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**The War on Terror vs The Rule of Law
A Matter of Human Rights and Justice for All?**

What are the rights of a 'David Hicks' ? Are he and his ilk simply being swept under the carpet? An examination of the complex issues for criminal lawyers emerging from the aftermath of September 11 and the war in Afghanistan

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I: INTRODUCTION

It is trite to say the events of 11 September 2001 had an impact far beyond the immediate and devastating destruction inflicted on the primary targets of the alleged terrorists. In the ensuing economic and political fallout, the principles of law relating to due process and human rights are amongst those issues, which have challenged the democratic heart of the United States government. Since President Bush declared the 'War on Terror'¹, 598 people have been indefinitely detained at Camp X-Ray, Guantanamo Bay Naval Base, Cuba and as many as 1,200 Muslim non-citizens in the United States have been taken into custody, questioned and arrested². However, as the world faces impending criminal trials alleging terrorist acts, a number of issues relating to the practice and procedure of criminal law will be brought sharply into focus.

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¹ Speech by President Bush to joint session of Congress, 20 September 2002

² *Of those, many were incarcerated and most deported for violations of immigration law. Few were charged with criminal offending. In fact, by the end of August 2002, the government had brought criminal charges in only three major cases, as a result of September 11. American John Walker Lindh pleaded guilty to being an enemy Taliban soldier and is co-operating with prosecutors. Zacarias Moussaoui faces trial as the only person charged in relation to the September 11 attacks. Richard Reid is accused of trying to blow up a passenger airplane last December. ('Bush's war on terror runs afoul of the rule of law', Anne Gearan, Seattle P.I, Wednesday 28 August 2002). Between 11 September 2001 and 11 January 2002, 714 people were detained as 'special interest' cases. However as at July 2002, none of the 'special interest' detainees had been indicted for terrorist activity. Instead, most of them had been deported for visa violations. Nevertheless, many reported numerous breaches of human rights including custodial interrogations without access to counsel, arbitrarily prolonged confinement, including detention without charge, physical abuse and other violations. Human Rights Watch, August 2002, Vol.14, No.4 (G), pp 3,9,11*

New Zealand has very little direct experience of terrorism. While the events of September 11 affected New Zealand in terms of economic fallout, the remoteness of the country in geographic terms has shielded its citizens from a sense of imminent physical threat. However, the issues discussed in this paper address a less direct, but very real threat to the fundamental notions of fairness and due process, which every democratically run country must protect. This paper will discuss this threat and ask whether, in the face of terrorist activity, the rule of law should make way at all for interests such as national security.

What are the rights of a David Hicks?

David Hicks has the right:

1. to the status of 'prisoner of war' and protection of the Geneva Convention

The detainees being held at Camp X-Ray in Guantanamo Bay, Cuba, have been defined by the United States government as 'battlefield detainees' and 'unlawful combatants'. The Bush administration has refused to define the detainees as prisoners of war, therefore they are not entitled to the full protection of the Geneva Convention. Nor are they entitled to the protection of the constitutional rights of the United States, because they are being held in Cuba³.

The Geneva Convention defines a prisoner of war as one who has fallen into the power of the enemy and who is either a member of the armed forces of the adversary state, or a member of a militia or volunteer corp⁴. A member of a militia is defined as a person who is subject to a discernible chain of command, wears a fixed distinctive insignia, carries arms openly and conducts operations in accordance with the laws and customs of war. If there is any doubt about a captured fighter's status, the person must be treated as a prisoner of war until a competent tribunal determines otherwise⁵.

3 See the ruling of Judge Colleen Kollar-Kotelly who said the nation's "leased military bases abroad, which continue under the sovereignty of foreign nations, hostile or friendly" are not U.S. territory.

4 Geneva Convention relative to the Treatment of Prisoners of War, Article 4.

5 Geneva Convention relative to the Treatment of Prisoners of War, Article 5: '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.'

Applying this definition, the Taliban detainees might be defined as prisoners of war because they are soldiers of the armed forces of Afghanistan. However, the Al Qaeda members might not fit within the definition of a prisoner of war as they do not wear identifying insignia or abide by the laws of war.

