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MICHAEL RATNER AND ELLEN RAY, GUANTANAMO: WHAT THE WORLD SHOULD KNOW (MELBOURNE: SCRIBE PUBLICATIONS, 2004) PAGES I - XXIV, 1-165. ISBN 1 920769 277.

Reviewed by
Greg Carne[1]

AN OFFSHORE CAGE SELECTED IN THE VAIN HOPE OF AVOIDING ACCOUNTABILITY TO THE STANDARDS OF LAW?[2]

The revelation in 2004 of torture and cruel, inhuman and degrading treatment at the Abu Ghraib prison in Iraq has refocused attention on the legal structures and conditions of the indefinite detention of persons in US military custody at the Guantanamo Bay Naval Base in Cuba.[3] Two features are important in this re-focus. In 2003, Major General Geoffrey Miller, the commander of Guantanamo Bay, was sent to Iraq to "gitmoize" (ie to apply the Guantanamo detention management principles) to Abu Ghraib. Secondly, it has become apparent that serious human rights abuses within US military custody are more properly seen within a context of the ascendency of asserted US executive power in establishing an extra-legal system of classification and detention, with exceptionalism in that system to international human rights standards.

Michael Ratner, president of the New York based Center for Constitutional Rights[4] and Ellen Ray, journalist and president of

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1 Senior Lecturer, Faculty of Law, University of Tasmania.

2 Adapted from Kirby J's observations about Guantanamo Bay litigation in the US Supreme Court in *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271, 301.

3 See also Seymour Hersh, *Chain of Command The Road from 9/11 to Abu Ghraib* (2004) Ch 1 esp 2-20, and Joseph Marguiles, "A Prison beyond the Law" (2004) 80 *The Virginia Quarterly Review* (Autumn, VQR Portfolio).

4 Ratner served as co-counsel in *Rasul v Bush* 124 S.Ct. 2686 (2004), litigation before the US Supreme Court which established by 6 judges to 3

the Institute for Media Analysis, provide a timely and incisive account of "what the world should know" about the practical and legal aspects of the detention of hundreds of foreign nationals, deemed enemy combatants, at Guantanamo. Their insights are of particular import for the Australian reader given the forthcoming military commission trial of David Hicks[5] and the previous listing of Mamdouh Habib as eligible for trial,[6] the highly critical observer report of the Law Council of Australia regarding the military commission process[7] and the successful and continuing efforts of the United Kingdom government in obtaining the return of its nationals,[8] in stark contrast to the Australian government. In his introduction to the book, Hicks' Australian lawyer, Stephen Kenny, discusses the deferential approach of the Australian government to the US military detention and commission trials, observing that it has neither requested the return of the Australians, nor insisted the same standard of justice be applied to them as the American Taliban, John Walker Lindh. Instead, Australia is the sole government to have entered an agreement with the United States allowing for the military commission trial of its nationals.

Ratner and Ray use the format of conversation and interview to good effect in eliciting key issues and themes from the Guantanamo experience, most prominent being the ascendancy of executive power and US exceptionalism to international

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the ability of US Courts to review the lawfulness of US military detention, outside of the United States, of non-nationals deemed enemy combatants. Australians David Hicks and Mamdouh Habib were co-petitioners in this case as were 12 Kuwaiti nationals. Shafiq Rasul and Asif Iqbal were the original British detainee petitioners, who were removed from Guantanamo on 9 March 2004 and released without charge shortly after arrival in the UK, prior to the commencement of the case in the US Supreme Court.

5 Hicks was designated for a Military Commission trial in July 2003 and charged with various crimes in May 2004. His initial Military Commission hearing occurred on 25 August 2004, with a trial scheduled for commencement in early 2005.

6 Habib was designated for a Military Commission trial in July 2004 and was not charged with an offence. He was subsequently released and returned to Australia. He has alleged torture and ill treatment whilst in custody in Afghanistan, Egypt and Guantanamo Bay.

7 Lex Lasry QC, *United States v David Matthew Hicks* First Report of the Independent Legal Observer for The Law Council of Australia – September 2004 <http://www.lawcouncil.asn.au/> at 5 October 2004.

8 See the 175 page statement of three of the five UK nationals released from Guantanamo Bay: "Composite statement: Detention in Afghanistan and Guantanamo Bay: Shafiq Rasul, Asif Iqbal and Rhumel Ahmed", 26 July 2004 <http://www.ccr-ny.org/v2/reports/report.asp?> at 5 October 2004.

human rights standards. Chapter One, "Guantanamo and Rule by Executive Fiat" powerfully articulates the consequences of the Bush administration's attempt to establish Guantanamo as a law free zone: its identification in the Muslim world as a symbol of oppression; reversion to a pre-Magna Carta, medieval-like executive fiat in the place of the rule of law; and the imperative to fundamentally undermine domestic legal rights. Throughout the chapter, the authors substantiate their central thesis of executive authority and exceptionalism, by analysing and exposing several developments involving legal creativity and fictions in relation to detainees, freed from normal legal constraints.

