

# Getting Real: Reforming international law governing the detention of terrorist suspects

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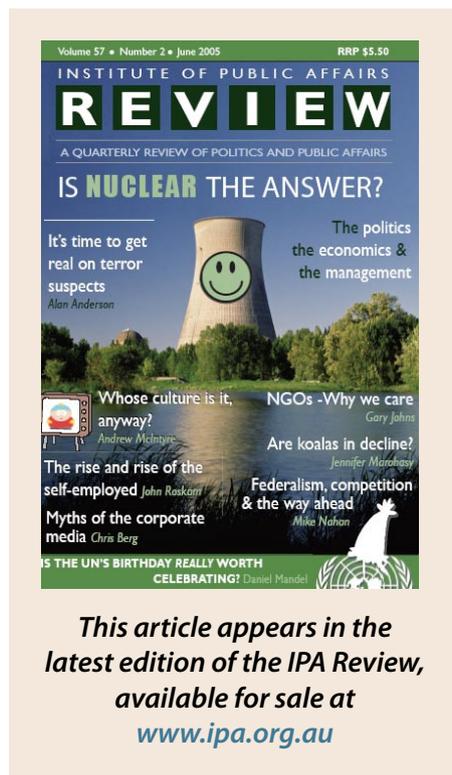
The US response to the September 11 attacks has been nothing if not controversial. President Bush's decision to designate detained Al-Qaeda suspects as 'unlawful combatants' evoked a chorus of dissent from proponents of international law. Yet amidst the host of press releases and opinion pieces condemning the illegality of Guantanamo Bay, it is difficult to find detailed legal expositions of the basis for these protests.

Most critics baldly assert a breach of the Geneva Conventions or, in some cases, the 'spirit of the Geneva Conventions'.<sup>1</sup> There is little legal analysis from most critiques of the Executive Order<sup>2</sup> that established the detention regime. When this author rang one Australian legal professional body which had issued several media releases asserting such a breach, the responsible staff member was unaware of any legal analyses.<sup>3</sup>

The vagueness of legal critiques flows not just from the inherent ambiguity of international law, but also from an under-appreciated fact: existing international law is simply incapable of application to the fight against international terrorism.

## COMBATANTS AND CRIMINALS

The case against the detention regime was publicized in Australia using the examples of David Hicks and Mamdouh Habib, the two Australians detained under it. Hicks was captured on the battlefield in Afghanistan; Habib was arrested in Pakistan as a terrorist suspect. While the US does not distinguish between these 'unlawful combatants', the arguments against their de-



This article appears in the  
latest edition of the IPA Review,  
available for sale at  
[www.ipa.org.au](http://www.ipa.org.au)

tion were quite distinct.<sup>4</sup>

In those cases analogous to Hicks, where terrorist suspects are captured in the context of military operations, critics assert that the Third Geneva Convention<sup>5</sup> classifies them as 'prisoners of war' (POWs) and accords them defined rights as a result. If their classification is in doubt, critics argue that the Convention requires that detainees be entitled to a full court hearing to determine their status.

In cases analogous to Habib, where terrorist suspects are arrested in a non-combat environment, critics assert that they are not combatants but criminal suspects, entitled to due process and a speedy trial. If the law of armed conflict does not apply, the applicable interna-

tional instruments are the Universal Declaration of Human Rights<sup>6</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>7</sup>—the latter conferring the international law equivalent of *habeas corpus*.

## THE GENEVA CONVENTIONS

Turning first to the Hicks class of detainees, the Australian Section of the International Commission of Jurists (ASIC) asserts that Article 4 of the Third Geneva Convention applies to classify them as POWs.<sup>8</sup> Article 4 lists the following relevant categories of POW:

- members of the *armed forces of a Party* to the conflict (including militias and volunteer corps that are parts of the armed forces, where the Party must be a party to the Convention or must accept and apply its provisions);<sup>9</sup>
- members of other militias and members of volunteer corps which fulfil the four conditions of lawful belligerency, including wearing a *fixed distinctive sign* recognizable at a distance, and conducting their operations *in accordance with the laws and customs of war*; and
- members of *regular armed forces* who profess allegiance to a government or authority not recognised by the detaining power.

To qualify as 'armed forces' in the first and third categories, it is well-established that combatant units must observe the 'four conditions of lawful belligerency' mentioned in the second category,<sup>10</sup> a definitional point regarded as implicit by the drafters of the Convention.<sup>11</sup> ►

The ASICJ, true to the 'Dennis De-nuto' approach adopted by most Guantanamo critics (it's the *vibe* of the Convention, your Honour!), merely asserts that Hicks 'clearly' falls within 'one or more' of these categories. Which one? What is clear to the ASICJ is unsubstantiated bluster to anyone practised in the vagaries of international law.