David Hicks is detained at Camp X-Ray under President Bush's November 13 military order. Pursuant to that order, he can be held anywhere in the world and be put on trial by a military tribunal in which the normal rules of evidence do not apply and which can impose the death penalty.

2. to be held under adequate conditions

The conditions under which the detainees are being held have been the subject of outrage amongst human rights groups. News footage showed detainees being led into the compound blindfolded, manacled, handcuffed and wearing surgical masks. They were made to kneel before their captors, deprived of sight, sound and touch. There are reports of the detainees being held in cages which consist of a steel roof, concrete floor and chain-link walls, with little protection from the elements. There are anecdotal reports the detainees have not had access to culturally appropriate food or been able to observe their religious obligations⁶. The detainees are not entitled to access to legal counsel and have limited written contact, if any, with their families⁷.

⁶ See Human Rights Watch website at www.hrw.org

⁷ It is interesting to note when the compound was used as a temporary holding facility to deal with the flow of refugees from Haiti and Cuba in 1994, the detainees were held in permanent hard-walled shelters. Geneva Conventions Apply to Guantanamo Detainees En Francais, Human Rights Watch, 11 January 2002.

If the detainees were held as prisoners of war, the conditions of their detention would clearly be in breach of the Geneva Convention. The Convention provides that prisoners of war must be quartered in conditions that meet the same general standards as those quarters available to the captor's forces⁸. They are entitled to humane treatment, which at a minimum includes basic shelter, clothing, food and medical attention. They have the right not to be subjected to torture, corporal punishment or humiliating or degrading treatment, even if suspected of war crimes such as the murder of civilians. If charged with a war crime, they are entitled to be tried by the same court under the same rules as the detaining country's armed forces and to the basics of a fair trial, including access to legal representation⁹.

By denying prisoner of war status to the Taliban and Al Qaeda fighters, the United States is able to evade its responsibilities under the Geneva Convention. Although it has committed its armed forces to a War against Terror, it denies that captured enemy soldiers are prisoners of that war.

3. to due process

The right to a trial before a United States Court

The detainees are not entitled to a trial before a United States Court because they are not being held in that country and thus arguably do not fall under the jurisdiction of federal courts¹⁰. Initially, a military tribunal was set up to hear charges brought against the detainees. The tribunal had the power to impose the death penalty, even though the detainee did not have the right to legal representation, there was no right of appeal to a federal court and there was a lower standard for admitting evidence.

8 Fourth Geneva Convention: Article 25: 'Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.'

9 Ibid: Article 82: 'A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.'

10 On 1 August 2002 United States District Court Judge Colleen Kollar-Kotelly ruled that David Hicks and two British citizens, Shafiq Rasul and Asif Iqbal have no right to trial before US Courts.

President Bush reacted to claims the military tribunals were unfair and in breach of due process, by ordering the Secretary of Defence, Donald Rumsfeld to formulate a new set of rules. Rumsfeld consulted with a number of experienced advisors including Lloyd Cutler and Griffin Bell. The rules were released on 21 March 2002. They included:

- the presumption of innocence
- the standard of proof beyond a reasonable doubt
- the provision of legal representation by an assigned lawyer at government expense
- the right to retain private counsel (who must be cleared for classified secrets)
- openness of proceedings to the media and public
- the right of a defendant not to give evidence
- the principle that no adverse inference is to be drawn from the defendant's failure to give evidence
- the right to full disclosure of evidence against the defendant
- the right to cross-examine prosecution witnesses
- the requirement of a two-thirds vote for a finding of guilt and for sentence.
- the requirement of a unanimous vote before the death sentence may be imposed
- the right of review by the President, the Secretary of Defence and by a review board appointed by the latter. There is, however, no right of appeal to the ordinary federal courts

The United States Government released the new provisions declaring their satisfaction in terms of fairness¹¹.

A closer look at the new provisions reveals that the Secretary of Defence or the presiding officer of the tribunal may close trial proceedings to the public and the press if either determines this is necessary to guard the secrecy of "classified or classifiable" information, to protect the physical safety of members of the tribunal or prosecutors or prospective witnesses, or to safeguard "intelligence and law enforcement sources, methods, or activities" or "other national security interests."

