OCCASIONAL PAPER 1

The Rule of Law is Essential for Human Progress

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President Bush established Guantánamo Bay to enable the United States to put prisoners alleged to be terrorist beyond the reach of the American legal system, beyond the reach of the Geneva Conventions and beyond the reach of any element of international law. By executive decree, he established Military Tribunals which the United States Supreme Court struck down on the basis that the President had exceeded his powers. Congress passed a law establishing new Commissions, a law that has not yet been tested in the Supreme Court.

The future of the Commissions probably rests on a judgment as to whether or not such laws can be passed in relation to non-citizens. Its Rules of Procedure are utterly inconsistent with the Rules of Procedure in the normal justice system of America or of Australia. The loose use of hearsay evidence and evidence obtained under harshly intrusive questioning is allowed. It is left to the President to define how far that intrusive questioning may go.

This is the system established to try David Hicks and other people from Guantánamo Bay. In my view it was a system designed to achieve a guilty verdict on the basis of evidence that would be totally unacceptable if applied to American citizens or to an Australian citizen within Australia. The circumstances surrounding the Hicks trial, if one can call it that, and the plea bargain support that view.

For around a year, perhaps for longer, David Hicks had been kept in solitary confinement, no access to the sky, to the outside, to other people, inadequate exercise, a lighting system controlled from without the cell and also, we are advised, temperature changes from extreme cold to heat, could be part of the regime.

There were attacks on Major Mori and his credibility and the way he was conducting the Defence, all undertaken by the Prosecution, even at one point implying that Major Mori could be charged. At the arraignment proceedings itself Hicks' civilian lawyers were barred from the process because they wouldn't sign a blank cheque agreeing to rules for the conduct of Counsel, which the United States Department of Defence had not yet drafted.

These processes collectively were designed to put Hicks under intense mental pressure, perhaps for a very specific reason. While the United States Government, and for that matter

the Australian Government, seemed to want, as Stephen Charles indicated, a guilty verdict, the evidence they had available, even after five years imprisonment, was weak and could not have been successful for a United states citizen in a civilian or in a normal United States Court Martial.

Justice Susan Crawford, Head of the Military Tribunals, struck out the more serious charges, including the charge of murder. It was the more serious charges that were used by United States personnel, by the Government of Australia, by the United States Ambassador to Australia, to suggest that Hicks was amongst the worst of the worst. Quite recently the Ambassador said that Hicks would kill Australians and Americans without blinking an eye. There was only one charge remaining, that of providing material support for terrorism. The maximum sentence for that offence is reported to be seven years. This charge was corruptly imported from the United states civil system, it was retrospective in its impact and the particular law, because of retrospectivity, would not meet normal judicial standards.

I believe it likely that the United States authorities did not want the weakness of their evidence publicly exposed, even in a fraudulent Military Tribunal. Even though cross-examination would have been extremely limited, it could still have exposed the secrecy by which evidence had been collected. The Defence would have exposed the fact that they were not properly advised of the evidence, of the means by which it was obtained, that it was in fact a very secret process, designed to achieve one verdict. If the process had gone to open court, each hour would have demonstrated that justice was not being served, that this was not a court of law. The best alternative for governments, with some semblance of their credibility preserved was to have Hicks under such pressure that he would accept a plea bargain. This does explain the solitary confinement of over twelve months. It does explain the other pressures placed upon him, pressures that would have included the threat of continuing jail in Guantánamo Bay for twenty years or more. What person amongst us would not have accepted a plea bargain that achieved some element of freedom at the end of nine months?

This is made all the more evident in the final stages of the Tribunal process. Ten colonels had been flown in from around the United States to determine sentence, they determined the maximum allowed for that particular offence, seven years, only to find within fifteen minutes that they had been ordered to participate in a total and absolute farce. Within fifteen minutes they learnt that there had indeed been a plea bargain and the maximum sentence was nine months, less than many courts would give for a drink-driving charge. They learnt that the plea bargain had been consummated in Washington, by-passing the Prosecution, by-passing the Tribunal and its Judge two weeks earlier. Whatever this process reveals, no sane person can call it an exercise of justice.

So David Hicks will be home by the end of the year, partially gagged. The gag order which was undermined by information provided to the British Government and subsequently published in his application to become a British citizen and subject to the same treatment as other British citizens formerly held at Guantánamo Bay.

And so this story comes to an end but at what a price. The main story is not David Hicks. The main story is a willingness of two allegedly democratic governments prepared to throw every legal principle out the window and establish a process that we would expect of tyrannical regimes. That our own democracies should be prepared to so abandon the Rule of Law for an expedient and, as I believe evil purpose, should greatly disturb all of us. But how many are concerned? Too many are not concerned because they believe that such a derogation of justice can only apply to people who are different, in some indefinable way.

Only the other day I was speaking with somebody who quite plainly believed that Hicks deserved anything that was meted out to him because he was what he was, the Rule of Law did not need to apply. For somebody who has done terrible things, why does he deserve justice? That denies the whole basis of our system, the necessity of a civilised society which cannot exist unless there is an open, predictable justice system that applies equally to every person.

David Hicks at the best was clearly a very foolish young man. He was terribly misguided and may well have done some terrible things. I do not know. But if our Government says he has had his day in court, he made a plea bargain, therefore he deserved what he got, it only emphasises its lack of commitment to the Rule of Law for all people.

If the Government believes it to be expedient, we now know that it is prepared to push the Rule of Law aside. That is a larger issue than the tragedy of David Hicks.