - Photo: Supplied to News Image Library

The Australian Attorney-General accepted the US decision without demur. A senior adviser to the Attorney said in a letter on 6 May 2002 that under President Bush's order the US may hold foreigners detained fighting in Afghanistan for an indefinite period and that 'whether the detainees at the United States military base in Guantanamo Bay in Cuba are being held as prisoners of war is really a matter for the United States'[7].

The Australian government says it was concerned to see that Hicks and Habib were treated humanely. But what if they were not so treated? On the reasoning justifying their continued imprisonment, even if they were subject to daily torture, there is nothing they could do about it beyond asking their captors to desist. It is discomforting, to put it mildly, to find in the twenty-first century the world's greatest democratic nation subjecting its captives to a sort of outlawry, putting them beyond the reach of any legal assistance. This cannot be right.

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If *Hamdi* is correctly decided, even if a prisoner could seek *habeas corpus*, all the government need show is that he was captured in battle with the US or its allies, whether or not he could be called an 'unlawful combatant'. If this is right, and it is questionable, the difference between lawful and unlawful combatants could, at Guantanamo Bay, be the difference between life and death. Yet there is not a single step a prisoner can take to have his status properly determined.

A number of US appellate courts have held that prisoners at Guantanamo Bay are outside their jurisdiction and not protected by the Constitution. For example, on 11 March 2003 the Court of Appeals for the District of Columbia held it had no jurisdiction to grant *habeas corpus* holding that the constitution did not entitle the detainees to due process[8]. On 10 November 2003 the Supreme Court agreed to hear argument about the issue of jurisdiction.

A consequence of the 'enemy combatant' or 'unlawful combatant' classification is that the military claims the further power to try the prisoners for special offences by special tribunals; such trials may result in the death penalty. The proposed tribunals, whatever minor alterations may be made to the process at the request of governments, will surely be instruments of mere farce. There is no guarantee of public trials. The prosecutor will be from the military. The tribunal

members will be from the military. Chief defence counsel will be from the military. Cases will be proved on evidence admissible by no recognisable rule of evidence but which the tribunal holds 'has probative value to a reasonable person'. Hearsay evidence, no matter how remote, may be admitted.

Prosecutors will not be required to establish any chain of custody of evidence, from creation to tender, and evidence deemed sensitive to security may be admitted by the tribunal but kept secret from the defendant. Communications between counsel and accused will not be confidential. Even if acquitted, a prisoner may continue in indefinite detention.

There will be no appeal, except to the Commander In Chief, to whom all the others are beholden (and he has already publicly proclaimed the prisoners to be 'bad men'). This is in marked contrast to the procedure governing the prosecution of service people before courts martial according to the US *Uniform Code of Military Justice*. A convicted person may appeal to the US Court of Military Appeals, consisting of five civilian judges and thence to the Supreme Court.

A person to be tried may, at his own expense, employ outside counsel. The prospect of any prisoner at Guantanamo Bay being able to afford outside counsel is doubtful. In any event, no reputable lawyer is likely to undertake the defence of a prisoner when confined by odious military restrictions as to the manner of the defence. The restrictions on defence counsel imposed by *Military Commission Instructions* raise profound questions of legal ethics. On 2 August 2003 the Ethics Advisory Committee of the National Association of Defense Lawyers of the USA determined (in part) as follows:

> …it is unethical for a criminal defense lawyer to represent a person before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission[8]

The essential problem is that defence counsel will be required by *Military Commission Instructions* (MC1 – 5) to sign an agreement to comply with all applicable regulations or instructions for counsel including any rules of court for conduct during the course of the proceedings. Breach of the agreement could itself be a criminal offence. It includes the following acknowledgements on the part of defence counsel:

- counsel understands that communications with the client may be subject to monitoring or review by government officials *(confidentiality and client legal privilege are thereby extinguished, even though evidence derived from such eavesdropping cannot be used in proceedings against the accused)*;
- counsel shall reveal to the Chief Defense Counsel (a military judge advocate) and any other appropriate authorities, information relating to the representation of the client which counsel thinks is reasonably necessary to prevent the commission of a future criminal act likely to result in death or substantial bodily harm or significant impairment of national security *(counsel thus undertaking to inform on his or her own client)*;
- counsel waives the client's ability to test the constitutionality of the proceedings in a civilian court *(thereby abandoning one of the client's most fundamental rights and at the same time ensuring the proceedings remain concealed from judicial scrutiny)*;
- once proceedings have begun counsel will not leave the site of the proceedings without approval of the Appointing Authority or Presiding Officer *(thereby abandoning the lawyer's freedom of movement)*;
- counsel will make no public or private statements regarding closed sessions or about classified material *(not even to the client)*.