¹¹ In the Department of Defense Briefing on Military Commissions, March 21, 2002, Donald Rumsfeld stated, "If one steps back from examining the procedures provision by provision and instead drops a plumb line down through the center of them all, we believe that most people will find that taken together, they are fair and balanced and that justice will be served in their application."

This provision has been criticised by Ronald Dworkin, the eminent American Professor of Jurisprudence. Dworkin comments if part of a trial is conducted in secret, the defendant may also be excluded from that part, along with any private lawyer he has hired, in spite of the fact that any such lawyer would be an American with a security clearance¹².

Dworkin comments¹³:

'The power to close a trial for these reasons seriously undermines the promise of public trials: it leaves the defence secretary or the presiding officers free to close to the public the crucial parts of almost any military tribunal trial they wish to keep secret, because almost all evidence that might be used against accused terrorists could be thought sensitive, and almost any witness who might testify against them could be thought in danger of reprisals. Of course the government must guard classified information, keep its intelligence sources secure, and protect its personnel and witnesses. But secrecy and witness protection are also at stake in many ordinary criminal trials, and American judges have developed procedures, including restricted court sessions, that safeguard those interests without corrupting a trial's fairness, as Rumsfeld himself conceded at his press conference.'

Dworkin goes on to say:

'If the Bush administration had been content to try all suspected terrorists in ordinary courts, those familiar measures could have been used again. If it had insisted on military tribunals, as it has, but allowed appeals from guilty verdicts to the ordinary appellate federal courts, then civilian judges could have reviewed the evidence presented in the closed portion of a trial, in confidential proceedings, to determine whether that evidence supported a guilty verdict. But the decision the government has now made to allow trials to be closed and to prevent appeals to civilian courts is indefensible. The new procedures permit a prisoner to be tried in secret and sentenced to death on evidence that neither he nor anyone else outside the military - no one, that is, who is not under the Pentagon's direct command - has even heard. That plainly increases the risk of wrongful convictions and executions, and the added risk is unnecessary. It would not have compromised national security to permit appeals to appellate federal judges.'

12 Ronald Dworkin, 'The Trouble with the Tribunals', *The New York Review of Books*, April 25, 2002

13 Ibid

Legal Limbo

The detainees are effectively in legal limbo. They are held on an indefinite basis. Few have been charged with criminal offending. They are on a United States military base, but they are not on United States soil therefore the constitutional rights do not apply and the government does not have to answer questions about who they are, or what they have done. They are not prisoners of war, therefore international humanitarian laws do not apply. They do not have the right to trial by a United States court. They can be held as long as the United States government chooses to hold them. Unless they are charged with a crime or defined as a prisoner of war, their status will remain unchanged.

One school of thought says indefinite detention is appropriate, as the detainees are unlawful combatants, belligerents and parties to a war. They should not then receive better treatment than regular prisoners of war who are always held until the end of a conflict. They should be confined for as long as the war continues and due process is not denied unless the government continues to hold them after the war ends without a trial¹⁴.

One way out of this 'legal limbo' is for a detainee to be charged with a criminal offence. At that point, the provisions of the Geneva Conventions apply. Under the Third and Fourth Geneva Conventions of 1949, dealing with prisoners of war and civilians respectively, the prisoner would be entitled to the following rights:-

- i. to be told 'early on and in a language he understands' what he is accused of;
- ii. to be presumed innocent until proven guilty;
- iii. to be tried without undue delay;
- iv. to be heard before an impartial decision maker;
- v. to be tried in a regularly constituted court (if the accused is a POW, it may be a military court)
- vi. to prepare and present a defence;
- vii. to present witnesses;
- viii. not to be required to testify against himself or to confess guilt;
- ix. to be tried in his presence;
- x. to be convicted only of a crime that he himself committed;
- xi. not to be punished more than once for the same act;
- xii. to be convicted only for what was a crime at the time of the act in question;
- xiii. to have a sentence no more severe than the law allowed at the time of the act in question;
- xiv. to be told of his rights of appeal and what time limits there are;
- xv. to appeal and ask for pardon or reprieve;
- xvi. to have any death sentence stayed until six months after notification of the Protecting Power

¹⁴ 'When to Hold Them', Rich Lowry, National Review Online, 26 March 2002. See web page at www.nationalreview.com/lowry/lowry032602.shtml

Even if a detainee is tried and acquitted by a military tribunal that person may still be detained by the United States government on the basis he or she is dangerous and an enemy combatant. This detention might again continue on an indefinite basis¹⁵.

