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'Politics have replaced justice' (Major Michael Mori, July 2006): the long imprisonment of David Hicks

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Bellingen Briefing:

Rosemary Webb, (2007) POLITICS HAVE REPLACED JUSTICE'
(Major Michael Mori, July 2006): THE LONG IMPRISONMENT OF
DAVID HICKS

This paper draws together some key points and perspectives surrounding the imprisonment of David Hicks. It assumes most readers are familiar with the raft of arguments over time on this case, and aims to add to this knowledge by providing a chronology, with added argument drawing in particular on comment by leading legal persons in Australia, including George Williams of the University of New South Wales, and former Federal Attorney General Kep Enderby. It takes the position that, as David is an Australia citizen, the circumstances of his incarceration mean that his government has an ethical and political responsibility to bring him home without further delay. I argue that the case of David Hicks demonstrates that under the so-called 'war on terror', political expediency has rendered citizenship valueless and human rights unprotected. That is, confronted by politics, citizenship no longer promises justice. The substance of this paper was originally presented to last year's September 11 Civil Liberties Seminar in Bellingen, convened jointly by the Bellingen Institute and the Centre for Peace and Social Justice at Southern Cross University.

If we are to properly understand the wider implications of principle and context in this case, we need its chronology. The following explanation includes a listing of other detainees and individuals in comparable situations to David Hicks. These include Mamdouh Habib, eventually repatriated from Guantanamo after the Howard government formally requested his release following a Washington Post expose (now 'free' but systemically harassed in Australia); Jack Thomas, arrested, charged, convicted, released, and after release put under surveillance by means of a 'control order' that included a specific ban on his contacting Osama Bin Laden (recently arrested again on the basis of old charges); Murat Kurnaz (West German resident of Turkish citizenship, Guantanamo prisoner 2002-2006); Salim Ahmed Hamdan of Yemen, captured in Afghanistan, handed to the US military, sent to Guantanamo Bay (charged with conspiracy. Assessing the demeanor of the Australian Government towards David Hicks, we should bear in mind the 9 British citizens,

repatriated at the insistence of the UK Government and now at liberty.

A chronology of events:

2001 David Hicks captured in Afghanistan by the Afghanistan armed force, the Northern Alliance, that was opposing the government forces. He was seen as a member of an irregular international Taliban militia, 'fighting, or prepared to fight', on the side of the Taliban de facto government of Afghanistan and its military forces and against United States' armed forces invasion to remove it [remember that the Taliban Government/Afghanistan was perceived to be harbouring al Qaeda following the September 11 attacks]. The Northern Alliance sold him for US\$1000 to the Americans, who then sent him to Guantanamo Bay];

2001 Murat Kurnaz arrested in Pakistan, sold for bounty to US armed forces in Afghanistan;

January 2002 Murat Kurnaz, David Hicks sent to Guantanamo Bay;

2001-2 Jack Thomas also training in Afghanistan with Taliban militia;

2002 Mamdouh Habib detained in Pakistan, tortured in Egypt, sent to Guantanamo Bay;

January 2003 Jack Thomas detained in Pakistan en route to Australia;

August 2004 – at an open preliminary hearing at Guantanamo Bay (attended by Australian officials, Lex Lasry QC, Terry Hicks and Beverley Hicks) the US military charged David with three crimes: 1. conspiracy (to commit war crimes) (conspiracy to attack civilians as an unprivileged belligerent, to attack civilian objects, to murder, to destroy property and to commit terrorism); 2. attempted murder (as an unprivileged belligerent) (that is, attempting to murder Americans); 3. Aiding the enemy [described as 'guilt by association': David was not accused of killing or injuring any particular person];

July 2005 US Court of Appeals upheld the authority and jurisdiction of the Military Commission over Guantanamo Bay (Hamdan v Rumsfeld). Salim Hamdan had sought declarations in the US courts that a) conspiracy was not a crime pursuant to the law of war, and b) that the order the President had made could not be made relying

solely on presidential power;

August 2006 Murat Kurnaz repatriated after almost 5 yrs and only after a change of government in Germany;

September 2005 Military Commission ordered resumption of David Hicks's case;

November 2005 US District Court for District of Columbia (which has jurisdiction) granted stay on proceedings pending Hamdan decision;

30 December 2005 Detainee Treatment Act – supported by US House of Reps and the Senate – meant that the only jurisdiction for appeals by Guantanamo Bay detainees is the District of Columbia Circuit: US Federal Courts do not have jurisdiction;

April 2006, British High Court upheld David's application for British citizenship, submitted on basis of his mother's British citizenship;

June 29 2006 US Supreme Court ruled for Hamdan on both grounds, that conspiracy was not a crime under the law of war, that is not a war crime and that presidential power alone cannot authorise such departure from the ordinary requirements of justice. If Hamdan's detention had indeed been simply custody pending a criminal trial, this ruling should have seen him released from detention and discharged. He is still in Guantanamo Bay;

July 6 2006, David told that the British government would register him as British citizen; July 7 (anniversary of the London bombings) Home Secretary John Reid advised this citizenship was withdrawn (David's UK lawyer was not notified before this advice was actioned);

February 2007, US filed charges against David.