These are but some of the impediments erected by the government of the US in the way of the adequate defence of prisoners to be tried at Guantanamo Bay. And the brave lawyer who undertakes a defence subject to these preposterous restrictions will, if he or she does not abide by the agreement, be liable to criminal prosecution under U.S.C. : 1001.

The tribunals will consist of three to seven military officers, and will be able to convict on the verdicts of two thirds majorities (except where the death penalty is involved in which case unanimity of seven will be required). It is worth remembering that Australia attained trial by jury after a difficult fight. The first criminal tribunals were established in 1788 in New South Wales and consisted of a judge advocate and six military or naval officers who could convict by majority. The system changed in 1824 when the Supreme Court in criminal cases consisted of the chief justice and seven military or naval offices. The system was potentially corrupt, because the colony's governor could direct the attorney general to prosecute, yet was usually the commanding officer of most of the tribunal members. (On one memorable occasion in 1827 Governor Darling threatened retribution against army officers who declined to convict the lawyer Dr Wardell of seditious liable).[9] There was no appeal. On any view, the same sort of problems are apparent in the proposed US trials. It was not until 1839 that we acquired the unrestricted right of trial by jury in indictable criminal cases, and not until late in the nineteenth century that an accused person had the right to appeal. All this seems to be overlooked by our government in its consideration of the position of Hicks and Habib.

It is not easy to see how any rational person, particularly the Attorney-General of Australia, could accept as reasonable the conduct of the USA at Guantanamo Bay. The detention interrogation trial and sentence of prisoners remains entirely with the executive. The judicial arm of government is excluded. The great irony is that the USA holds itself out as a country in which the separation of powers between parliament, the executive and the judiciary is an all important guarantee of freedom. The present abuse of executive power by the President of the United States demonstrates the fragility of the whole concept.

To many, including me, it is a matter of profound embarrassment that the government of Australia is so ready to accept without serious question the gross violations of international and domestic law already committed, and proposed, in respect of two Australian citizens. Taking a wider view, if the US Government makes exceptions in favour of, say, Australian or British prisoners, the process becomes even more repugnant. I do not understand why the Australian Government has not protested at the very fundamentals of the whole process of detention and proposed trials.

Mr Howard now says he will not seek the repatriation of Hicks and Habib because they have not offended against Australian law. Presumably, if guilty of treason they would be welcomed back. The government continues to say it is unconcerned that the prisoners are kept in isolation and denied the rights of prisoners of war, and must be dealt with by American military tribunals. One only has to consider the composition and procedures of the proposed tribunals to see they are intended not to try but to convict. In such kangaroo courts the onus of proof and proof beyond reasonable doubt become meaningless concepts. It is sad that Australian nationality means so little to the Australian government.

1 Dr Saby Ghoshray 'Prosecution or Persecution: Analysing Defendant's Rights and Fairness of US Military Tribunals within the Framework of International Law', and John Wesley Hall Jr. who addressed on the 'Opinion of National Association of Criminal Defense Lawyers' 2/8/2003.

2 'Detention, treatment, and trial of certain non-citizens in the war against terrorism' (66 F. R. 57833).

3 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of 12 August 1949, 75 U.N.T.S. (1950) 31: Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, 75 U.N.T.S. (1950) 85; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. (1950) 135. Geneva Convention Relative to the Protection of civilian Persons in Time of War of August 12, 1949; 75 U.N.T.S. (1950) 287. There are 190 states party to the Geneva Conventions.

Protocol Additional to the Geneva conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 U.N.T.S. (1978).

Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts of 12 August 1949 and 8 June 1977, 1125 U.N.T.S. (1978) 609.

Article 118 of the Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (the Third Geneva Convention), provides that 'prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.'

4 A paper delivered at the conference of NT Criminal Lawyers Association Port Douglas in June 2003.

5 Mark Hamblett 'Government argues Jose Padilla has few rights' *NY Law Journal* 29/7/2003.

6 J Thomas Schieffer to Mrs JR Walters

7 Phoebe Dunn to Mary Walters

8 *Odah et al v USA* & *Ragul v Bush*

9 The committee went on to say that it would not condemn lawyers who undertook to represent persons accused before military commissions, because some might feel an obligation to do so, at the same time warning of the 'serious and unconscionable risk' involved in violating the required agreement.

10 *R v Wardell (No. 3)* 1827 Decisions of the Superior Courts (Macquarie University).