Disclosure

International human rights conventions guarantee the right of the accused to know and confront the evidence against him or her¹⁶. The same conventions provide that everyone charged with a criminal offence has the right to legal counsel¹⁷. Article 6 of the International Convention on Human Rights, extends that right to allow the person to choose their own legal assistance¹⁸.

15 Katharine Q. Seelye, "Pentagon Says Acquittals May Not Free Detainees," The New York Times, March 22, p A13

16 European Convention on Human Rights, Article 6 □ Everyone charged with a criminal offence has the following minimum rights: (a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him

17 1949 Geneva Convention Relative to the Treatment of Prisoners of War, includes the rights to counsel, to a □ reasonable opportunity to consult with his Counsel before and during trial, □ to at least three weeks notice of charges before trial and at least two weeks to prepare a defence, to interpretation of charges and □ the substance of the proceedings □ as well as any documentary evidence, to remain silent, to cross-examine adverse witnesses, to a presumption of innocence □ until his guilt is established by legal and competent evidence beyond a reasonable doubt, □ and to trial in compliance with □ the rules of evidence prescribed in the Manual for Courts-Martial, United States, 1951. □ See U.N. Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command, Korea, in Paust, Bassiouni, et al., International Criminal law Documents Supplement 155-61 (2000).

18 □ Everyone charged with a criminal offence has the following minimum rights: □ c: to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. □

This can raise problems for the State in terms of disclosing classified information during trial or at the bail hearings of an alleged terrorist. The prosecution may have evidence it does not want to disclose to the accused or detainee or their counsel on the grounds the need to protect national security justifies maximum secrecy, or a lessening of previously recognised freedoms. The prosecution may know or suspect the retained counsel is sympathetic to the terrorist cause. The government might fear that full disclosure would allow terrorists to map the progress of their investigation. Since nobody knows the full extent of the organisation behind the current terrorist activities, there is a danger of information being disclosed in one matter which is critical to an ongoing investigation in another.

In *US v Osama bin Laden*¹⁹ a number of defendants were convicted of participating in the bombing of American embassies in Nairobi and Dar es Salaam. The Court interpreted the federal Classified Information Procedures Act in such a way that the prosecution were able to require defence lawyers to receive security clearances before being allowed to review classified information pertinent to the trial. One might argue a security clearance could not guarantee political and religious neutrality. It might also be argued that, if counsel is sympathetic towards their client's alleged 'cause', he or she is highly unlikely to reveal this bias particularly if the opportunity to view critical classified information is at stake.

If an accused does not have the means to retain counsel of his or her choice, then counsel must be appointed. In such cases, the question arises whether the State should have the right to appoint counsel? While this may allay fears in respect of disclosure in a politically charged and complex case, it effectively denies an accused the right to the effective assistance of counsel and counsel of his or her choice. In addition, the reverse possibility applies - of counsel being appointed who has views favourable to the State's position. The defendant might not be confident of receiving unbiased State-appointed representation when their alleged crime is the subject of huge public interest on the scale of the September 11 attacks and their legal representative is unknown to them.

¹⁹ 58 F. Supp. 2d 113 (1999).

Whether chosen by the accused or appointed by the State, counsel has ethical and professional guidelines and rules of practice by which they must abide. In New Zealand these include a duty to prevent a situation arising where confidential information is received on the basis that it is not to be disclosed to a client.

