

BOOK REVIEWS

DETAINEE 002: THE CASE OF DAVID HICKS BY LEIGH SALES (CARLTON, VICTORIA, AUSTRALIA: MELBOURNE UNIVERSITY PRESS, 2007) 336 PAGES. PRICE AU\$32.95 (PAPERBACK) ISBN 9780522854008

INTRODUCTION

The case of David Hicks has generated great controversy. This is not surprising having regard to three factors. The first was the hostile attitude exhibited against him by the then Australian Government (with a degree of acquiescence displayed by the Federal Opposition). The second was the initial lack of concern shown by the general public, perhaps because of the events that occurred on 11 September 2001 and the widely perceived threat of international terrorism. The third factor was the campaign waged by supporters of Hicks based on the flawed nature of the process that culminated in his agreement to plead guilty to certain charges of assisting terrorist organisations in return for ultimately obtaining his freedom. The nature of that process was strongly criticised by members of the Australian legal community including the Law Council of Australia.¹

Now that Hicks is no longer in prison and the brouhaha has subsided, it becomes possible to revisit the whole affair objectively. An important starting point is the book *Detainee 002*,² which is the subject of this review. It was written by Leigh Sales, the then North American correspondent of the Australian Broadcasting Corporation. The book will be of special interest to lawyers especially for the way it relates the facts of the affair.

Detainee 002 provides a very readable account of the handling of the Hicks affair by the United States and Australian Governments and a lively description of the personalities of the principal participants. It also displays a considerable understanding of the main international and domestic law issues relating to the use of Guantánamo Bay as a place of detention for terrorist suspects following the catastrophic events of 11 September 2001. But Leigh Sales is not a lawyer. So the book, quite understandably, does not dwell on important legal matters, notably rule of law issues. No mention is made, for example, of the searing indictment by Philippe Sands of the stance of the US and United Kingdom Governments on matters of international law and human rights in his acclaimed book *Lawless World*.³

This book review includes an examination of the legal issues underlying the Hicks affair and the conduct of the US and Australian Governments in that light. That examination raises important questions and presents a sharper picture of the Australian Government's discharge of its responsibilities. In saying this, we do

¹ See Law Council of Australia, *David Hicks: Five Years Without Justice* (2003–07) <<http://www.lawcouncil.asn.au/hicksjustice.html>> at 23 September 2008.

² Leigh Sales, *Detainee 002: The Case of David Hicks* (2007) ('*Detainee 002*').

³ Philippe Sands, *Lawless World: Making and Breaking Global Rules* (2006) ('*Lawless World*').

not express or imply any criticism of the author who, when she wrote, was not aware of some developments which have recently come to light. We seek simply to draw attention to the fundamental rule of law and other legal issues which were at stake in the Hicks affair and to provide another perspective, one which is somewhat less favourable to the two Governments than that which emerges from *Detainee 002*.

THE BOOK: CONTENTS AND STRUCTURE

The book provides a narrative account of Sales's dealings with the Australian and US diplomatic and military officials who were involved with the case, and also with the military and civilian lawyers who acted for and against Hicks.

The early chapters provide insights into Hicks's personality, his early childhood in the northern suburbs of Adelaide, South Australia, his conversion to the Islamic faith and his search for meaning and adventure in his life. They describe the events which led to his fateful visit to Afghanistan and his return there even after the events of 11 September 2001; his capture by members of the Northern Alliance when he attempted to leave that country; his transfer to the US military forces; and his ultimate imprisonment for over five years in the prison facility at Guantánamo Bay. The conditions he experienced for most of that time amounted to solitary confinement, despite denials to the contrary by the Australian Government.⁴ The book deals in some detail with the policy of the US Government to detain, interrogate, punish and try (through a system of military commissions) suspected international terrorists at Guantánamo Bay.⁵ This policy was adopted with the expectation that the system would be immune from judicial review, based on precedents established during World War II.⁶ This expectation was based on the mistaken assumption that the suspected terrorists did not enjoy the normal protections accorded to military combatants under international law and the conditions of their detention would not be subject to judicial review by American courts.⁷

The book emphasises the strong alliance that was established between the US and Australian Governments in the wake of the events of 11 September 2001, which led the Australian Prime Minister to be acquiescent in Hicks's detention, despite the growing intensity of international and other criticisms of the US Government's policy. This was so despite the long delays that occurred in formulating the processes to be used by the military commissions and the repeated legal setbacks suffered by the US Government at the hands of the US Supreme Court.⁸

⁴ Sales, *Detainee 002*, above n 2, 99, 154–5.

⁵ See, eg, *ibid* chs 3, 5–6, 10, 11.

⁶ See, eg, *Ex parte Quirin*, 317 US 1 (1942); *Johnson v Eisentrager*, 339 US 763 (1950).

⁷ The US Supreme Court ruled that at least common art 3 of the *Geneva Conventions* applies ‘even if the relevant conflict is not one between signatories’: *Hamdan v Rumsfeld*, 548 US 557, 629 (2006). The page references to *Hamdan v Rumsfeld* throughout this article have been sourced through the Westlaw database, available from <<http://www.westlaw.com>> at 23 September 2008.

⁸ See *Rasul v Bush*, 542 US 466 (2004); *Hamdi v Rumsfeld*, 542 US 507 (2004); *Hamdan v Rumsfeld*, 548 US 557 (2006); *Boumediene v Bush*, 553 US ___ (2008).

The book details the efforts made by officials at the Australian Embassy in Washington to expedite the charging and trial of Hicks,⁹ and also to improve the quality of the procedure to be used during the two trials that he faced,¹⁰ which, however, only went some way towards meeting the serious and informed criticisms advanced against that process.¹¹

The book also describes the efforts made by the relatives and supporters of Hicks and his military and civilian lawyers to free him and seek his return to Australia.¹² The culmination of those efforts, and the changes that occurred in public opinion generated by those efforts, combined with the impending federal elections due to be held before the end of 2007, finally led to Hicks accepting a plea of guilty. This resulted in him serving a further period of nine months imprisonment in Australia on the condition that he withdrew his previous allegations of mistreatment and agreed that he would not, for a period of one year, communicate with the media regarding his detention at Guantánamo Bay.¹³

SALES'S OWN EVALUATION

In an address to the Sydney Institute in 2007, the author set out what the book sought to achieve. Sales acknowledged that she painted an unflattering picture of Hicks.¹⁴ She was happy to wear the criticism made by lawyers that the book was 'obsessed with balance and pragmatism' and 'annoyingly fair'.¹⁵ She saw that as a vindication of what she had set out to do as a journalist, which was to provide a clinical balanced account, assessing the affair objectively. The author indicated her opposition to what she described as 'advocacy journalism', especially when it is not declared as such,¹⁶ although she conceded that pure objectivity is unattainable.¹⁷

What Sales saw as her central task in writing the book was exploring whether the US Government's policy of dealing with the suspected terrorists detained at Guantánamo Bay and the handling of the Hicks affair by both the US and Australian Governments served the goals of the so-called 'war on terror'.¹⁸ The clear negative answer to that question can be found in the final chapter of the book, which contains an overall evaluation of the affair.¹⁹

The heading of that chapter is 'With Hindsight' which signifies 'wisdom after the event'.²⁰ The author points to the sharp disagreement which existed about whether measures taken to combat the 'war on terror' compromised basic traditional US values and respect for the rights of individuals — a question that

⁹ Sales, *Detainee 002*, above n 2, 93–5.

¹⁰ Ibid 96–8.

¹¹ See generally Timothy L H McCormack, 'David Hicks and the Charade of Guantánamo Bay' (2007) 8 *Melbourne Journal of International Law* 273.

¹² Sales, *Detainee 002*, above n 2, 89–91, 170–3, 180–1, 187–8, 216–18, 221–2.

¹³ Ibid 212–13, 228.

¹⁴ Leigh Sales, 'Detainee 002: The Case of David Hicks' (2007) 19(3) *The Sydney Papers* 11, 11 ('The Case of David Hicks').

¹⁵ Ibid 13.

¹⁶ Ibid 14.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Sales, *Detainee 002*, above n 2, ch 17.

