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AUSTRALIA AND THE RULE OF LAW*

The Hon Sir Gerard Brennan AC, KBE**

International Law has been much in the news in recent years. And rightly so. The legitimacy of the use of force in Afghanistan and Iraq has been the subject of both professional and popular concern. I am not alone, I think, in the belief that Australia has been led into an unlawful and immoral war in Iraq but this is not the occasion to debate the validity of that view. Instead, the issue is whether Australia can maintain with undiminished commitment the rhetoric of the rule of law.

This is a question that is at the heart of the debate about the response to terrorism; it is a question that concerns the powers of Executive government and trust in the judicial process. In a lecture delivered on 25 November 2003, Lord Steyn observed:[1]

> Even in modern times terrible injustices have been perpetrated in the name of security on thousands who had no effective recourse to law. Too often courts of law have denied the writ of the rule of law with only the most perfunctory examination. In the context of a war on terrorism without any end in prospect this is a sombre scene for human rights. But there is the caution that unchecked abuse of power begets ever greater abuse of power. And judges do have the duty, even in times of crisis, to guard against an unprincipled and exorbitant executive response.

His Lordship focused on Guantanamo Bay. He drew attention to the provisions of Article 75(4) of the First Protocol additional to the 1949 Geneva Conventions that provides:[2]

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[1] Lord Steyn, "Guantanamo Bay: The legal black hole", 27th FA Mann Lecture, British Institute of International and Comparative Law, delivered at Lincoln's Inn, London, 25 November 2003.

[2] Ibid.

> No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence relating to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure...

Although the United States has not ratified the Protocol, Lord Steyn asserts that it is generally accepted that Article 75 reflects customary international Law.[3] The Attorney General of Australia, on the other hand, is willing to distinguish the legal obligations of the United States from those of Australia because Australia has, and the United States has not, become a party to the Protocol.[4]

That is evidently one of the bases on which the Australian government seeks to justify the detention of Australian citizens in Guantanamo Bay. The United States contends that the prisoners at Guantanamo Bay are unlawful enemy combatants liable to be tried and punished by military commission. What has made them enemies in a relevantly legal sense? There was no declaration of war against Afghanistan. If the United States was not at war with Afghanistan what was its authority to deploy troops in that country, to take prisoners and to transport them to Guantanamo Bay? Reliance is placed on a presidential Military Order authorising the indeterminate detention of the prisoners.[5] The Military Order makes the President's state of mind conclusive of the viability of a person to detention. It defines the persons subject to the Military Order as:[6]

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[3] Ibid.

[4] Ruddock, "A response from the Commonwealth Attorney-General" [Summer 2003-2004] Bar News 26 (New South Wales); refer Barker, "The Guantanamo Bay scandal" ibid 21.

[5] On 13 November 2001, President Bush issued a Military Order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in The War Against Terrorism", 66 Fed Reg 57, 833-836, 16 November 2001. Section 1(e) of the Military Order states that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained". Section 2 provides that any non-citizen of the United States may be detained if the President determines "in writing" that "there is reason to believe" he or she "is or was a member of the organization known as al Qaida" or has engaged in or supported terrorism or other acts aimed at injuring the United States.

[6] Ibid.

> any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
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> (1) there is reason to believe that such individual, at the relevant times,
> (i) is or was a member of the organization known as al Qaida;
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
> (2) it is in the interest of the United States that such individual be subject to this order.

To make assurance doubly sure, no individual subject to the Military Order is "privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal".[7] A United States court has held that it has no jurisdiction to entertain claims for *habeas corpus*.[8] The English Court of Appeal has commented:[9]

> On the face of it we find surprising the proposition that the writ of the United States courts does not run in respect of individuals held by the government on territory that the United States holds as lessee under a long term treaty.

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[7] Ibid.

[8] See Rasul v Bush (2003) 321 Federal 1134, now subject to petitions to the United States Supreme Court for certiorari [Nos 03-334, 03-343, 2003]; for more information see United States Supreme Court Docket 2003 (Unscheduled) at <http://supreme.lp.findlaw.com/supreme_court/docket/2003/unscheduled.html> (visited February 2004).

[9] Abassi v Secretary of State for Foreign and Commonwealth Affairs [2002] England and Wales Court of Appeal (Civil Division) 1598 para 15.

Their Lordships noted that that case may go to the United States Supreme Court but went on to say:[10]

> What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter.