The first of these developments relates to the US disclaimer of sovereignty over Guantanamo Bay through a highly contrived interpretation of the 1903 lease agreement between the United States and Cuba.[9] Provisions of the lease allow for the exercise by the United States of complete jurisdiction and control over and within the leased areas during the period of occupation under the agreement, with the continuance of ultimate sovereignty residing with Cuba. The United States claim that it does not exercise sovereignty over Guantanamo is contested by a range of factual and practical legal matters, a point later endorsed by the US Supreme Court in *Rasul v Bush*.[10]

Beyond the threshold question of sovereignty is the question of which laws would apply within Guantanamo and more generally in relation to individuals sought by the US in the war on terror. The authors demonstrate with clarity that in each instance, the US administration has sought to substitute narrow and inventive executive concepts in place of recognised legal principles. The *Geneva Conventions* were considered as applicable to the Taliban, not to Al Qaeda, but in any event, Taliban would not be treated as prisoners of war. The problem with such usages lies not merely in its selective application of the Geneva Conventions, (and more generally in ignoring the Conventions' presumption of POW status pending the determination of a regularly constituted tribunal where status is in doubt) but the fact that aside from those conventions, there exists other international law, such as the Convention Against Torture and

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[9] See Appendix One, 98-100: *Lease of Coaling or Naval Stations Agreement Between the United States and Cuba (1903)* Signed by President of Cuba February 16, 1903 and Signed by President of the United States February 23 1903.

[10] 124 S.Ct. 2686 (2004).

the International Covenant on Civil and Political Rights, as well as customary international law, which the US administration has carefully ignored.

An important corollary of this approach is the use of "enemy combatants", a term favoured because of its convenience and malleability. The authors correctly observe that "enemy combatants" is "a kind of catch all term to which no status or rights apply under international or domestic law and which the administration thus believes it can use to treat people as it wants." This easy categorisation enables and justifies, in the administration's view, executive detention of both foreign nationals and US citizens, insulated from due process and institutions, with its legal basis claimed to be in Military Order No 1[11] and, even more vaguely, under the President's inherent powers as Commander in Chief. This extraordinary use of the term is claimed to provide the legal rationale for Presidential designation of persons anywhere in the world and their subsequent indefinite detention.

The authors subsequently examine the human rights consequences of the claimed legal framework for detention, measured against the regular framework of international human rights law and US Federal criminal law. An evaluation of the obligations of the UN Convention Against Torture is made and US federal laws prohibiting torture and making offences of grave breaches of the Geneva Conventions are mentioned, establishing a legal context for the discussion of abuses affecting unlawful combatant detainees, including those held in Guantanamo.

This discussion traverses the physical and psychological conditions imposed during transportation and interrogation as well as the practice of rendition, involving transportation of a detainee to another state of which they are a national, without legal proceedings or formal extradition, for interrogation under torture. The repeated theme evoked by the authors is that detainee treatment is entirely dependent upon executive discretion, with the frequently cited term "humane treatment" a tactical euphemism, contingent upon demands of military necessity.[12] Such treatment in detention involves a variety of

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[11] See Appendix One, 106-112: Military Order of November 13, 2001 "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism".

[12] The Bush administration has stated that all detainees are treated humanely "to the extent appropriate and consistent with military necessity" (at page 47).

physical and psychological abuse and violations of human rights. The disjuncture between this executive determined "humane treatment" and international and national human rights standards is demonstrated as clinical and calculating, through reference to Justice Department and Presidential Counsel legal memoranda displaying intentions to engage in *inhumane* treatment of detainees and a risk management appraisal of Federal criminal liability for so doing.[13]

Chapter Three "Guantanamo: Testimony and Case Details" allows the authors to provide fuller details substantiating their preceding claims about "humane treatment" and the abuses of the Guantanamo regime as informing the Iraq detention model. In identifying administration citations of humane treatment-culturally appropriate meals, medical treatment, religious worship, mail privileges and Red Cross visits to check on the conditions of detainees – such matters are described as subject to the control of intelligence interrogators, systematically manipulating such items in a scheme of rewards and punishments. The claim of humane treatment as spurious is confirmed by a range of other petty and disturbing practices, some ingeniously devised to offend Muslim cultural sensibilities.

The chapter canvasses a range of other examples, emphasising the extent of human rights infractions – false confessions, in psychological expectation of respite from interrogation or for minor reward, the consequence of indefinite detention without prospect of release; the situation of five released British detainees, highlighting the operations of foreign intelligence agencies in Guantanamo in prolonging detentions for their own objectives; the indiscriminate round up by Pakistani police of Afghans in return for financial favours; and the detention of children as young as thirteen and of aged and senile persons.