Comments and argument:

In August 2006, analysing this case, George Williams, Anthony Mason Professor and Director of the Gilbert and Tobin Centre of Public Law at UNSW, said that: 'The treatment of Hicks is an unprincipled abdication of the responsibility of every government to secure the fundamental rights of its citizens'. (link at <http://www.fgfd.org>)

Williams holds that:

all rules associated with ensuring justice in determining guilt or innocence have been and are being broken in the case of David Hicks; by ordering extraordinarily wide discretionary powers to special military tribunals, the US President has ensured that basic common law rules of evidence used in ordinary criminal trials do not apply.

The Howard Government's position has been the core problem: having apparently prejudged him it has continued to support the search for a process that will produce a conviction, rather than insisting upon his right to a fair trial.

David's case highlights the ambiguity of legal process in altered global scenarios, especially conflict scenarios. Analysts suggest the case exposes selective application of the law, particularly selective exploitation of the 'law of war' which depends on there being a state of war between nation-states. This 'state of war' is increasingly rare - modern global politics and conflict sees war increasingly within rather than between states, and between ethnic groups. This shift has been allowed to neutralise application of the Geneva Conventions on the rights of prisoners. For example, Williams argues that, as a captured combatant in war or armed conflict David is either

1. a prisoner of war, who should be accorded the rights and protections given POWs by the four Geneva Conventions OR otherwise
2. falls into some undefined category of captured combatant whose rights are not covered by the existing Geneva Conventions. This is the position of the control of the US Administration and the Military Commission: with his legal status undefined David's rights are not protected.

This black hole does not only affect David Hicks. Kep Enderby [former Federal Government Attorney General, former Judge at the Supreme Court of NSW] raises the ethical implications of manipulation of the law of war for political purposes, and the creation of new criminal law in response to specific 'war' scenarios (Enderby, ABC Ockham's Razor, August 2006). Do captured international irregular militia fighters like the members of the Taliban, or Hezbollah or Hamas, jihadists and al Qaeda fighters have Geneva Convention POW status, or do they have some different kind of status because of this manipulation? Further, 'If the power to detain continues for the duration of hostilities, who is going to determine when they have ended?' US political scientist

Michael Ignatieff argues that 'Even if emergency measures are eventually revoked the very fact that the law is made more severe in a time of emergency, civil libertarians argue, does damage to respect for the law as an abiding set of standards ... especially ... with national emergencies, which substitute some form of martial law for the rule of law throughout a whole country.' (Ignatieff, 2005, p. 30)

George Williams states that the opinion of the Australian legal community is clear, that David Hicks can be tried in Australia under Australian law. Julian Burnside observes that Australian law would not accept hearsay evidence - as the Military Commissions set to try David Hicks and fellow detainees will do (Burnside in New Mathilda, February 2007). I argue that this case highlights discrepancies between declared public policies of the United States and Australia (regarding justice, rights, respect for rule of law, and presumption of innocence) and demonstrates a disregard by these two governments for norms of civilised behaviour in respect of human rights. It demonstrates a political disregard for substantive justice, which takes into account not only the word of law but whether applied rules or laws are truly 'just', protecting the presumption of innocence until proved guilty, and ensuring right to protection of citizens by their nation-states.

Enderby raises these points and questions in relation to the case:
is there any legal justification for his detention?
were the acts he is alleged to have done crimes when he did them?
even if they were crimes, do they have anything to do with why he is being detained?
how is international criminal law made, or is being made, through this case?
David's case raises considerations of the 'little understood and seldom thought about' law of war, and how it is made.
Further, that any law that justifies the taking away of a person's liberty should be as certain as possible - this certainty is absent here.

Some concluding points:

1. Adelaide supporters of David Hicks (fgfd.org - fair go for david) dispute the Howard Government's rationale for refusing to effectively intervene. They comment that:

- to contextualise the statements about David's military activities in Kosovo, he was fighting on the side of NATO and the UN;
- he was not armed when he was captured by the Northern Alliance;

- he was not shooting at any troops;
- other Taliban fighters with him at the time were immediately released (that is, David had value to bounty hunters);
- he was allowed no phone contact with his family until December 2002;
- his mental and physical state is now extremely fragile;
- he has been in solitary confinement since September 2003.