Two Australians, Messrs Hicks and Habib, are being held under the Military Order.[11] Lord Steyn notes:[12]

> [T]he military will act as interrogators, prosecutors, defence counsel, judges, and when death sentences are imposed, as executioners. The trials will be held in secret. None of the basic guarantees for a fair trial need be observed.

Everything is "subject to decisions of the President as Commander-in-Chief" even in respect of guilt and innocence in individual cases as well as appropriate sentences.[13] But it seems that Australia has brokered a deal about the way in which Australian prisoners will be treated. The United States will not seek a death penalty in the case of the Australian prisoners; an Australian lawyer with appropriate security clearances may be retained as a consultant (but not as a representative);

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[10] Ibid; see Rasul v Bush (2003) 321 Federal 1134 para 66.

[11] On 11 November 2003, these two detainees being held at the United States military prison in Guantanamo Bay succeeded in their applications for an appeal against their imprisonment. The United States Supreme Court held that it would hear appeals by foreign detainees and agreed to review a ruling that United States courts lacked jurisdiction to consider claims by this group held without access to their families or their lawyers, and held without any charges brought against them. The review will begin in 2004 with a decision expected by mid year. This was the first time the Court decided a case on the Bush administration's anti-terrorism policy: "Hicks, Habib succeed in US court appeal", The Age, 11 November 2003 at <www.theage.com.au/articles/2003/11/11/1068329520527.html?from=storyrhs> (visited February 2004).

[12] Lord Steyn, "Guantanamo Bay: The legal black hole", 27th FA Mann Lecture, British Institute of International and Comparative Law, delivered at Lincoln's Inn, London, 25 November 2003.

[13] See note 5.

conversations with lawyers will not be monitored and "subject to any necessary security restrictions" the trial will be open.[14]

These arrangements do not follow from any rule of law. They are simply Executive arrangements brokered between the Executive governments of the two countries. No doubt they place the Australian prisoners in a privileged position comparable with some of their fellow prisoners. Lord Steyn notes that the British prisoners have similarly been excluded from the death penalty and comments:[15]

> This gives a new dimension to the concept of "most favoured nation" treatment in international law. How could it be morally defensible to discriminate in this way between individual prisoners? It lifts the curtain a little on the arbitrariness of what is happening at Guantanamo Bay and in the corridors of power on both sides of the Atlantic.

Australia has accepted that two of its citizens should be kept in prison, *incommunicado*, without charge, without consular intervention, without the ordinary access to law and lawyers, with no legal authority recognisable by international law. It has accepted the jurisdiction of a drumhead tribunal that will determine the guilt of these citizens under no law which any court administers, not even an ordinary military court, unable to be defended by any lawyer save one assigned to him by his prosecutors on evidence not governed by any of the ordinary rules.

This failure to condemn the breakdown of the rule of law, this "monstrous failure of justice", as Lord Steyn calls it, is not the only notable example of Australia's ambivalence to the rule of law. The other instance, closer to home, relates to the Executive steps taken with respect to the arrival of "boat people". It is not the intention here to enter into a discussion about the desirability of mandatory detention – a lot more shall be heard about that, no doubt, in the months ahead.

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[14] Ruddock, "A response from the Commonwealth Attorney-General" [Summer 2003-2004] Bar News 26 (New South Wales); see note 4 above.

[15] Lord Steyn, "Guantanamo Bay: The legal black hole", 27th FA Mann Lecture, British Institute of International and Comparative Law, delivered at Lincoln's Inn, London, 25 November 2003.

The steps that are taken to repel boat people have demonstrated a fear of the rule of law. And that is a fear that has found a resonance in a large – perhaps a majority – proportion of the Australian electorate. The rule of law protects the personal liberty of every citizen and of every alien who is within the jurisdiction of the court. The English Court of Appeal in *Abassi* quoted well-established authority.[16] Their Lordships recalled Lord Scarman's citation of Lord Atkin's judgment in *Liversidge v Anderson,* pointing out that:[17]

> no member of the executive can interfere with the liberty...of a British subject except on the condition that he can support the legality of his action before a court of justice.

Their Lordships held:[18]

> This principle applies to every person, British citizen or not, who finds himself within the jurisdiction of the court: 'He who is subject to English law is entitled to its protection'.

It applies in war as in peace. In Lord Atkin's words (written in one of the darkest periods of the last war):[19]

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.