²⁰ *The Australian Concise Oxford Dictionary* (2nd ed, 1993) 531.

she thought was rooted in both politics and morality.²¹ Instead of answering that question she chose to examine the matter from a pragmatic perspective by objectively answering another question: whether the decision to sacrifice certain legal and human rights in the interests of national security had worked to achieve the essential aims of the US Government, which were to ‘eradicate terrorism and to mete out swift justice to terrorists’.²² She thought that the immediate response of that Government to the events of 11 September 2001 was understandable but less so with the passing of time as the immediate sense of urgency and threat declined.²³

In giving her negative answer to the question posed, the author identifies two crucial errors made by the US Government. The first was the failure to build a solid legislative foundation, which would have been readily granted by Congress at the time, despite the Government’s concerns that Congress would be ‘slow and unwieldy’.²⁴ As a result, the Government left itself open to legal challenges and to criticism because ‘swift justice’ was not delivered through the military tribunals system, especially when compared with those cases dealt with by the court system.²⁵ The second error was a failure to consider how the prison facility at Guantánamo Bay, with its prospect of indefinite detention for its detainees, would affect the international reputation of the US in the long term.²⁶ The US Government neglected to pursue public diplomacy to win international support and this helped to elevate Guantánamo Bay as a rallying cause for Islamic fundamentalism. The author thought it was unlikely that the policies pursued had reduced terrorism around the world.²⁷

In her view, the same polarised disagreement which surrounded the politics and morality of the Guantánamo Bay policy surrounded the Australian Government’s handling of Hicks. Once again, the author prefers to concentrate on the pragmatic evaluation of the Australian Government’s performance, even though she refers in passing to the importance of examining whether the Australian Government’s policy upheld democratic values.²⁸ She shows an awareness that Hicks would have faced the same process even if he was ‘entirely innocent’ and also that he was ‘entitled to the same standard of justice as any Australian citizen’ regardless of whether he attracted public sympathy.²⁹ In her view, the end result was seen as lacking in credibility. Although the Prime Minister could never have foreseen that the case would unfold in the way it did, his government was dogged in its refusal to change tack in the face of ample evidence of incompetence on the part of the US Government. According to the book, this was an inflexible policy position that was dictated by long term concerns of being seen as a loyal ally of the US, even though the US had

²¹ Sales, *Detainee 002*, above n 2, 231.

²² Ibid.

²³ Ibid 231–2.

²⁴ Ibid 232.

²⁵ ‘Since September 11, the only successfully litigated terrorism prosecutions have occurred in conventional courts around the world, including the cases of John Walker Lindh, Richard Reid and Zaccharias Moussaoui’: *ibid* 233.

²⁶ Ibid 232.

²⁷ Ibid 235, 244.

²⁸ Ibid 238.

²⁹ Ibid.

unwittingly or otherwise misled the Australian Government.³⁰ The author thought that Hicks was undoubtedly guilty of associating with al Qaeda, but the legal procedure used against him was ‘poorly executed’ and ‘lacking in credibility’.³¹ It had the effect of severely undermining ‘the democratic values and ideals on which Australia and the US are built’.³² She concludes with a resounding answer to the question posed at the start of the chapter, namely, that the policies pursued at Guantánamo Bay generally, and the handling of Hicks in particular, had not made ‘the world safer from terrorism’ and had not ‘delivered swift justice to terrorists’.³³

The author also indicated that another underlying aim of the book was to debunk some of the myths surrounding Hicks. The myths were as follows:

- 1 The Australian Government abandoned Hicks.³⁴
- 2 Hicks was tortured at Guantánamo Bay.³⁵
- 3 Hicks was not abused while in US custody, using the term ‘abuse’ in a sense different from torture.³⁶
- 4 The ‘war on terror’ is a war.³⁷
- 5 Hicks was a lost soul in the wrong place at the wrong time.³⁸

As will become apparent, we believe she succeeded in doing so in relation to all the myths except the second (although there are qualifications relating to the first and the third).

A *The Abandonment Issue*

Although Australian ministers and diplomats expressed concern about delays in the US handling of the Hicks case, they were unable to get answers from US Department of Defense officials.³⁹ While the evidence does not support the charge of abandonment, neither does it support the view that the Australian Government pursued Hicks’s interests with vigour. The Government failed to insist on Hicks being either charged and brought to trial or released within a reasonable time.⁴⁰ As a result, an unconscionable delay occurred before Hicks was charged and brought to trial.

³⁰ Ibid 239.

³¹ Ibid 244.

³² Ibid.

³³ Ibid.

³⁴ Sales, ‘The Case of David Hicks’, above n 14, 14.

³⁵ Ibid 15.

³⁶ Ibid 15–16.

³⁷ Ibid 16–17.

³⁸ Ibid 17.

³⁹ Ibid 14–15.

⁴⁰ For a detailed account of the attitude of the Australian Government, see Lex Lasry, *The United States v David Matthew Hicks: Final Report of the Independent Observer for the Law Council of Australia, Guantánamo Bay, Cuba* (Law Council of Australia Report, 24 July 2007), available from <<http://www.lawcouncil.asn.au/hicksjustice.html>> at 23 September 2008.

B *The Torture Issue*

The author suggests that Hicks's interrogators at Guantánamo Bay were not called upon to resort to harsh techniques because he 'sang like a canary' and because a US military prosecutor described him as lacking in courage.⁴¹ The author may be correct but the evidence is sketchy, and we know that persons were tortured at Guantánamo Bay.⁴²

C *The Abuse Issue*

On the other hand, Sales is sceptical of the claim that Hicks was not 'abused' while in US custody. In the book and in her address to the Sydney Institute she pointed to some evidence of 'rough handling' in Afghanistan and to the fact that he was mentally and emotionally abused and subjected to petty mistreatment.⁴³ Yet she states that Hicks's lawyers have not substantiated the claim that Hicks was mistreated on two occasions at a land base where he was taken while held on the *USS Peleliu*.⁴⁴ Her stated reason for making that claim, which is based merely on a similar claim by a fellow journalist, is unsatisfactory.⁴⁵ Claims of his mistreatment cannot be discounted, especially with growing evidence coming to light of the mistreatment of suspects by foreign governments under the policy of 'extraordinary rendition' and also by the US military authorities. The evidence indicates that US naval vessels, including the vessel mentioned above, were used to detain and interrogate suspects.⁴⁶ Unfortunately there is nothing on the public record to show that the US naval authorities were pressed to provide, or that they actually produced, records to show that Hicks had *not* been taken off the vessel in question at the time alleged by him.

To the extent that Hicks was 'roughly handled' in Afghanistan and subjected to mental and emotional abuse and petty mistreatment, the author is correct in refuting the myth that he was not abused. But in the absence of reliable evidence, it is not possible to resolve the allegations of mistreatment at the land base.

D *'War on Terror'*

We agree with the author's view that the use of the term 'war on terror' is problematic, given the absence of a clear enemy and the indeterminate end to hostilities,⁴⁷ and with her view that the US Government appeared to have invented rules as it went along with only limited consultation with the

⁴¹ Sales, 'The Case of David Hicks', above n 14, 15.

⁴² Aggressive interrogation techniques amounting to torture were approved and applied at least in the case of Mohammed al-Qahtani: Center for Constitutional Rights, *The Torture of Mohammed Al Qahtani, Interrogation Log Detainee 063* (2002), available from <<http://ccrjustice.org/reports>> at 23 September 2008. For further analysis of torture in Guantánamo Bay see Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (2008); Neil A Lewis, 'Red Cross Finds Detainee Abuse in Guantanomo', *The New York Times* (New York, US) 30 November 2004, 1.

⁴³ Sales, *Detainee 002*, above n 2, 152–4; Sales, 'The Case of David Hicks', above n 14, 15–16.

⁴⁴ Sales, *Detainee 002*, above n 2, 51. See also 152–4.

⁴⁵ Ibid 282 (fn 8).

⁴⁶ Duncan Campbell and Richard Norton-Taylor, 'US Navy Ships Accused of "Holding Terrorism Suspects"', *The Guardian Weekly* (London, UK) 6 June 2008, 1.

