WHY WE FIGHT WARS[1]

Justice H G Fryberg[2]

Mr President, Honary Colonel, Commanding Officer and friends

In the latest Association newsletter, the irrepressible Peter Morton has published a number of war quotes. Among them is one attributed to General Charles de Gaulle: "The graveyards are full of indispensable men".[3] The General said that in 1969 when aides were urging him not to retire, but the aphorism has an ambiguity which makes its inclusion among war quotes appropriate. Countless millions died in war during the last century and there is no sign in this one of any change in human attitudes to war. Given the horrible cost, why do people fight wars? We were all soldiers once, and willing to go to war. But why? What would we fight for?

Questions like this can be answered at varying levels of abstraction. At the highest such level, we fight for happiness, for the good life. We fight to preserve our way of life, we are sometimes told. In modern Western society this has become synonymous with freedom and democracy. How many times have you heard President Bush employ these words in relation to the war in Iraq? But the goals of freedom and democracy are unachievable without the critical ingredient which they have in common: a society governed by the rule of law. My thesis tonight is: we fight wars to preserve the rule of law for ourselves and our friends.

The precise content of the concept of the rule of law is the subject of some academic controversy. For tonight's purposes it is sufficient to refer to some relatively uncontroversial features. The concept embodies a social system in which the rules are ordained and published before they are in force; in which the rules are enforced through a fair process conducted by an impartial tribunal; and in which the rules are equally binding on all members of the society, including the rulers, the enforcers and the lawmakers.

The rule of law must be distinguished from rule by law, as well as from rule by arbitrary decree. The People's Republic of China may well be described as a country which practices rule by law; but I would certainly contend that it is not on any sensible view of the term one in which the rule of law prevails. The rule of law involves more than a mechanical enactment of legislation in accordance with predetermined procedures. It has a normative element. The rules must not only be properly enacted; they must also be fair.

To some, the very idea of an association between law and war is ridiculous. Cicero recorded an old Roman maxim: *inter arma silent leges* - "in time of war, the laws are silent". To Clemenceau is attributed the expression which is the bane of military lawyers: "Military justice is to justice what military music is to music". But Australians have a different attitude. From Breaker Morant to Gunner O'Neill we have been outraged by military injustice.

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1 Address to the Annual General Meeting of the Queensland University Regiment Association at Brisbane, 15 September 2006.

2 Maj (ret).

3 http://www.qura.org.

The graves of Morant and Hancock

Importantly, the outrage has been generated not by the perceived innocence of the accused, but by the perceived denial to him of due process. In Morant's case it was the denial of a fair trial; in O'Neill's it was the infliction of unlawful punishment. These denials are seen by Australians as unfair. That perception derives from the deeply rooted acceptance in our society of the rule of law, part of our English inheritance. As Lord Atkin said in a famous English case in wartime 1942, "In this country, amid the clash of arms the laws are not silent".[4]

Today, we are told, we are deeply involved in the war on terror. The expression "war on terror" was coined, or at least given currency, by President Bush after the attack on the World Trade Centre in 2001. It has replaced the "Cold War" as the catchphrase designed to unify the nation against a common enemy. That is doubtless a salutary objective. However it is also used as part of political rhetoric to justify increasing the power exercised by executive government over those outside the structure of government, those whom the media call "ordinary people". Any such increase may well involve some compromise in the application of the rule of law. It therefore behoves us to ask: are we giving up the very thing for which we are fighting?