The secondary argument relies upon Article 5 of the Convention, which states that, in the case of any doubt, a detainee will be accorded the rights of a POW until his status is determined by a 'competent tribunal'. Under this argument, detainees need not even assert POW status to be entitled to full judicial review of their circumstances.<sup>12</sup>

This interpretation of Article 5 fundamentally undermines the rationale of the Convention. By stipulating standards of conduct for lawful combatants, adherence to which entitles them to consequent rights, the Convention seeks to discourage precisely the misconduct in which Al-Qaeda and associated forces have intentionally engaged.<sup>13</sup> While Article 5 provides an avenue for appeal in cases of genuine doubt, it is not intended to extend *de facto* protection to those who manifestly fail to meet the criteria.

Consider the practical implications of extending POW rights to terrorist suspects. The Convention stipulates that POWs need only provide their name, rank, serial number and date of birth, and may not be subjected to disadvantageous treatment of any kind to extract information.<sup>14</sup> In captivity, they may not be separated from 'the armed forces with which they were serving' without consent.<sup>15</sup> Effective interrogation would be impossible.

This is not an academic point. Information from Guantanamo interrogations derailed plans for attacks during the Athens Olympics and elsewhere.<sup>16</sup>

Each POW is entitled, immediately upon capture, to write a letter to his family.<sup>17</sup> Given that the secret capture of Al-Qaeda suspects frequently leads to other suspects, such a right would be

wholly incompatible with the successful prosecution of the War on Terror.

Suspending disbelief to assume Hicks-class detainees qualify as POWs, another problem presents itself. Article 118 provides for release of POWs 'after the cessation of active hostilities'.

If the United States is at war with Al-Qaeda and its affiliates, POWs have a long time to wait. The US regards cessation as the point where 'there is no reasonable prospect of the resumption of hostilities [against Al-Qaeda]'.<sup>18</sup> Even assuming that only hostilities in the Afghan region are relevant, there

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is no sign of an imminent cessation of low intensity conflict—contrary to the wishful thinking of some activists.<sup>19</sup>

The ASICJ notes that Hicks would be repatriated to Australia, far from the conflict zone, and lamely asserts that his release would be 'entirely consistent with the spirit and purpose of the Convention'.<sup>20</sup> Those concerned with non-Australian detainees have recognized the problem of indefinite legal detention, but volunteer no solution, apart from calling upon the US to try detainees and release those not convicted.<sup>21</sup>

Although this might be desirable, there is no basis in the Convention or the law of armed conflict to require such trials of POWs. This is because 'the purpose of detention [of combatants] is to prevent captured individuals from returning to the field of battle and taking up arms once again'; it is not to punish them.<sup>22</sup>

It is clear that the application of the Convention to terrorist suspects leads to a number of unacceptable results, frustrating their interrogation and subjecting them to open-ended detention without trial.

## CRIMINAL ARRESTS

What about persons like Mamdouh Habib, detained as terrorist suspects in a non-combat environment?<sup>23</sup> Their classification turns upon one's view of the War on Terror.

One view holds that the War on Terror is 'more a figure of speech than a legal term of art' and 'more accurately described as a non-State specific campaign against globally organised crime'.<sup>24</sup> On this view, the whole apparatus of global Islamist jihad is nothing more than a glorified Capone organization, with the destruction of the Twin Towers and the strike on the Pentagon not an attack on the US, but merely a few thousand simultaneous homicides.<sup>25</sup>

That such an absurd view could gain currency in legal circles is a symptom of the legal thought-process, in which every event is stuffed into the strait-jacket of precedent. Contrary to this view, September 11 was not merely a crime, but the most obvious Western manifestation of the new face of war, which military strategists have been discussing for well over a decade.<sup>26</sup>

Again, consider the practical consequences of accepting the view of the international law clique.

The *International Covenant on Civil and Political Rights* requires an arrested person to be informed immediately of the charges against him, with a right to take proceedings before a court to determine the lawfulness of his detention without delay.<sup>27</sup>

It sets out the requirements for trial of a person charged with a criminal offence. These embody the full gamut of evidential rights to which we are accustomed in the West, enabling the accused to examine the witnesses against him, to have legal counsel of his choice and to be tried without

'undue delay'.<sup>28</sup>

Such rights are entirely inconsistent with an effective campaign against global terrorism. It is all very well to extend *habeas corpus* to an accused car thief in Manhattan, or even an alleged murderer in Sydney. It is quite another to extend it to an Al-Qaeda suspect detained by troops in the tribal badlands of the Afghan/Pakistani border and drag frontline soldiers back to the District Court in Washington each time they detain a suspect.