2. Kep Enderby comments on the individual and collective significance of the case of David Hicks – 'World governance (is) .. in disarray - David Hicks is a casualty, but so to a very great extent is global due process and the rule of law.'

3. Alfred W McCoy, 'The Punishment of David Hicks' in The Monthly June 2006, p 22 summarises the implications of the fact and the manner of the imprisonment on David Hicks

'Stripped of all rights as an "unlawful combatant", isolated inside a concrete cell, abandoned by his homeland and pushed to the brink of suicide, David Hicks has somehow managed, despite his utter powerlessness, to defy the world's most powerful person, George W Bush. His tenacious resistance to months of psychological torture has denied the White House a potent confession that would legitimate its regime of inhumane interrogation and extralegal incarceration. One could even say that, whatever Hicks might have been before he reached Guantanamo, his four-year stint of brutal beatings, endless solitary confinement and mock trials has transformed him into an unlikely symbol for the sanctity of human rights. For what was done first to this outcast, reduced to little more than a lab rat could, we would soon learn, also be done to others. ... (that is, through Abu Ghraib prison)

The US has now served charges on David Hicks, promising the Howard Government that he will be 'first in line' to go to trial. This promise does not let the Government off the hook. It cannot allow his detention to continue.

His military lawyer, the extraordinary and courageous Major Michael Mori, doubts his chance of a fair trial. Indeed, as we know, the charge of murder in the original raft of charges is now being rationalised on the basis of alleged intent only thwarted by lack of opportunity'. Seemingly George Orwell's 1984 'Thought Police' prevail in 2007.

We must all see the consequences for David's physical survival and psychological viability if he is not immediately released home to Australia. Justice demands that this release be without prejudice to

his consistent denial of the charges - ethical imperatives surely rage against early release only being achieved through the US system of plea bargaining (pleading guilt). It's encouraging to at last see politicians across the political spectrum speaking out and acknowledging the human rights abuses inherent in this case. It's heartening to at last see a groundswell of public and press anger, together with demands that David be brought home now, no matter what were his actions in 2001. Clearly there is consensus that the story has gone on 'long enough'. This litany of injustice to an Australian citizen contravenes safeguards on human rights, justice, tolerance, the integrity of law, and citizenship. As George Williams insists, 'The treatment of Hicks is an unprincipled abdication of the responsibility of every government to secure the fundamental rights of its citizens'.

The opportunity and responsibility for securing immediate release for David Hicks still resides with the Howard Federal Government. Its failure to end his long imprisonment without charge exposes the vulnerability of citizens, the absence of compassion, and the fragility of the rule of law even in an avowedly democratic nation like Australia.

Rosemary Webb, March 2007.

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Some useful websites and publications:

Amnesty International

<http://web.amnesty.org/pages/stoptorture-061101-features-eng>
(Amnesty recently launched a global email campaign on behalf of David Hicks)

Commonwealth Attorney-General

www.ag.gov.au/agd/WWW/ministerruddockhome.nfs/
[for official translation of events, also gives Military Commissions website]
www.dod.mil/news/commissions.html/

Alfred W McCoy, 'The Outcast of Camp Echo: the punishment of David Hicks', in *The Monthly*, June 2006.

'Prisoners without Trial' Advocacy website, post 9/11 advocacy &

public education project, Center for Human Rights & Constitutional Law, Los Angeles: <http://prisonerswithouttrials.net/>

Fair Go For David: supporters' website, information and links
<http://www.fairgofordavid.org/htmlfiles/main.htm#appeal>

Kep Enderby, on Ockham's Razor, August 27 2006, ABC Radio National. <http://www.abc.net.au/rn/ockhamsrazor/>

GetUp: Action for Australia
www.getup.org.au/

International Commission of Jurists (Australian Section)
<http://www.icj-aust.org.au/>
(web page highlights open letter to the Prime Minister of Australia, published in national newspapers 3 June 2006)

Justice for Jack Thomas website
www.justice4jack.com

David Hicks at Myspace.com
http://www.myspace.com/david_hicks

Julian Burnside, 2007, 'David Hicks: Hearsay, Torture and the Attorney-General', in New Mathilda, February 2007:
<http://www.newmatilda.com/home/articledetail.asp?ArticleID=2056>

George Williams, Anthony Mason Professor and Director of the Gilbert and Tobin Centre of Public Law at UNSW, August 2006, article link at <http://www.fgfd.org>