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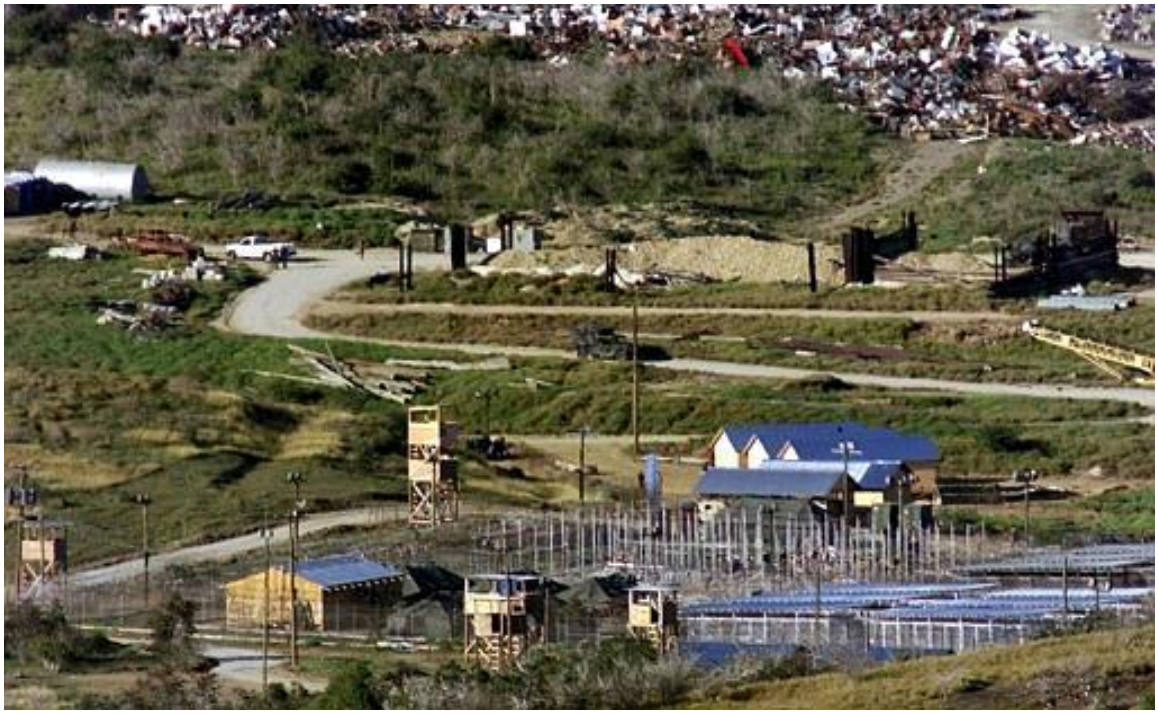
4 *Liversidge v Anderson* [1942] AC 206 at p 244.

I do not propose to say anything tonight about Australia's anti-terrorism laws. I have not read them thoroughly, nor have I seen enough of their application in practice, to make an informed comment. I want to focus on one matter only: the imprisonment and trial of foreigners at Guantanamo Bay by the United States government and the Australian government's willing acceptance of this.



I say "by the United States government" because the alleged basis for the whole exercise has been the executive power of the President of the United States, particularly as commander-in-chief of military forces. I focus on imprisonment because it contrasts with freedom. I refer to foreigners because only foreigners are imprisoned at Guantanamo Bay; no United States citizen is subjected to this regime. Guantanamo Bay is, of course, in Cuba.

May I begin by reminding you of a little recent history. Following the attack on the World Trade Centre and the Pentagon and the presumed attempted attack on the White House in September 2001, the US Congress authorised the President to

> "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[5]

Less than two months after the attack and acting under that resolution, the President ordered the armed forces of the United States to invade Afghanistan. At that time the de facto government of Afghanistan comprised members of a group called the Taliban, but this government was not recognised by the US. US forces in conjunction with several anti-Taliban militias controlled by local warlords engaged militias which supported the Taliban. Afghanistan had no regular army and none of the militiamen wore a uniform.

[5] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:sj23enr.txt.pdf

A number of foreigners fought in the pro-Taliban militias. Among them were Salim Hamdan of Yemen and David Hicks of Australia. Both were captured by anti-government militia forces which turned them over to the US military in November and December 2001. In June 2002 they were transported to Guantanamo Bay, along with many hundreds of others captured in a variety of circumstances, not all of them in combat.

Guantanamo Bay was chosen for this prison because it was thought that, not being sovereign American territory, prisoners would be unable to apply for habeas corpus in American courts. That proved wrong. In 2004 the Supreme Court of the United States held that this could not prevent individuals from applying to a federal court for a writ of habeas corpus.[6] However it remains American law that foreigners have far fewer rights than citizens. One can legitimately question why an Australian should be accorded worse treatment under US law than an American, but there seems no doubt that under American law the rights which the Americans so proudly claim to uphold are not extended to others.