Counter-terrorism, by its very nature, involves the collection of intelligence by clandestine means. Revealing all evidence to the accused would mean revealing the identity of covert operatives and the capabilities of technological surveillance measures, undermining the capacity of the authorities to thwart terrorist plots.<sup>29</sup> And courts have already heard allegations of legal counsel sympathetic to the terrorist cause relaying instructions from the accused to terrorist associates.<sup>30</sup>

Al-Qaeda is not an organized crime syndicate. Crime syndicates do not wage war against sovereign nations. Al-Qaeda may be stateless, but it is not without state support.<sup>31</sup> It represents the asymmetric future of warfare.

Prior restraint has no place in the criminal justice system. Therefore, fighting Al-Qaeda under the criminal model would make the prevention of attacks virtually impossible.<sup>32</sup> In the wake of September 11, no society would accept such fetters on its capacity for self-defence.

## THE SEARCH FOR SOLUTIONS

Attempts to accommodate the War on Terror in the framework of existing international law are doomed to failure. As is often the case, real world developments have left the legal fraternity struggling to fit a square peg into a round hole. At its most inane, the fraternity asserts that abandoning counter-terrorist measures will actually reduce terrorism<sup>33</sup>—a nice argument for

Toorak dinner parties, but one which highlights to the public the unreality of the international law perspective.

The danger is that, by making

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themselves irrelevant to public debate, international lawyers and civil libertarians have ceded the battlefield entirely to government and its security services. Politicians, spies and policemen are risk-averse by nature; they know that a single successful attack will see them blamed for not doing more.<sup>34</sup> The result, at Guantanamo Bay, is a system of indefinite detention, subject to limited review,<sup>35</sup> the scope of which is still a matter before the courts.<sup>36</sup>

Instead of vainly endeavouring to fit the square peg into the round hole, international lawyers should advocate a new hybrid regime, to be embodied in a new convention, reflecting the unique challenges posed by international terrorism.

Such a convention should recognize, in the words of US Supreme Court Justice Kennedy, that 'where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker'.<sup>37</sup> It must also recognize that the 'zone of hostilities' is now global.

The US Supreme Court has made a start on formulating such a scheme in domestic law, holding that detainees must have some opportunity to challenge their designation as an 'unlawful combatant' before a neutral decision-maker, but accepting that significant curtailment of the rules of evidence

may be necessitated by national security considerations.<sup>38</sup> Yet the court upheld the legitimacy of indefinite detention if the 'unlawful combatant' designation is affirmed.

A more liberal regime is surely appropriate if we are to achieve a legitimate balance between security interests and individual liberties.

Historically, the *Habeas Corpus Act* of 1679 gave authorities approximately three to six months to indict a detainee for a felony or high treason.<sup>39</sup> Such a time frame might well be an appropriate deadline for indicting non-citizen terrorist suspects.

Suspects would be granted access to court-appointed counsel, who would be subject to appropriate security checks. While suspects would not necessarily be entitled to see all the evidence against them, government assertions of confidentiality would be assessed by the judge, with hearings relating to sensitive material taking place in the absence of the accused, but in the presence of counsel. Where necessary, hearsay evidence would be accepted from soldiers and intelligence agents on deployment.

Such a system would not, of course, satisfy legal purists. Those purists should appreciate that the rules they would like to impose, and for which they disingenuously assert support in existing international law, will never be accepted by governments or the public. Even favourable judicial rulings will merely lead to legislative reform. The stakes are simply too high.

Until international law changes to conform to the post-September 11 threat environment, it will remain an academic pursuit: a fine subject for debate in the Faculty room, but irrelevant to the conduct of the global War on Terror.