⁴⁷ Sales, *Detainee 002*, above n 2, 31.

international community and others.⁴⁸ However we reject her acceptance of the dubious assertion that the international rules of war appear outdated because terrorists do not accept them.⁴⁹

E *The 'Lost Soul' Issue*

The author is also correct in rejecting the myth that Hicks was a lost soul in the wrong place at the wrong time.⁵⁰ She points out that, whatever his motivations may have been, he was, on his own admission, knowingly involved in training with terrorists. So much is clear from Hicks's letters from abroad to his relatives⁵¹ and from his recorded interviews with the Australian Security and Intelligence Organisation ('ASIO') and the Australian Federal Police ('AFP') on the *USS Peleliu* and at Guantánamo Bay.⁵²

OUR APPRAISAL AND OTHER CRITICISMS

In our view, the book represents a fair and balanced account of the Hicks affair, subject to important qualifications.

First, the author's argument that Major Mori — the military lawyer appointed to defend Hicks — should have secured a plea bargain from as early as 2003⁵³ is flimsy in the extreme. At that time, the US wanted a lengthy prison sentence and would settle for nothing else. The author acknowledges that any willingness on the part of the US prosecuting authorities to negotiate below their offer of 10 years imprisonment would not have gone 'all the way down' to the offer made by Major Mori, which was that Hicks would serve a two year sentence of imprisonment.⁵⁴ Further, the willingness on the part of the US military authorities to agree to a plea bargain acceptable to Major Mori only emerged once public opinion had changed in Australia and the Australian Government felt under pressure, even from its own backbench, to seek to have the case settled and have Hicks returned to Australia by early 2007.

Second, the book belittles the part played by Major Mori for no evident reason, with little credit given to him for raising public awareness in Australia and helping to change public opinion which previously had been quite hostile to Hicks. In our view, the book fails to convey the full import of that achievement with only a passing reference being made to how Major Mori, with Hicks's father, helped to 'successfully [change] the media focus from Hicks's own conduct to the flawed legal process'.⁵⁵

The role of the Major is analysed in Chapter 16 of the book, where he is described as having attained the status of a 'folk hero', and it is accepted that he was a tireless advocate for his client.⁵⁶ But the author felt that his dedication

⁴⁸ Ibid 31.

⁴⁹ Ibid 37.

⁵⁰ Sales, 'The Case of David Hicks', above n 14, 17.

⁵¹ Sales, *Detainee 002*, above n 2, 21, 24.

⁵² Ibid 24–5, 86.

⁵³ Ibid 224–7.

⁵⁴ Ibid 225.

⁵⁵ Ibid 222–3.

⁵⁶ Ibid 221.

should not put the defence team's performance beyond critique.⁵⁷ This rested on two criticisms. One related to the criticism with which we have already dealt: that Hicks's lawyers were unwilling to accept a plea bargain at an earlier point in time.⁵⁸ The other concerns our next qualification.

The third qualification relates to the criticism based on the failure of Hicks's lawyers to mount a Federal Court action in Australia, compelling the government to request his release and his return to Australia — a step that was taken as late as 2006. Sales alleges that some members of the legal fraternity could not understand why that action had not been commenced earlier.⁵⁹ In our view the criticism fails to take account of the then existing state of the legal authorities, which showed that such an action would have had little or no chance of success — especially when considered in the light of the traditional reluctance of our courts to review the conduct of foreign relations by an Australian Government⁶⁰ and the refusal of the courts to recognise the legal right of a citizen to obtain diplomatic assistance.⁶¹ Even in the case that was commenced,⁶² the Federal Court went no further than to find against the Australian Government's attempt to have the action dismissed on the ground that it did not raise an arguable case. In so deciding, Tamberlin J emphasised that this did not mean that the Court ruled either way on the merits of the case or that the cause of action would have succeeded.

Fourth, and again by way of qualification, while the book acquits the Australian Government of deserting Hicks and of being too trusting of the US, it fails to recount all or quote even some of the statements made by the Prime Minister, the Foreign Affairs Minister and the Attorney-General characterising and denigrating Hicks as a dangerous terrorist — a view certainly not supported by evidence known to the Australian Government, which consisted of the confessions made by Hicks to officers of the AFP and ASIO.⁶³ This evidence was virtually all that the US had, apart from unreliable evidence given by a British detainee who later recanted his testimony once he was freed. The most that the author acknowledged, and then only in a passing reference at the end of the book, is that Australian Government ministers were seen as having 'publicly

⁵⁷ Ibid 222.

⁵⁸ Ibid 223.

⁵⁹ Ibid 223–4.

⁶⁰ 'Issues arising out of international relations have widely been regarded as non-justiciable': *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 307 (Wilcox J). See also *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 937–8; *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270, 274. Cf *Re Diffort; Ex Parte Deputy Commission of Taxation (NSW)* (1988) 19 FCR 347, 370 (Gummow J). Although often used, the term 'non-justiciable' is capable of generating confusion and for a discussion of its possible meanings in this context, see Geoffrey Lindell, 'Judicial Review of International Affairs' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 160, 161–2.

⁶¹ See below Part VII.

⁶² *Hicks v Ruddock* (2007) 156 FCR 574.

⁶³ Sales, *Detainee 002*, above n 2, 86, 92, 168. A similar conclusion was reached by some lawyers within the US prosecution team: Hicks was characterised as a 'fair low-level accused' (at 163), as a 'guy who spent a little bit too much reading *Soldier of Fortune* magazine' (at 166) and his case was categorised as 'weak' (at 161).

judged Hicks in a way that they never judge defendants in regular criminal courts'.⁶⁴

Fifth, there is no reference in the book to any Australian inquiries directed to the US questioning what evidence it had to show that Hicks was a terrorist or that he participated in terrorism, apart from what he had admitted. Although the book points to the hope on the part of Australian Embassy officials that the delay in processing Hicks would yield more damaging evidence against him,⁶⁵ this hope was never realised. More importantly, neither the Embassy nor the Australian Government made any inquiry about the matter.

Finally, there is only a vague reference to the early finding by Lex Lasry, the Australian Law Council's representative, that the military commission process was flawed and could not deliver a fair trial.⁶⁶ The book fails to show that the concerns expressed about the process by Australian Embassy officials, based on a similar appraisal of the flaws identified by an Attorney-General's Departmental representative,⁶⁷ were taken into account or examined by senior government ministers. It would seem that these concerns were ignored. Nor is there any evidence that the Australian Government sought the advice of Australian Legal Military officers who could be expected to have a more expert knowledge of international humanitarian law. Even after it was changed at the request of Australian Embassy officials, the military commission system was seen to have flaws which were later exposed in the Supreme Court's decision in *Hamdan v Rumsfeld*.⁶⁸

In our view, taken together, all these qualifications lead to a conclusion that the author has been too kind to the Australian Government.

THE RULE OF LAW

A central element of the rule of law is that:

no [person] is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.⁶⁹

There are three important principles which are designed to safeguard the liberty of the subject. First, and admittedly subject to some qualifications, 'the power to order that a citizen be involuntarily confined in custody is ... part of the

⁶⁴ Ibid 240.

⁶⁵ 'The Australians had assumed much of the delay was because the Americans were gathering a damning dossier against Hicks. Instead, they mostly relied on Australian material that had been in their hands since 2002 ... It made the delay in the case even more bizarre': ibid 168.

⁶⁶ Ibid 187. For the early findings of the Law Council Independent Legal Observer see Lex Lasry, *United States v David Matthew Hicks: First Report of the Independent Legal Observer for the Law Council of Australia* (Law Council of Australia Report, 30 August 2004) 3–5, 40, available from <<http://www.lawcouncil.asn.au/hicksjustice.html>> at 23 September 2008.

⁶⁷ Ibid 186–7.

⁶⁸ 548 US 557 (2006).

⁶⁹ A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1931) 183–4.

judicial power of the Commonwealth entrusted exclusively to Ch III courts'.⁷⁰ Secondly, a 'person who is arrested may be detained only for the purpose of bringing him before a justice [or magistrate] to be dealt with according to law',⁷¹ and '*without unreasonable delay*'.⁷² Thirdly, normally detention cannot be used for the purposes of interrogation or to obtain information.⁷³ Only the heightened fear of terrorism can explain how easily and without public outcry those basic considerations were set aside in the treatment of Hicks and other detainees at Guantánamo Bay.