By a series of executive orders and instructions,[7] President Bush and Mr Rumsfeld, his Secretary of Defence, established military commissions to conduct trials of some of those who were so transported, laid down the procedures to be followed by those commissions, provided the maximum sentences which the commissions could impose and established a system of review of commission decisions. Those orders and instructions have been heavily criticised by persons of the highest integrity and authority around the world.

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6 *Rasul v Bush* 542 US 466 (2004).

7 Presidential Order 13/11/01: http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html
Military Commission Orders: http://www.defenselink.mil/news/Aug2004/commissions_orders.html
Military Commission Instructions:
http://www.defenselink.mil/news/Aug2004/commissions_instructions.html.

Falconer condemns 'shocking' Guantánamo

David Fickling
Wednesday September 13, 2006

It is impossible to describe all of these criticisms in detail tonight. They have one common theme: the system of military commissions established by the orders and instructions was not one which accords with the rule of law.

In June this year, in *Hamdan v Rumsfeld*,[8] the Supreme Court of the United States held by a majority of 5-3 that the military commissions were invalidly constituted.

In essence the Court held that Congress had not only not authorised the orders and instructions, it had expressly denied the President authority to create military commissions of this kind. The structure and procedures of the commissions violated both the United States' own *Uniform Code of Military Justice* and part of the Geneva Conventions on the Conduct of War. The opinion of the Court concluded, "[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction".

Despite that peroration, it is quite clear that the basis of the decision is the absence of Congressional authorisation for the commissions. The problem was that the President established them in a form inconsistent with his authority to do so. The judgment is silent as to the power of Congress to enact legislation conferring authority. On 12

[8] No 05-184, 29 June 2006, http://www.law.cornell.edu/supct/html/05-184.ZO.html.

September the President sent a bill to Congress to do just that.[9] If the bill is not amended, a system of military commissions could be re-established, similar in form to that struck down by the Court. Since 12 July the House of Representatives armed services committee has been holding a series of hearings to receive testimony on standards of military commissions and tribunals. These hearings are continuing and Senate committees have also scheduled hearings. It seems probable that before the November Congressional elections, legislation will be passed conferring some sort of authority on the President. By the end of the year essentially the same system as was struck down by the Supreme Court might be re-established with the authority of Congress.

What was the justification for and what were the features of that system?

The justification was asserted in the founding order made by the President on 13 November 2001. It was "that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognised in the trial of criminal cases in the United States District Courts". The order did not spell out why that was not practicable, nor did it suggest that it was impracticable to use ordinary courts-martial[10]. It did not even mention the possible use of an international tribunal such as the International Criminal Court or a special purpose tribunal such as those established for the former Yugoslavia or Rwanda. It is not too difficult to guess why Americans would not consider an international tribunal, but the refusal to use ordinary courts-martial (or at least to structure the commissions so as to confer the equivalent protections) is more puzzling; some would say sinister, especially in the light of the government's failure or inability to demonstrate the impracticability of such an arrangement in *Hamdan*.[11]

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9 Called the *Military Commissions Act of 2006*.

10 Which have jurisdiction under UCMJ §18 "to try any person who by the law of war is subject to trial by a military tribunal". A court-martial is a military tribunal: see UCMJ §21.

11 *Hamdan v Rumsfeld*, majority judgment, sec VI C.