The dangers of less than full disclosure were clear in the recent Lockerbie trial. In that case the CIA insisted on withholding evidence relating to its star witness, Abdul Majid. The CIA claimed the withholding was necessary on the grounds of security interests. The CIA backed down only when the Scottish judges threatened to declare a mistrial. The evidence was released and it emerged Majid was a paid informer. There was also information on the file showing the CIA themselves had real doubts regarding the truth of his allegations. This presents a clear example of how the withholding of information should not be justified on the basis of unsubstantiated speculation. Consideration should also be given to the long-standing principle that the public has a right to know what their government is up to.

If the State has real concerns for national security, one way of countering this problem might be for the State to appoint lead counsel and provide full disclosure of all information to the appointed person. The accused person could then nominate second counsel of his or her choice. Disclosure of sensitive and classified information would not automatically be provided to second counsel but would be subject to the decision of lead counsel. If lead counsel decides the information is critical to the defence, only then would he or she disclose it to second counsel and the defendant. However, it is debatable whether or not this satisfies the right of a defendant to know and confront all evidence against him or her.

Another way of dealing with this problem might be for a joint commission including the court and the bar which could define rules and administer them concerning efforts to prevent any abuse that counsel for an accused might make of sensitive evidence.

20 Rule 1.09 □ In most circumstances, a practitioner is bound to disclose to the client all information received. □

21 See the unreported decision in pdf. format at <http://i.cnn.net/cnn/2001/LAW/01/31/lockerbie.verdict.03/verdict.pdf>

22 Gordon Campbell, 'New anti-terrorism legislation in New Zealand is rushed, secret and vague', New Zealand Listener, November 17, 2001

23 *U.S. Department of Justice v Reporters Committee*, 489 U.S. 749, 773 (1989)

In any event, whether counsel is retained by the accused or appointed by the State, and whether the appointment is random or controlled by the State, counsel is required to zealously represent an accused in accordance with the canon of ethics. If counsel cannot meet these ethical obligations, their representation may fall short of the accused's constitutional and fundamental requirements.

The presumption of innocence

David Hicks has not been charged with any crime and there are still questions about whether the allegations against him constitute a crime under Australian law. The 'War on Terror' and the events of September 11 should not justify constraints on the media. However, Hicks is a good example of the presumption of guilt.

Media reports have described Hicks as a 'terrorist' and 'traitor' in the media even though there is no evidence to support these claims. The detainees generally have been described as killers even though none of them have been convicted of murder or manslaughter. Chief tribunal lawyer, William J Haynes II has described the prisoners as 'dangerous people' and stated 'when somebody's trying to kill you or your people and you capture them, you can hold them.'

Any variance in respect of criminal trial procedure must not override fundamental protections and individual rights and freedoms accorded by international and national conventions and legislative safeguards. The protection of a democracy from terrorism is equally as important as protecting the rights and freedoms which make it a democracy. Likewise, the State's security interests compete with the right of an individual to fair treatment by the State's security agencies, including the police. The trade-off between giving greater rights to prosecutors and law enforcement at the expense of defendants and accused and their counsel is that the State would achieve more easily their goals of immobilising criminals and taking more people into custody at the expense of minimising rights of the accused²⁴.

Judicial integration is the most effective way of balancing prosecutorial goals with the rights of an accused and third parties. However, the approach requires harmonisation of fundamental standards and will require participating countries to sacrifice those aspects of their law which do not meet minimal international law standards such as the death penalty, life imprisonment and aspects of the order authorizing military tribunals for alleged terrorists.

24 Katharine Q. Seelye, "Pentagon Says Acquittals May Not Free Detainees," The New York Times, March 22, p. A13.

CONCLUSION

The answers to these and related issues will determine the type of society in which we will live. Efforts to circumvent the rule of law to combat a longstanding criminal problem with political dimensions will not end the violence. They are likely to provide impetus to the cycle of illegal violence and terror. The circumvention of law and the exaggerated characterizations of criminal law to mobilize domestic and/or foreign support will backfire, especially if the 'war' continues indefinitely, as the 'drug war' has. These rhetorical justifications are dangerous and will bring our civilisation down to the level of the terrorists. In some cases the terrorists have little to lose while the civilized countries and their inhabitants have a lot at stake. The circumvention or dilution of longstanding principles of Western democracy and civilization risks an undermining of our very essences and spirit.

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