If ordinary courts are to be replaced with a system of military tribunals and commissions, that system will need to carry an assurance of due process in order to comply with the essential requirements of the rule of law. But this regrettably has not occurred. Perhaps this is not surprising given that military tribunals were originally designed to carry out military ends which were in fact the very ends that were deliberately chosen to fight terrorism. Despite the modern sophistication of involving legally trained personnel in military law and the welcome civilising influence of international humanitarian law, it may still remain essentially true, as was once said of the military tribunals considered in *Clifford v O'Sullivan*,⁷⁴ that they were 'not courts at all, but mere committees of officers meeting to inform the mind and carry out the orders of the Commander-in-Chief'.⁷⁵

The view has been expressed that:

most legal critics would agree that Hicks has admitted to many actions that are hard to support in any moral sense ... But a basic legal concern is that when Hicks was roaming around Afghanistan, guarding tanks and meeting Osama bin Laden, he was doing nothing that was then illegal under US, Australian or international law. Had he consulted a legal adviser before his journey, he would have been informed that his travels were dangerous and foolhardy, but not that they were illegal.⁷⁶

With the exception of a possible offence committed under s 7(d) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), and subject to one other qualification, we have no reason to disagree with this view, at least as it regards the conduct which gave rise to Hicks's plea of guilty.⁷⁷ At his first trial

⁷⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28 (Brennan, Deane and Dawson JJ).

⁷¹ *Williams v The Queen* (1986) 161 CLR 278, 305 (Wilson and Dawson JJ) ('Williams'). See also at 293 (Mason and Brennan JJ) to the same effect.

⁷² *Ibid* 293 (Mason and Brennan JJ), citing with approval *Bales v Parmenter* (1935) 35 SR (NSW) 182, 189 (Jordan CJ) (emphasis added).

⁷³ *Williams* (1986) 161 CLR 278, 283 (Gibbs CJ), 293–4 (Mason and Brennan JJ), 305 (Wilson and Dawson JJ).

⁷⁴ [1921] AC 570.

⁷⁵ David L Keir and Frederick H Lawson, *Cases in Constitutional Law* (6th ed, 1979) 223.

⁷⁶ Hilary Charlesworth, 'Destructive Hicks Saga Shakes Faith in Our Government', *The Canberra Times* (Canberra, Australia) 9 April 2007, 13, quoted in Marley Zelinka, 'Hicks v Ruddock versus *The United States v Hicks*' (2007) 29 *Sydney Law Review* 527, 528 (fn 3).

⁷⁷ See Devika Hovell and Grant Niemann, 'In the Matter of David Hicks: A Case for the Australian Courts?' (2005) 16 *Public Law Review* 116, 129, who indicate the reason for the doubt about whether Hicks would have committed this offence.

in 2004, Hicks was charged with three counts.⁷⁸ The first was conspiracy, under which he was accused of training with al Qaeda in 2001, returning to Afghanistan after 11 September 2001 and fighting alongside John Walker Lindh against the US. The second count was attempted murder by an unprivileged belligerent, without specifying a victim or specific incident. The count merely alleged that Hicks had intended to kill US troops and their allies after 11 September 2001 through small arms fire and explosives. The author indicated that the reference to 'unprivileged belligerent' related to the US view that Hicks was fighting outside the international rules of war because he was not a member of a regular or proper army.⁷⁹ The third count was that of aiding the enemy by alleging that during 2001 Hicks 'intentionally aided' al Qaeda and the Taliban but without specifying any further details.⁸⁰ It is extremely doubtful whether the three counts disclosed any offences known under the international rules of war⁸¹ but, even if they did, there was no evidence to support them apart from his having trained with al Qaeda.

At his second trial in March 2007, Hicks pleaded guilty to the offence of being an 'unlawful enemy combatant' who provided material support for terrorism by reason of having trained with al Qaeda in 2001 and having returned to Afghanistan to join the Taliban after 11 September 2001.⁸² This offence, created by the *Military Commissions Act of 2006* (US),⁸³ was known to the domestic federal criminal law of the US before Hicks entered Afghanistan.⁸⁴ Hence the foreshadowed qualification to the view mentioned above. But that offence was triable before an ordinary court with all the usual safeguards afforded to the accused in an ordinary criminal trial. Thus it is correct to say that, to the extent that the law enacted by Congress in 2006 took those important safeguards away, it operated retrospectively. That the stated purpose of the provisions which created these offences was to codify offences that have traditionally been triable by military commissions and not to establish new crimes that did not previously exist⁸⁵ does not deny or qualify the retrospective operation of the law enacted by Congress in 2006 as we have stated it.

The retrospective operation of this law may even be contrary to the prohibition against *ex post facto* criminal laws contained in art I § 9(3) of the *US Constitution*. The reach of that prohibition is taken to extend to retrospective changes in the punishment for a criminal offence and to the rules of evidence and

⁷⁸ Sales, *Detainee 002*, above n 2, 166–7, appendix II. See also Hovell and Niemann, above n 77, 121–9, for an analysis of these charges and whether they disclosed offences known to international law and Australian domestic law.

⁷⁹ Sales, *Detainee 002*, above n 2, 167.

⁸⁰ Ibid.

⁸¹ See McCormack, above n 11. The doubts as regards the conspiracy charges were endorsed by Stevens, Souter, Ginsburg and Breyer JJ in *Hamdan v Rumsfeld*, 548 US 557 (2006), 603–5. However, that issue remains unresolved as the other member of the majority, Kennedy J, found it was unnecessary to decide on the point: 638, 655.

⁸² Described by the author in *Detainee 002*, above n 2, 214–5. See appendix III for the official charge sheet.

⁸³ 10 USC § 950v(b)(25) (2006).

⁸⁴ *Crimes and Criminal Procedure*, 18 USC §§ 2339A, 2339B (1996): Section 2339A was passed in 1994 and criminalises providing material support to terrorists. Section 2339B, passed in 1995, sanctions anyone who provides material support or resources to designated foreign terrorist organisations.

⁸⁵ *Military Commissions Act of 2006*, 10 USC § 950p(a) (2006).

procedure which operate to disadvantage an accused by affecting the substantial rights of the accused.⁸⁶ Depriving defendants of the normal due process rights accorded to them in an ordinary criminal trial seems to fall within the prohibition as so interpreted.

The Australian Government would have been aware that since the division of judicial opinion in *Polyukhovich v Commonwealth*⁸⁷ there exists the possibility that the Australian Parliament is now similarly constrained by Chapter III of the *Australian Constitution*, even in the absence of an express provision against *ex post facto* laws.⁸⁸ That possibility may explain its refusal to legislate retrospectively to make the conduct of Hicks and other suspected terrorists a criminal offence even if it was not an offence when that conduct took place.

Hicks was subjected to US laws which operated extraterritorially. If the US is entitled to legislate against the extraterritorial conduct of citizens of other countries which harms or injures US citizens, the governments of those countries are entitled — if not morally obliged — to ensure that their citizens are only dealt with in accordance with the basic requirements of due process that are universally recognised and otherwise comply with international law.

Our concern with the author's treatment of the rule of law is that it is relegated to a subsidiary consideration. This treatment follows from the question asked at the beginning of the book: did Guantánamo Bay and the handling of Hicks serve the goals of the 'war on terror'? The answer given by the book is a resounding 'no'.

As the very statement of the question suggests, it is designed to attract a pragmatic answer, not a principled answer. The author makes this clear when she asks:

what if, instead of looking at Guantánamo Bay and the case of David Hicks politically or morally, we examine it pragmatically? Put aside the question of whether it was right or wrong to sacrifice certain legal and human rights in the first place. Then objectively ask if the decision to set aside those rights in the interests of national security has worked. Has the Bush administration's detainee policy furthered its goals in the War on Terror: to eradicate terrorism and to mete out swift justice to terrorists?⁸⁹

⁸⁶ See, eg, *Calder v Bull*, 3 US 386, 390 (1798); *Cummings v Missouri*, 71 US 277, 325–6 (1867); *Kring v Missouri*, 107 US 221, 228–9, 232 (1883); *Duncan v Missouri*, 152 US 377, 381–2 (1894).

Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offense was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr Bishop? And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

Justice Miller delivering the opinion of the Court in *Kring v Missouri*, 107 US 221, 231–2 (1883).