If international law entitles refugees to claim asylum in other countries and Australia's 1958 Migration Act recognises that entitlement, why were the Tampa refugees sent to Nauru and why was the "pacific solution" devised? Why were the islands to the north of Australia excluded from the migration zone by Executive Order until the Senate

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[16] Abassi v Secretary of State for Foreign and Commonwealth Affairs [2002] England and Wales Court of Appeal (Civil Division) 1598 para 60.

[17] R v Home Secretary ex parte Khawaja [1984] 1 Appeal Cases 74, 110 per Lord Scarman, citing the classic dissenting judgment of Lord Atkin in Liversidge v Anderson [1942] Appeal Cases 206, 245 and Eshugbayi Eleko v Government of Nigeria [1931] Appeal Cases 662, 670.

[18] R v Home Secretary ex parte Khawaja [1984] 1 Appeal Cases 74, 111 per Lord Scarman.

[19] Liversidge v Anderson [1942] Appeal Cases 206, 244-245.

disallowed that Order? Not because Australian law was inadequate to deal either with applicants for asylum or those who arrive in Australia unlawfully and without an asylum claim. It was to prevent the boat people – a mere fraction of those who are in Australia without valid visas – from invoking the application of Australian law. It was to forestall the possibility that the law, administered by the courts of this country might be invoked. The Kurds and their boat were towed out to sea; the Tampa refugees were taken by Australian transport to Nauru.

This was the kind of conduct which, 350 years ago, was the basis of the accusation against the Earl of Clarendon that he sent persons to "remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law, and to produce precedents for the imprisoning of any other of His Majesty's subjects in like manner". That gap in the law of *habeas corpus* was remedied in 1679 to allow the writ to run outside England until, in deference to the emerging authority of colonial courts, it was enacted in 1862 that no writ of *habeas corpus* should be issued out of England by any English judge or court into any colony or foreign dominion where there existed a court having authority to issue and enforce obedience to the writ.[20]

In England, the Court of Appeal has noted a movement that is:[21]

> ...founded on modern international human rights norms, which is infused by the principle that any measures that are restrictive of liberty, whether they relate to nationals or non-nationals, must be such as are prescribed by law and necessary in a democratic society. The state's power to detain must be related to a recognised object and purpose, and there must be a reasonable relationship of proportionality between the end and the means.

Reasonable restrictions on the liberty of asylum seekers may be justified in order to process applications – a "recognized object and purpose" – provided the period of restriction bears "a reasonable relationship of proportionality between the end and the means", but

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[20] Holdsworth WS, "A History of English Law", Volume IX at 120-125 (1903-1938, London).

[21] A, X and Y and Others v Secretary of State for the Home Department [2002] England and Wales Court of Appeal (Civil Division) 1502; [2003] 2 Weekly Law Reports 564.

executive detention for other purposes finds no support in the history of our law. As Justice Deane said in *Re Bolton; Ex Parte Beane*:[22]

> The common law of Australia knows no *lettre de cachet* or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action.

And so three of the Justices in the High Court of Australia in *Chu Kheng Lim v Minister for Immigration* stated:[23]

> [T]he involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

But what is the purpose of Australia's mammoth efforts to repel the boat people by transporting them mandatorily to Pacific Islands and by excluding parts of Australia from the statutory migration zone by executive action? The Prime Minister has given the answer:[24]

> The point of our policy is to deter people from arriving here illegally....

When asked "Why is it more appropriate to tow these 14 [Kurdish] people back to Indonesia than process them here?" the Prime Minister replied:[25]

> Because it sends a message that people should not expect to be able to arrive willy-nilly in Australia and gain access to our legal system. That's why it's important.

Is it important that those who arrive in Australia to claim the status of refugee under international law and under the law of this country should be prevented from gaining access to our legal system? The

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[22] (1987) 162 Commonwealth Law Reports 514, 528; affirmed in Chu Kheng Lim v Minister for Immigration (1992) 176 Commonwealth Law Reports 1, 19.
[23] Chu Kheng Lim v Minister for Immigration (1992) 176 Commonwealth Law Reports 1, 27-28 per Brennan, Deane and Dawson JJ.
[24] ABC Radio, AM Program, 14 November 2003.
[25] Ibid.

problem is not with the law – for that can be amended – but with Australia's respect for the legal process. It is vital for organisations such as the International Law Association not only to maintain an interest in international law but to insist that the provisions of international law, which are the product of so much human endeavour and wisdom over so long a time, are respected, observed and enforced by the spirit as well as the curial institutions of this nation.