Appointments to commissions were to be made "as a military function" [12] and proceedings were required to be conducted in accordance with orders and instructions issued by Mr Rumsfeld or his delegate. Four months later Mr Rumsfeld detailed the arrangements for the commissions.[13] Each commission was required to have one judge-advocate and from three to seven non-legal officers as other members. Commission members were appointed by Maj Gen John D Altenburg under power delegated to him directly by Mr Rumsfeld. A number of those appointed had served in Afghanistan. Gen Altenburg was responsible for approving charges and referring them to a commission. All procedural decisions, including rulings on pure questions of law, were determined by majority vote, but all interlocutory questions the disposition of which would bring a charge to an end were required to be referred to Gen Altenburg for decision. Other interlocutory questions could be so referred. Convictions did not require unanimity - a two thirds majority was sufficient. There was no appeal from a commission decision, but Mr Rumsfeld was required to review each decision and either return it to the commission for further proceedings or forward it to the President with a recommendation. The ultimate decision on guilt or innocence and on sentence was to be made by the President. By the President's order the jurisdiction of the commissions was made exclusive and defendants were denied the right to seek any remedy or maintain any proceeding directly or indirectly in any court of the United States or any foreign court or international tribunal. In other words, the order purported to deny an Australian citizen access to Australian courts. Perhaps most tellingly, the President's order explicitly did not create any right, benefit or privilege, substantive or procedural, enforceable by any party against the United States or its officers.

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12 The commissions themselves have been described by the Judge-Advocate, Pacific Air Forces-Australia as "a lawful form of military action in a time of war … by the US President as the Commander-in-Chief": see Bialke, Lt Col Joseph P: "Al-Qaeda and Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict", (2004) 55 *AFL Rev* 1 at p 69.

13 Military Commission Order No 1, 21 March 2002.

Mr Rumsfeld's order provided some safeguards for the accused:

a. They had to be given a copy of the charges in a language they understood[14]

b. They were presumed innocent until proven guilty[15]

c. The standard of proof was proof beyond reasonable doubt[16]

d. They had to be represented by military counsel, could be provided with any necessary interpreters and they could engage a civilian lawyer[17]

e. They had to have access to evidence intended to be led by the prosecution and to any evidence known to the prosecution which tended to exculpate them[18], but not if the evidence was ruled to be protected information, a term which included classified information and information protected by a rule from unauthorised disclosure[19]

f. They could not be obliged to testify at the trial and no adverse inference could be drawn from their failure to do so.[20]

g. They could obtain witnesses and documents for their defence, but only to the extent necessary and reasonably available as determined by the presiding officer.[21]

h. They could be present in person at the trial unless disruptive or unless the proceedings were closed. The accused's military counsel had to be permitted to be present at all proceedings but could be ordered by the presiding officer not to disclose to their client what took place in closed proceedings.[22]

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14 Paragraph 5A.

15 Paragraph 5B.

16 Paragraph 5C.

17 Paragraph 5D, 5J, 4C(3)(b).

18 Paragraph 5E.

19 Paragraph 6D(5).

20 Paragraph 5F.

21 Paragraph 5H. The value of this right is dubious, or at least limited : see "Guardian finds Afghan witnesses US couldn't", http://www.guardian.co.uk/guantanamo/story/0,,1809981,00.html.

22 Paragraph 5K, 6B(3).

i. The trial was to take place in public unless the presiding officer or Gen Altenburg decided otherwise. Notwithstanding the general right of the accused's counsel to be present at all proceedings, a decision on closing proceedings could be made on the basis on a closed, ex parte application by the prosecution.[23] In Hicks' case the Australian government obtained an assurance that the trial would be held in public

Those measures went some way toward providing a system which accords with the rule of law as described above. That being so, what were the features which were subjected to the criticism to which I referred earlier?

First, there was only one test for the admissibility of evidence: would the evidence have probative value to a reasonable person?[24] This test had to be applied by military officers only one of whom had any legal experience. The ability to assess probative value often depends heavily upon experience, for example with hearsay evidence, identification evidence or propensity evidence. It seems likely that much of the evidence against the defendants will be in the form of hearsay statements by informers and fellow prisoners from Afghanistan who would not be made available for cross-examination. Not only would these officers have difficulty in applying the test; but also they would be able to overrule the view of the judge-advocate by simple majority vote.

Moreover, there was nothing to exclude evidence, including evidence of confessions, obtained unlawfully or improperly. Until earlier this year the American government sought to maintain the admissibility of confessions obtained by torture. They were belatedly excluded as a result of political pressure,[25] after FBI officers provided evidence that torture had actually occurred at Guantanamo Bay,[26] but confessions obtained by threats or actions not amounting to torture, or by improper inducements remained admissible. Such confessions are notoriously unreliable, but it may be doubted whether officers who served in Afghanistan would find them so.