⁸⁷ (1991) 172 CLR 501.

⁸⁸ Deane, Gaudron and Toohey JJ affirmed the existence of the separation of powers constraint while Mason CJ, Dawson and McHugh JJ denied its existence except as regards 'bills of attainder'. The matter remained unsettled because the remaining member of the Court, Brennan J, expressed no opinion on the issue: see Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 206–12. See also Hovell and Niemann, above n 77, 129–32.

⁸⁹ Sales, *Detainee 002*, above n 2, 231.

As to Guantánamo Bay and the Bush Administration's detainee policy, the author's conclusion, which is unquestionably correct, is that 'if a government sets aside values and processes that distinguish civilised societies, such as the rule of law, human rights and balance of power, it needs to have a superior system ... to replace them'.⁹⁰ This the Bush Administration did not have.

As to the Australian Government's handling of the Hicks case, the author's conclusion, again unquestionably correct, is that 'the legal procedure he faced was poorly executed and was sorely lacking in credibility. It severely undermined the democratic values and ideals on which Australia and the United States are built'.⁹¹ It is remarkable that until recently, and despite the delay of six years, the Hicks case remained the only case where the trial of a detainee at Guantánamo Bay had resulted in a conviction or, for that matter, in an acquittal on the merits.

The approach taken in the book to these questions, which is in essence a pragmatic approach, is no doubt legitimate, when viewed from a journalistic perspective. In downgrading the intrinsic importance of the rule of law and related values, the book can only be seen as a reflection of the modern preoccupation of governments and the media alike with pragmatic or managed outcomes rather than with outcomes based on important and traditional values associated with the liberty of the subject and due process. When added to the superior resources available to governments to publicise their case, the pragmatic approach can only lessen the ability of individuals to defend themselves against serious charges levelled against them by governments, especially if those individuals are unpopular or are members of unpopular minority groups.

Our point is that the Hicks case should not be assessed only as a pragmatic exercise, but that it should be examined from the deepest perspective of individual liberty, the rule of law and due process. So examined, the Hicks case represents a glaring departure from fundamental elements of the rule of law, due process and human rights.

In one respect the author, perhaps unintentionally, trivialises the importance of these considerations by making disparaging references to lawyers and 'human rights activists'. There is a reference to the holding of rallies around the country in 2006 'bringing together "usual suspects"' described as 'human rights activists ... civil libertarians and lawyers'.⁹² There is another reference to a Law Council of Australia official who is said to be typical of the 'people who surrounded and advised Mori — voices of principle, not pragmatism'.⁹³ In our experience, to be described as a 'voice of principle' would not be a condemnation but a commendation. Not so, evidently, in the world of journalism or politics.

Whatever may be the position for journalists, we think that for lawyers, at least, the answer to the question of whether the process used against Hicks departed from the rule of law deserves specific consideration. In our view it must be answered in the affirmative. We have already pointed to the retrospective nature of the offence to which he pleaded guilty. This departure from due process was compounded rather than explained by the Australian Government's

⁹⁰ Ibid 238.

⁹¹ Ibid 244.

⁹² Ibid 212.

⁹³ Ibid 227.

perception that it was necessary for Hicks to be dealt with by US military authorities because he could not have been charged with any offence known to Australian law in force at the relevant time.⁹⁴ Rather than justifying such a course of action, this should have been a reason for not proceeding further and supporting efforts to have one of its own citizens returned to Australia, as occurred with British detainees who were set free after they had been allowed to return to the UK at the request of their government.⁹⁵

There is also the reliance placed on a confession obtained without the presence of a lawyer and in highly questionable circumstances, especially if Hicks's allegations of previous mistreatment (acknowledged by the author to be 'rough handling')⁹⁶ were well-founded. To this we should add the criticisms about the nature of the evidence that could have been admitted against a detainee despite its nature as hearsay and the coercive methods used to obtain it, even after changes made to the system necessitated by adverse US Supreme Court decisions.⁹⁷

An egregious departure from due process was the highly disparaging public statements made by senior members of the Australian Government, which prejudged Hicks's guilt and treated him as a most dangerous terrorist, an allegation that was outrageous in the light of all that we now know. Although it is not unique to the Hicks case, we note a disturbing modern trend under which governments and the media feel increasingly free to prejudge and generate a climate of adverse publicity about persons accused of committing serious criminal offences. This represents a serious undermining of the presumption of innocence. This is not, however, the occasion to discuss the consequences of this disturbing development.

None of these departures from the rule of law can be said to have been waived or cured by the plea of guilty.⁹⁸ There may well have been an understandable desire of anyone detained at Guantánamo Bay to avoid further detention for an indeterminate period of time under the kind of conditions that prevailed there. If the past is any guide, successful legal challenges to the military commission system, both before and after 2006, only serve to prolong the detention process by enabling US military authorities to reconstitute the system in the hope of ultimately ensuring compliance with US law. As welcome as the intervention of the Supreme Court has been, it needs to be remembered that the long delays in the system are accentuated by the court's seeming inability or unwillingness to

⁹⁴ Ibid 92–3.

⁹⁵ Ibid 122, 167, 184, 200.

⁹⁶ Ibid 153, 182.

⁹⁷ Ibid 206–12. After the US Supreme Court decision in *Hamdan v Rumsfeld*, 548 US 557 (2006), Congress passed the *Military Commissions Act of 2006* 10 USC (2006). 'It was a triumph for the administration. The system was not greatly different from what had existed before, except now it had the backing of Congress': Sales, *Detainee 002*, above n 2, 210.

The specific rules of evidence were what bothered most critics. Prosecutors could use classified information to secure convictions without giving defendants and their lawyers access to it. Evidence obtained via hearsay or coercion would be admissible if the chief of the military commission panel ruled it of 'probative value to a reasonable person', allowing very wide latitude: at 211.

These matters and other aspects of the failure to accord due process have been analysed in depth in McCormack, above n 11, 278–82.

⁹⁸ McCormack, above n 11, 287–9.

expedite the hearing of challenges before they are dealt with by the lower courts in the system.

Nor is the conduct of both the US and Australian Governments enhanced by disclosures that have since come to light after the publication of the book under review. Those disclosures show that the military commission system was not independent even after it was reconstituted by Congress. Obviously we do not suggest that the author could have had regard to those disclosures. But they are very serious and include those made by Colonel Morris Davis, the Chief Prosecutor, after he resigned from that position. He is reported to have asserted that the offer of the plea bargain was made without the approval of the prosecution and was the result of political influence — even if that influence did work in Hicks's favour.⁹⁹ These disclosures confirm the soundness of the suspicions that existed following the visit of the US Vice-President to Australia and the discussions held with the Australian Prime Minister; and also the past political association which the Convening Authority, Judge Susan Crawford, had with the Republican Party.¹⁰⁰ In addition, there has been the further disclosure that if it had been up to Colonel Davis, Hicks would not have been charged at all. According to Colonel Davis, he only charged Hicks because he was forced to do so by politicians.¹⁰¹ He did not believe that Hicks was amongst the worst or most serious suspected terrorist offenders. Colonel Davis is also reported as having confirmed that there was a perception that it was necessary to find those charged guilty, regardless of their innocence, for political reasons in order to justify their long period of detention and other treatment.¹⁰² Even more recently there have been reports that a high-ranking legal adviser in the Office of Military Commissions in the US Department of Defense has been prevented by a military judge from participating in the prosecution of a detainee at Guantánamo Bay because he exerted improper influence over a team of prosecutors and may have compromised the fair conduct of that case. The same report indicated that the adviser had been at the centre of a bitter dispute with Colonel Davis who alleged that the adviser had interfered in the work of the military prosecution office, pushed for closed-door proceedings and pressed reliance on evidence obtained through techniques that critics called torture.¹⁰³

The underplaying of the rule of law in the book perhaps only underlines the work that still needs to be done by the legal community in educating the public about the importance of the rule of law and due process. As the author acknowledges, the same 'controversial process' adopted by the US military authorities, with the acquiescence of the Australian Government, would have

⁹⁹ Geoff Elliott, 'Hicks Case "Pushed to Suit Howard" Agenda', *The Australian* (Sydney, Australia) 25 February 2008, 1.