The final chapter examines in some detail the two formal legal processes arising from the Guantanamo Bay detentions, namely

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[13] See also the following memoranda in Appendix One, 121-127 and 128-132: *Memorandum from Alberto R Gonzales to the President* Decision re: Application of the Geneva Conventions to the Conflict with Al Qaeda and the Taliban January 25, 2002, and *Memorandum from Colin L. Powell to Alberto R. Gonzales (Counsel to the President) and Assistant to the President for National Security Affairs Condoleezza Rice* January 26, 2002. A more detailed compilation of such documents is found in Karen Greenberg and Joshua Dratel (eds) *The Torture Papers: The Road to Abu Ghraib* (2005).

the military commissions established by Military Order[14] and proceedings before the United States civilian courts, and ultimately the Supreme Court, challenging the legality of the detentions in Guantanamo[15] and of US citizens in military custody within the United States.[16]

The analysis of military commissions reinforces the central themes of ascendancy of executive discretion and exceptionalism to international human rights standards. A useful juxtaposition is made between the usages of the term enemy combatants as applying to non-state actors and the non-application of Geneva Convention standards and resultant justification for military commission trials, with the relevant civilian Federal criminal law terrorism prosecution model. The authors reinforce their central themes relating to military commissions, through other points: that the Presidential power of designation as an enemy combatant, rendering that person subject to a military commission, is unchecked; the fact that an established system of courts-martial, having fairer and independent procedures has not been used; that the evolution of international humanitarian law and international human rights law following World War II renders the military commissions model obsolete; and that the rules of evidence, procedure and sentencing before such commissions are random and unpredictable, confirmed by the punitive motives of the commissions, cited by a US source mentioned in the book.[17] This evaluation of military commissions is neatly encapsulated in the authors' observations of a collapse

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[14] See Appendix One, 106-112, *Military Order of November 13, 2001 (Military Order No 1)* "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism".

[15] *Rasul v Bush* 124 S.Ct. 2686 (2004). This chapter was completed by the authors prior to the decision of the Supreme Court in this case. An Afterword is provided by the authors responding to the US Supreme Court's historic decision on 28 June 2004.

[16] *Rumsfeld v Padilla* 124 S.Ct 1904 (2004) and *Hamdi v Rumsfeld* 124 S.Ct 2633 (2004).

[17] See Appendix One, 143. "News Transcript from the United States Department of Defense" Department of Defense News Briefing Friday February 13, 2004; Comments by Paul Butler, principal deputy assistant secretary of defense for special operations and low intensity conflict: "As I stated, under the laws of war, we have a right to hold enemy combatants who represent a threat to the United States and its forces off the battlefield. Military commissions are designed to *punish* those who have committed war crimes during the course of a war" (emphasis added).

of the separation of powers[18] and an abrogation of the rule of law, providing a dangerous example for imitation by other states, whilst inflaming further hostility towards the United States in the Muslim world.

The discussion about proceedings before the US Supreme Court to test the legality of detention in Guantanamo is incisive and instructive. The bringing of actions before the courts is considered as having prompted broader political reactions about Guantanamo. These reactions have included editorial writings, reports of mistreatment, indications of that little of significance has been obtained from the detentions, releases of groups of prisoners who had been wrongly detained and submissions from an extremely broad range of amicus curiae. Such developments are seen as having shifted the political context of discussion and providing legitimacy to the constitutional testing of executive power.

The US District Court and Court of Appeals denial of any rights to aliens held outside of the United States is included to emphasise the significance of the Supreme Court's unexpected admission of the matter to review, by discussing the administration's reaction to it, including the establishment of Combatant Status Review panels and the release of up to 140 detainees. Such responses are considered as pre-emptive attempts to assure the Court of regularity of process, to ease international criticism and to strengthen the administration's position in the event (subsequently confirmed) that alien detainees are permitted to test the legality of their detention, by trying to constrain the type of review and detainee rights determinable in actions before the US District Court. The authors correctly anticipate that much effort will be expended and much executive resistance encountered in the lower courts in determining the scope for review of the legality and conditions of detention of individual detainees.

Guantanamo What the World Should Know is a timely and illuminating assessment of the US administration's attempt to construct and propagate an extra-legal intelligence-gathering methodology and framework in prosecuting the war on terror. The authors credibly communicate and document the scope for systemic violations of human rights through the arrogation of

[18] At page 72: "The president and the Pentagon have decided that they will define the crimes, prosecute people, adjudicate guilt and dispense punishment. This is unchecked rule by the executive branch. It dispenses entirely with our system of checks and balances".

executive power and exceptionalism to long developed international and domestic legal standards. The reader is left with a strong impression that such enthusiastic abandonment of rule of law precepts is of dubious benefit in the collection of intelligence, has eroded traditional, defining values distinguishing US democracy from authoritarian terrorist ideologies, whilst fostering greater credibility of those terrorist groups amongst moderate Muslims. These are substantial reasons to recommend close reflection of the arguments of the authors, if only to obtain a fuller appreciation of the dimensions of the task in defending and re-building the rule of law and human rights as an intrinsic part of an effective response to terrorism. This is more so given Australian complaisance towards the Guantanamo system, facilitating abuses in a self defeating approach to fighting terror.

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