The United States government continues to assert the right to monitor conversations between accused persons and their lawyers, although in September 2005 a belated order was issued prohibiting the communication to the prosecution and the use in proceedings against the prisoner of information so obtained.[27] The Australian government was given an assurance that monitoring would not occur in respect of Hicks. Why he should be treated as an exception was not explained.

It was of course possible that questions of admissibility of evidence could be referred to Gen Altenburg for decision. Given the fact that he was the person responsible for approving the charges and referring them to a commission in the first place, this hardly seems a decision by an impartial tribunal.

Those deficiencies in the evidentiary provision were magnified by the possibility of proceedings in closed court and in the absence of the accused. The accused could be denied access to protected information by the simple process of classifying it or passing a rule prohibiting its publication. That information could then be given to the commission in his absence. It is of course quite impossible for anyone to respond to evidence which

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23 Paragraph 6B(3).

24 *Ibid*, s 4(c)(3).

25 Military Commission Instruction No 10, 24 March 2006.

26 Lugosi, Charles I: "Mocking the Rule of Law: a Kangaroo Court for David Hicks", (2005) 14 *Temp Pol & Civ Rts L Rev* 335 at pp 361-2.

27 Military Commission Order No 3, 21 September 2005.

neither he nor anyone outside the commission knows about. The opportunity for fabrication of evidence is unconstrained and, as the *Dreyfus* case showed a century ago, potentially devastating for the accused.

It should not be thought that all of the prisoners at Guantanamo Bay were captured in Afghanistan. Some were not even seized in a combat zone. There are men taken in Bosnia, Gambia, Zambia and Thailand.[28] Most prisoners are not alleged to have committed offences within the jurisdiction of military commissions. It is not intended to charge them with anything. They are simply to be imprisoned until the President decides that the war against terror is over. That could take 50 years. Their continued detention is warranted, it is said, because they might take up arms against the United States if released. A person, such as Hicks, who has been charged may if convicted be sentenced to a term of imprisonment extending beyond the end of the war, but even if he is acquitted, he may continue to be detained until the end of the war.

The justification for the detention of most of the prisoners was not that they were prisoners of war, but that they were enemy combatants (traditionally the category assigned to spies and saboteurs). That meant, according to the President, that they were not entitled to the protection of the Geneva Conventions, and until 7 July 2006 the United States refused to apply the Conventions. For many of the prisoners, this unfortunate position was the result of being a member of a militia without uniforms. They were denied prisoner of war status, notwithstanding that many were fighting under the control of the government of Afghanistan, a country where militias have never been equipped with uniforms; not even those fighting on the American side.

On 7 July this year, following the finding of the Supreme Court that Common Article 3 of the Geneva Conventions applied to Hamdan, the Department of Defence required all personnel to ensure that their standards complied with that article. This means that unless Congress acts to change the law, the United States will, among other things, be bound to prohibit "outrages upon personal dignity, in particular, humiliating and degrading treatment". It also means that any prisoners who are put on trial must be tried "by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples".

The President initially asserted the existence of an unreviewable right to assign people to this category, but in June 2004 the Supreme Court held that some form of independent tribunal was the only way in which enemy combatant status could be lawfully determined.[29] Consequently, the government established a Combat Status Review Tribunal. The procedures of this tribunal had all of the defects of the military commissions and a few more besides.[30] "Enemy combatant" was redefined to include anyone who was part of Taliban or al Qaida forces engaged in hostilities against coalition partners, regardless of whether he actually did anything. Involvement in terrorism or combat against the United States was unnecessary. That definition is not recognised by international law, including the law of war which the United States claims to be enforcing through the military commissions. The person detained carries the onus of proving that he was not an enemy combatant. The standard of satisfaction for the tribunal to make an adverse finding is balance of probabilities, not proof beyond reasonable doubt.

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28 Lugosi: *loc cit*, p 358.