¹⁰⁰ Sales, *Detainee 002*, above n 2, 215–16, 229.

¹⁰¹ John Wiseman, 'Prosecutor Admits Hicks Case Political', *The Australian* (Sydney, Australia) 30 April 2008, 4.

¹⁰² Warwick McFadyen, 'Terror Trial Reality: It's All Just for Show', *The Age* (Melbourne, Australia) 3 May 2008, 9; Gary Younge, 'There's Still One Injustice in Cuba to Which Americans Are Wilfully Blind', *The Guardian Weekly* (London, UK) 29 February 2008, 9.

¹⁰³ 'US Lawyer Barred for Guantánamo Bias', *The Sydney Morning Herald* (Sydney, Australia) 12 May 2008 <<http://www.smh.com.au/news/world/us-lawyer-barred-for-guantanamo-bias/2008/05/11/1210444244306.html>> at 23 September 2008.

applied to Hicks even if he had been innocent.¹⁰⁴ To say that is not to overlook the admirable and commendable efforts made by the lawyers who defended David Hicks (some of whom acted on a pro bono basis), the legal academics who assisted them and the Law Council and its representative, Lex Lasry, for the complaints and representations they made to the Australian Government about the flawed process used against Hicks. In the end, however, the challenge remains for the practising and academic legal community to do more to educate the public about the rule of law and its relevance to the life of ordinary and law-abiding members of the community.

MILITARY INTERROGATION, DETENTION AND PUNISHMENT OF INTERNATIONAL TERRORISTS

The decision to deal with terrorists as ‘combatants engaged in a war’ rather than ordinary criminals has thrown up many issues. In relation to the Hicks affair, the most important of these is how he fitted into the traditional distinction between: (a) ordinary soldiers engaged in combat (however unlawful the nature of that combat) so as to be capable of being detained without further punishment until the conclusion of hostilities; and (b) soldiers who can also be punished for committing such known international offences as war crimes and crimes against humanity.

It may be assumed for present purposes that terrorist acts directed at civilian and not military targets do now constitute crimes at international law akin to war crimes and crimes against humanity, although that assumption needs to be substantiated. But even on that assumption, training with, and expressing support for, such organisations without injuring or attempting to injure soldiers of armies sent to destroy such organisations, or otherwise participating in the commission of terrorist acts, can hardly be placed in the same category.

On the other hand, to consign Hicks to the position of an ordinary soldier who is then liable to be detained for the duration of the ‘war on terror’ may well have been to consign him to detention for the remainder of his life, given its doubtful characterisation as a ‘war’ because, as was indicated before,¹⁰⁵ and as the author

¹⁰⁴ Sales, *Detainee 002*, above n 2, 238.

¹⁰⁵ See above n 37 and accompanying text. See also above Part III(D).

points out, there was an absence of a clear enemy and there was an indeterminate end to hostilities.¹⁰⁶

History shows that there is nothing new about terrorism. Terrorist movements associated with some forms of anarchism existed in European countries during the 19th century, particularly France, Italy, Spain and Russia.¹⁰⁷ It is by no means clear that the ordinary processes of the criminal law are not adequate to deal with such threats. We do not need to look beyond the response to the military arm of the Irish Republican Army in the UK and the convictions of terrorists in US courts mentioned in the book under review.¹⁰⁸ There is no small danger that special laws directed at terrorism will actually run the risk of enhancing the status of terrorists as martyrs and heroes.

There is an important lesson that should be learnt from the treatment meted out to the detainees at Guantánamo Bay outside the ordinary processes of the criminal law. That lesson is that much more thought will need to be given to adjusting existing international and domestic systems of law for detaining and putting on trial alleged terrorists in order to strike the appropriate balance between eradicating and punishing terrorism on the one hand and, on the other, observing the requirements of due process and the rule of law. Needless to say, any adjustment of international law will require the agreement and cooperation of the international community.

THE RIGHT OF A CITIZEN TO OBTAIN DIPLOMATIC ASSISTANCE

The Hicks affair poses significant issues concerning the extent to which Australian citizens have a right to obtain the diplomatic assistance and protection of their government when detained and subjected to overseas legal processes. Related issues have arisen when Australian citizens have been detained and punished for drug-related offences, especially when that punishment can involve the death penalty.

As will be seen shortly, the Hicks affair provided the first judicial test in Australia — although not in England — of the legal right of a citizen to obtain that assistance. Apparently international law leaves it to municipal law to

¹⁰⁶ Sales, 'The Case of David Hicks', above n 14, 16. The point made in the text was strikingly illustrated by the case of Salim Hamdan, the former driver of Osama bin Laden. At the date of writing he was the only other detainee at Guantánamo Bay who was convicted of committing offences against the law against terrorism by the reconstituted military commissions. He was found guilty of providing material support for terrorism and sentenced to five and a half years' imprisonment, but was acquitted of the more serious charge of conspiring to attack civilians. Because the period of his previous detention was taken into account, this meant that Hamdan would have served his sentence by the end of 2008. At the date of writing, there was lingering uncertainty as to whether he would, nevertheless, continue to be detained indefinitely for the duration of the war against terror after the expiration of that sentence because of his classification as an 'unlawful enemy combatant': William Glaberson, 'Bin Laden Driver Sentenced to a Short Term', *The New York Times* (New York, US) 8 August 2008, A1 <<http://www.nytimes.com/2008/08/08/washington/08gitmo.html?partner=rssnyt&emc=rss>> at 23 September 2008; Tim Reid, 'Bin Laden Driver Gets 66 Months — But Will Never Be Released', *The Times* (London, UK) 8 August 2008 <http://www.timesonline.co.uk/tol/news/world/us_and_americas/article4481580.ece> at 23 September 2008.

¹⁰⁷ George Woodcock, *Anarchism: A History of Libertarian Ideas and Movements* (1962) 7, 12–14, 278–94, 312–22, 325, 333–4, 344, 348, 387–91.

¹⁰⁸ Sales, *Detainee 002*, above n 2, 233.

determine whether a country is under a duty to protect its citizens abroad.¹⁰⁹ It seems that German courts recognise that the Federal German Republic is under a constitutional duty to provide diplomatic protection to German nationals, even though that duty is qualified since the Government enjoyed a ‘wide discretion in deciding whether and in what manner to grant such protection in each case’.¹¹⁰

By contrast, there is no Australian or English case which recognises the existence of a legally enforceable duty on governments to afford their subjects diplomatic assistance. There is instead influential English judicial authority which denies its existence.¹¹¹ In one of those cases, the duty to accord protection was thought to be in reality one of ‘imperfect obligation’ and therefore not capable of being enforced in the courts.¹¹² Significantly, some of the cases predated the ‘landmark decision’ of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*¹¹³ which, as was pointed out in *Abbasi*, ‘established that the mere fact that a power derived from the Royal Prerogative did not necessarily exclude it from the scope of judicial review’.¹¹⁴

F Abbasi

In the *Abbasi* case,¹¹⁵ the plaintiff’s son was one of a number of British citizens captured by US forces during the military campaign in Afghanistan and subsequently taken to the US Naval Base in Guantánamo Bay, where he was detained as an enemy combatant without access to a court or a lawyer. His mother sought to compel the Secretary of State for Foreign and Commonwealth Affairs to take positive steps to compel his Department to make representations on her son’s behalf to the US Government, or to take other appropriate action, or at least to give an explanation as to why that had not been done.

The English Court of Appeal dismissed the application despite its clear sympathy with the plight suffered by the detainees and its expressions of concern regarding the failure of the US authorities to adhere to the rule of law. Thus, for example, the Court acknowledged that Mr Abbasi was detained in a ‘legal black-hole … in apparent contravention of fundamental principles recognised [by the UK and the US] and by international law’.¹¹⁶

¹⁰⁹ *R (On the Application of Abbasi) v Secretary of State* [2002] EWCA Civ 1598, [35], [69] (‘*Abbasi*’).

¹¹⁰ *Rudolph Hess Case* (1980) 90 ILR 386, 395, referred to in *Abbasi*, above n 109, [102]: ‘It had to be left to the government to assess the foreign policy considerations, from the standpoint of both the interests of the Federal Republic and those of Hess, and decide on that basis how far further steps were appropriate or necessary’.