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REVIEW

JUNE 2005

## References

- 1 Michael Sweeney, *Detention at Guantanamo Bay: A Linguistic Challenge to Law*, Human Rights Magazine (American Bar Association) Winter 2003.
- 2 *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, Military Order of the President dated 13 November 2001.
- 3 Chivalry restrains me from identifying this person.
- 4 Nicholas McNally, *Illegal Imprisonment at Guantanamo Bay*, Law Society Journal, April 2004 (representing the Australian Section of the International Commission of Jurists), 81-82.
- 5 *Geneva Convention relative to the Treatment of Prisoners of War*, adopted 12 August 1949, <http://www.unhchr.ch/html/menu3/b/91.htm> at 23 May 2005.
- 6 *Universal Declaration of Human Rights*, adopted 10 December 1948, <http://www.unhchr.ch/udhr/lang/eng.htm> at 23 May 2005.
- 7 *International Covenant on Civil and Political Rights*, adopted 16 December 1966, [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) at 23 May 2005.
- 8 McNally, supra 4, 80.
- 9 See also *Geneva Convention*, supra 5, Article 2.
- 10 Joseph Bialke, *Al-Qaeda & Taliban unlawful combatant detainees, unlawful belligerency, and the international laws of armed combat*, Air Force Law Review, Spring 2004, fn 24.
- 11 *Commentary on the Third Geneva Convention relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, 63, per Bialke, supra 10, fn 24.
- 12 Sweeney, supra 1
- 13 Bialke, supra 10, part 5.
- 14 *Geneva Convention*, supra 5, Article 17.
- 15 *Geneva Convention*, supra 5, Article 22.
- 16 Ted Lapkin, *Why should Guantanamo Bay inmates be protected by the Geneva Convention?*, Sydney Morning Herald, 7 December 2004.
- 17 *Geneva Convention*, supra 5, Article 70.
- 18 *FAQs About: Detention of Unlawful Combatants at Guantanamo Bay*, Defence Institute of International Legal Studies, <http://www.disam.dsca.mil/itm/IMSO/FAQS/02-GuantanDetainees.pdf> at 24 May 2005.
- 19 *Guantanamo – an icon of lawlessness*, Amnesty International, AMR 51/002/2005, 6 January 2005, 2.
- 20 McNally, supra 4, 81.
- 21 *Guantanamo and beyond: The continuing pursuit of unchecked executive power*, Amnesty International, AMR 51/063/2005, 13 May 2005, 139.
- 22 *Hamdi v Rumsfeld*, 542 US (2004), per O'Connor J (joined by Rehnquist CJ, Kennedy & Breyer JJ), 10.
- 23 Habib has since been released.
- 24 McNally, supra 4, 82.
- 25 Michael Greenberger, *Is Criminal Justice a Casualty of the Bush Administration's "War on Terror"?*, Human Rights Magazine (American Bar Association) Winter 2004; *How Does International Human Rights Law Address Guantanamo Bay Detentions*, Minnesota Advocates for Human Rights, [http://www.mnadvocates.org/Q\\_A\\_Guantanamo.html](http://www.mnadvocates.org/Q_A_Guantanamo.html) at 23 May 2005.
- 26 Martin van Creveld, *The Transformation of War*, Free Press, 1991, 20-21.
- 27 ICCPR, supra 7, Article 9.
- 28 ICCPR, supra 7, Article 14.
- 29 *Hamdi v Rumsfeld*, supra 22, per Thomas J (dissenting), 18.
- 30 Richard Pyle, *Profile of Indicted Lawyer Stewart*, AP, 9 April 2005, reproduced at <http://209.157.64.200/focus/news/662885/> posts at 24 May 2005. Stewart represented 1993 World Trade Center bombing mastermind Sheik Omar Abdel Rahman. She was ultimately acquitted.
- 31 Dore Gold, *Hatred's Kingdom: How Saudi Arabia Supports the New Global Terrorism*, Regnery Publishing, 2003, Ch 10.
- 32 George Friedman, *America's Secret War*, Doubleday, 2004, 121.
- 33 Ed. Barbara Mollin, *Guantanamo Bay – out of the legal black hole*, Oxford Council on Good Governance, 2004, 11.
- 34 Lord Steyn, *Guantanamo Bay: The legal black hole*, 27th F.A. Mann Lecture, 25 November 2003.
- 35 *Rasul v Bush*, 542 US (2004).
- 36 *Hamdan v Rumsfeld* (8 November 2004), *Khalid v Bush* (19 January 2005) and *In re Guantanamo Detainee Cases* (31 January 2005), in the District Court for the District of Columbia, currently on appeal.
- 37 *Rasul v Bush*, supra 35, per Kennedy J, 4.
- 38 *Hamdi v Rumsfeld*, supra 22, per O'Connor J (joined by Rehnquist CJ, Kennedy & Breyer JJ), 27.
- 39 *Hamdi v Rumsfeld*, supra 22, per Scalia J (joined by Stevens J in dissent), 5.