¹¹¹ See Geoffrey Lindell, ‘The Coalition Wars against Iraq and Afghanistan in the Courts of the UK, Ireland and the US — Significance for Australia’ (Law and Policy Paper No 26, Centre for International and Public Law, Australian National University College of Law, 2005) 17 (fn 54) (‘The Coalition Wars’), where reference was made to Lindell, ‘Judicial Review of International Affairs’, above n 60, 187 and the cases cited in fns 105–6 therein. For the cases decided since that book was published, see *Abbasi* [2002] EWCA Civ 1598, [37].

¹¹² *Mutasa v Attorney-General* [1980] QB 114, 120, 123.

¹¹³ [1985] AC 374 (‘*CCSU v Minister for the Civil Service*’).

¹¹⁴ [2002] EWCA Civ 1598, [83].

¹¹⁵ The discussion of this case draws on that contained in Lindell, ‘The Coalition Wars’, above n 111, 16–19.

¹¹⁶ [2002] EWCA Civ 1598, [64].

As important as that was, what proved decisive in this case was not a breach of international law but, rather, the review of prerogative powers by reference to the English doctrine of legitimate expectations which imposed a legal duty on the British Government to *consider* the application of a citizen for diplomatic assistance.¹¹⁷ That duty was generated by ministerial statements of government policy both inside and outside Parliament, which indicated a UK practice to that effect.¹¹⁸ The decision in *Abbasi* possibly suggests that given the making of such statements of policy by government, the government's inaction or refusal of diplomatic assistance would be reviewable if it could be shown that the government failed to consider the application for such assistance or that its inaction or refusal to provide the assistance was 'irrational or contrary to legitimate expectations'.¹¹⁹ And in Australia, unlike the UK, there has been no statement of government policy which would generate a legitimate expectation that the government would consider an application for diplomatic assistance.

In the UK, it is authoritatively established (though not yet established at the level of the High Court in Australia)¹²⁰ that prerogative powers are no longer immune from judicial review merely by reason of their source as prerogative powers — as distinct from the 'subject matter' of the particular prerogative power that is challenged.¹²¹ Furthermore, the extension of the doctrine of legitimate expectations so as to give rise to substantive rather than mere procedural rights, which has occurred in the UK, has not met with acceptance in Australia. Accordingly, as one of the present writers had occasion to observe, there is no assurance that British developments would be followed in Australia 'given the growing divergence in administrative law of both countries [and] despite their common origin in relation to matters such as legitimate expectations'.¹²²

G Hicks v Ruddock

Against this rather unpromising background, and towards the end of the five year period spent by Hicks in detention at Guantánamo Bay, his legal advisers

¹¹⁷ Ibid [99], [106].

¹¹⁸ Ibid [87]–[92].

¹¹⁹ Ibid [106].

¹²⁰ In extra-judicial remarks directed to the prerogative mercy, Gummow J recently sounded what may be interpreted as a warning against assuming that the present High Court would be inclined to follow British judicial developments in this regard for prerogative powers that have not been subsumed by legislation: William Gummow, 'Administrative Law and the Criminal Justice System' (Paper delivered at the Administrative Law Seminar of the Law Society of South Australia, 'Administrative Issues in the Criminal Justice System', Adelaide, Australia, 20 June 2008) 5–11. Cf *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121.

¹²¹ 'Lord Scarman said ... that the controlling factor in considering whether a particular exercise of prerogative power was subject to review was "not its source but its subject matter": *Abbasi* [2002] EWCA Civ 1598, [84], quoting with approval *CCSU v Minister for the Civil Service* [1985] AC 374, 407.

¹²² Lindell, 'The Coalition Wars', above n 111, 32, where reference was made to views expressed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 9–10 (Gleeson CJ), 21–5 (McHugh and Gummow JJ), 37 (Hayne J), 48 (Callinan J). See also Geoffrey Lindell (ed), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason* (2007) 197–9.

decided to commence legal proceedings in the Federal Court.¹²³ An order was sought in the proceedings for the issue of habeas corpus and judicial review of a decision by the Australian Government not to seek his release from detention in the US and his return to Australia.

Reduced to its essentials, the basis of the action was the argument that the Australian Government had improperly exercised the executive power of the Commonwealth under s 61 of the *Australian Constitution*, in not seeking to have Hicks freed and returned to Australia, with reference to two major considerations. The first was that the Australian Government had regard to irrelevant considerations in deciding not to request his return, namely, the stated incapability of the Government to prosecute Hicks in Australia for his conduct abroad. The second rested on the claim that, according to law, the Australian Government owed a legal duty to *consider* his request for his return without having regard to irrelevant considerations — a duty which, it was argued, had not been discharged in this case.

It is true, as was indicated before, that there were no statements made by or on behalf of the Australian Government acknowledging the existence of a policy able to generate an expectation that it would consider applications for diplomatic assistance by its own citizens, as had been the case in *Abbasi*. But there was judicial authority in the UK suggesting the existence of a legal duty to that effect in remarks made by Lord Jowitt in *Joyce v Director of Public Prosecutions*,¹²⁴ which proceeded on the basis that the ‘state *must consider* the request for protection’ although its response is entirely discretionary.¹²⁵ It is possible that the obligation referred to in that case was political in the same sense that there is recognised a duty to afford diplomatic protection.

The argument in relation to irrelevant considerations under administrative law was also informed by Chapter III of the *Australian Constitution*, under which the executive cannot create an offence or punish a crime committed by an Australian citizen. The effect of a refusal to request the release of Hicks because, if released, he could not be punished in Australia, and the encouragement of the prosecution in Guantánamo Bay, was to effectively permit the prosecution of an Australian citizen for an offence not known to Australian law. The same Chapter III considerations, it was argued, operated as a matter of constitutional law to constrain the exercise of the executive power of the Commonwealth under s 61 in the conduct of its diplomatic relations with the US.¹²⁶

The Australian Government applied to have the action dismissed by way of summary judgment based essentially on two distinct but to some extent

¹²³ *Hicks* (2007) 156 FCR 574.

¹²⁴ [1946] AC 347.

¹²⁵ *Hicks* (2007) 156 FCR 574, 594, making reference to Lord Jowitt’s observations in *Joyce v Director of Public Prosecutions* [1946] AC 347, 371.

¹²⁶ *Hicks* (2007) 156 FCR 574, 596–7. It was recognised that Chapter III, and in particular s 71 of the *Australian Constitution*, prohibits the detention of Australian citizens and residents against their will by a *non-judicial* body (for example, the executive) as detention is seen, in substance, as punishment which is an exclusive *judicial* function: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27–8 (Brennan, Deane and Dawson JJ). There are many exceptions to this principle, one of which includes the detention of persons accused of committing criminal offences who are to be tried in accordance with due process. Hicks’s detention and the proceedings taken against him did not, in our view, comply with such process.

interrelated grounds.¹²⁷ The first was the ‘Act of State’ doctrine which in past times operated to immunise the actions of the Crown from judicial review regarding the exercise of its prerogatives regarding foreign affairs.¹²⁸ The second was the *Buttes Gas Case*¹²⁹ which can be taken as having established a principle of judicial restraint or abstention. Under that principle the courts of the forum will not adjudicate on transactions of foreign states in the conduct of foreign affairs, or on the sovereign acts done by foreign states in respect of persons or property within their jurisdiction.¹³⁰

Taken together with the problems associated with the technical requirements of the writ of habeas corpus when seeking the release of a person who is detained by the government of a foreign country in that country, it might well be thought that those grounds or principles posed significant obstacles to the success of the innovative action commenced on Hicks’s behalf. However, the Act of State doctrine has with the passing of time become somewhat obscure and appears increasingly difficult to reconcile with the expansion of the scope of judicial review of governmental action.¹³¹

The *Abbasi* case already shows that the traditional and historical reticence of British courts to review the legality of the conduct of the nation’s foreign affairs will no longer prevent courts from vindicating fundamental human rights of individuals.¹³² Thus Tamberlin J was able to point to modern authority which has established in England the principle that grave infringements of human rights form an exception to the *Buttes Gas* principle and the facts pleaded in that action were clearly thought to have satisfied that description.¹³³

Despite the fact that the case for Hicks was in some respects difficult and novel¹³⁴ and given the developing nature of the law in this area, Tamberlin J was unable to conclude that the action as pleaded had no reasonable prospects of success — the standard needed to be satisfied in order to dismiss the action without allowing the matter to proceed to trial. As he pointed out,

the modern law in relation to the meaning of ‘justiciable’ [for the purposes of the *Buttes Gas* principle] and the extent to which the court will examine executive action in the area of foreign relations and Acts of State are now far from settled.¹³⁵

¹²⁷ *Hicks* (2007) 156 FCR 574, 582.

¹²⁸ See also Lindell, ‘The Coalition Wars’, above n 111, 36–41; Lindell, ‘Judicial Review of International Affairs’, above n 60, 188–92.

¹²⁹ *Buttes Gas v Hamer* [1982] AC 888.

¹³⁰ See Lindell, ‘The Coalition Wars’, above n 111, 33–6; Lindell, ‘Judicial Review of International Affairs’, above n 60, 192–5.

¹³¹ In addition there is some doubt as to whether the doctrine can be invoked by the government against Australian citizens based on the same doubts which attend its operation in relation to the British Government and its citizens: see the authorities cited in Lindell, ‘Judicial Review of International Affairs’, above n 60, 191 (fns 129, 130).

¹³² *Abbasi* [2002] EWCA Civ 1598, [57] (independently of the *Human Rights Act 1998* (UK)), referred to in *Hicks* (2007) 156 FCR 574, 598 (Tamberlin J).

¹³³ *Hicks* (2007) 156 FCR 574, 583–4, 597.

¹³⁴ *Ibid* 600.

¹³⁵ *Ibid*.

The same applied to the elements of and the reach of the writ of habeas corpus¹³⁶ and the arguments based on irrelevant considerations.¹³⁷ Overall the law had ‘developed greatly’ and there were ‘no bright lines’ to justify the dismissal of the action at that stage.¹³⁸

But, as Tamberlin J also emphasised, this did not indicate one way or the other whether the action would have succeeded if it had gone to trial, since it was still necessary for those acting on behalf of Hicks to make good their legal and factual allegations outlined in the statement of claim.¹³⁹

At the same time the result of the unsuccessful application to obtain summary judgment must have sounded a signal warning to the Australian Government that it could no longer be certain that the traditional reticence of courts to intervene in areas involving the conduct of foreign relations would necessarily prevent the vindication of the right of personal liberty. This is now the second time that the Australian Government has failed to successfully rely on the Act of State doctrine at the interlocutory stage of a trial.¹⁴⁰

That said, it remains to be seen whether higher Australian courts would have upheld the application of ordinary principles of administrative law to the exercise of prerogative powers in relation to foreign affairs, particularly given the growing divergence between the Australian High Court and British courts on the scope of administrative law review.¹⁴¹ What was certain was that the action in *Hicks* did not provide guidance on that issue because the case was rendered moot by the return of Hicks to Australia after his willingness to plead guilty.

THE ROLE OF THE PUBLIC SERVICE

A long-standing assumption, which was once thought to hold true in both Australia and the UK, has been that an ideal civil service should be composed of ‘an efficient body of permanent officers’ who, despite their subordinate relationship to Ministers, possess ‘sufficient independence, character, ability, and experience to be able to advise, assist, and to some extent, influence, those who are from time to time set over them’.¹⁴²

In *Detainee 002*, Sales has rightly pointed to the role of the public service in the Hicks affair ‘as raising questions not just about the Government’s judgement but also about that of the public service’.¹⁴³ She suggests that because of its loyalty to the Government, the public service may not have been willing to offer full and fearless advice in the affair because it was not advice which the

¹³⁶ Ibid.

¹³⁷ Ibid 597.

¹³⁸ Ibid 600.

¹³⁹ Ibid.

¹⁴⁰ *Ali v Commonwealth* [2004] VSC 6 (Unreported, Bongiorno J, 23 January 2004) (see especially [18]–[21], [22]), mentioned in Lindell, ‘The Coalition Wars’, above n 111, 41 (fn 154). The case concerned an action for false imprisonment of the asylum seekers from the Tampa who were sent to Nauru as part of the so-called ‘Pacific Solution’.

¹⁴¹ See above n 122 and accompanying text.

¹⁴² The celebrated passage of the *Report on the Organisation of the Permanent Civil Service* (Report to the UK House of Commons, 1854) (‘Northcote-Trevelyan Report’), quoted in Peter Hennessy, *Whitehall* (1990) 511. The passage was described as the ‘opening premise’ of that Report, which could ‘be used, virtually unamended, in the Preamble of a White Paper on the Civil Service today’: at 38.

¹⁴³ Sales, *Detainee 002*, above n 2, 240.

Government wanted to hear.¹⁴⁴ We agree with the author's view that the need for public servants to take account of a government's objectives 'does not mean that once the government makes a particular policy decision there should be no further debate about its merits, particularly when [as occurred in this affair] situations change'.¹⁴⁵

Given the unfolding nature of the whole affair and the way events kept occurring, which should have alerted the Government to the legally uncertain and unfair nature of the US military commission process, it seems surprising that the Australian Government did not follow the example set by the British Government when it sought and obtained the return of its citizens detained at Guantánamo Bay,¹⁴⁶ even though it was itself a close and loyal coalition ally to the US.

It would be a matter of serious concern if Sales was correct in suggesting that the public service felt unable to advise the government of the day of the danger of continuing to follow its original decision to support the way the US Government dealt with Hicks.

CONCLUDING OBSERVATIONS

To conclude, an important value of this book is that it provides a lively narrative and largely even-handed account of the Hicks affair, even though the author has, in our view, been too kind to the Australian Government. Another value is that it also provides for lawyers and the public an important vehicle for testing and challenging the sincerity of our commitment to the rule of law and related values. Unfortunately, and as we have suggested in this review, in downgrading the intrinsic importance of the rule of law and related values, the book can only be seen as a reflection of the modern preoccupation of governments and the media alike with pragmatic or managed outcomes rather than with outcomes based on important and traditional values associated with the liberty of the subject and due process. The Hicks affair also draws attention to the precarious nature of any right which may exist of citizens to obtain the diplomatic assistance of the Australian Government and also raises questions about the role of the civil service in the affair.

So far as even lawyers are concerned, there is much to be said for the suggestion made by Philippe Sands that the "war on terrorism" has led many lawyers astray, even 'to eviscerate well-established and sensible rules of international law'.¹⁴⁷ These are rules 'which the US has in the past supported, relied upon and often created'.¹⁴⁸ The rationale advanced by the US Government for avoiding those rules is based on three arguments: (1) the unparalleled nature of the threat of modern terrorism; (2) 'all necessary means may be used to obtain information from captives, who are to be treated as combatants rather than

¹⁴⁴ Ibid 240 (see also 54–5).

¹⁴⁵ Ibid 240.

¹⁴⁶ With one significant exception (David Hicks himself), despite a decision of the British courts affirming his status as a British subject: see *R (on the Application of Hicks) v Secretary of State for the Home Department* [2005] EWHC 2818 (Admin); *Secretary of State for the Home Department v Hicks* [2006] EWCA Civ 400.

¹⁴⁷ Sands, *Lawless World*, above n 3, 206.

¹⁴⁸ Ibid.

ordinary criminals'; and (3) international law is either inapplicable or unenforceable.¹⁴⁹

In effect, '[w]ar was chosen over indictments', as was provocatively put by a close and trusted political adviser to President Bush,¹⁵⁰ but this was done without proper thought as to the rules that govern warfare or the consequences of turning terrorists and criminals into warriors.

Fortunately for those who value the observance of the rule of law in international and domestic law, these arguments have now been widely discredited thanks to their widespread international condemnation, the intervention of the US Supreme Court and the measures passed by Congress — even if somewhat belatedly — which have attempted to rein in the authority of the current US Administration, notwithstanding its assertion of unchecked authority to deal with international terrorism. Unfortunately, however, this did not prevent Hicks falling victim to a legally flawed process as a result of political expediency with the acquiescence of the Australian Government.

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¹⁴⁹ Ibid.

¹⁵⁰ Ibid 256, citing Karl Rove.

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