29 *Hamdi v Rumsfeld* 542 US 507 (2004).

30 See http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

The near impossibility for a prisoner of making a case under these conditions was illustrated by the following exchange at the hearing of one Mustafa Ait Idir. It occurred during a Review Tribunal hearing, but it could just as easily have occurred in a commission. In reading a list of allegations forming the basis for detention, the Recorder of the Tribunal asserted, "While in Bosnia, the Detainee associated with a known Al Qaida operative." In response, the following exchange occurred:

Franz Kafka

"Detainee: Give me his name.
President: I do not know.
Detainee: How can I respond to this?
President: Did you know of anybody that was a member of Al Qaida?
Detainee: No, no.
President: I'm sorry, what was your response?
Detainee: No.
President: No?
Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a

terrorist. Maybe I knew this person as a friend. Maybe it was a person who worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

President: We are asking you the questions and we need you to respond to what is on the unclassified summary."[31]

That could have come straight from Kafka.

The right to know the details of the prosecution case and the right to be present at the trial are fundamental to the rule of law. Such considerations were undoubtedly what led the United Kingdom government to reject the American use of the commissions for its nationals. Lord Goldsmith, the British Attorney-General, wrote, "I was unable to accept that the procedures proposed for the military tribunals were adequate to ensure a fair trial. I am pleased to note that, following this decision, all the British detainees were returned to the UK."[32] That was doubtless an admirable outcome for those detainees, but it completely undermines the principle of equality before the law, which is an essential constituent of a system based on the rule of law. The same is true of the raft of promises of special treatment made to the Australian government in respect of Hicks. But politics trumps legality, and Hicks is a white man.

Another important aspect of the rule of law is trial by an independent and impartial tribunal. How can it be said that this applies in relation to the Guantanamo Bay prisoners? The military commissions included officers who served in Afghanistan. They were appointed by Gen Altenburg, who was also responsible for approving the charges against the prisoners and placing them before the commissions. Any interlocutory decision to dismiss a charge had to be referred up to the general. The only right of appeal was a review by the President or Mr Rumsfeld, acting on the advice of military officers. The political imperatives facing the politicians, including the Australian Prime Minister, are obvious. John Howard has publicly convicted David Hicks: "He has, amongst those that are held in Guantanamo Bay, committed more serious offences than most."[33] In case anybody should fail to get the message, the President has said, "There are some who need

31 Lugosi: *loc cit*, p 359.

32 Speech to the Royal United Services Institute, 10 May 2006.

to be tried in U.S. courts. They're cold-blooded killers. They will murder somebody if they are let out on the street."[34] Can that sort of statement, made by the Commander-in-Chief, really be ignored by a non-legal military officer?

A further aspect of the rule of law is the requirement that criminal offences be defined in advance. Many of the prisoners have been charged with conspiracy in alleged breach of the laws of war. It seems probable that no such offence exists; four of the Supreme Court judges so found and three others left the point open.[35] That was the only offence with which Hamdan was charged (perhaps being Osama bin Laden's driver sounded too trivial). That is also one of the three charges against Hicks. His conspiracy was allegedly committed between 1 January 2001 and about December 2001, that is, in large part before the war on terrorism was declared.[36]

The other offences alleged against Hicks are attempted murder and aiding the enemy. The charge of attempted murder alleges he directed small arms fire, explosives and other means intended to kill American, British, Canadian, Australian, Afghan and other coalition forces. The charge of aiding the enemy nominates al Qaida and the Taliban as the enemy aided, notwithstanding that the Taliban were the government of Afghanistan at the time. It remains to be seen precisely what he is alleged to have done, when and to whom; the charge sheet gives no particulars of these offences. Hicks was unarmed when arrested at a roadblock outside the combat zone by Northern Alliance forces on 9 December 2001.[37] It all seems a bit unlikely, but until we hear the evidence to be given by the American Lindh, we must suspend judgment. Lindh, you may recall, admitted his guilt of a number of offences and was given a reduced sentence in return for a promise to testify against others.

Whatever Hicks did was not an offence under Australian law and the second and third charges are not alleged as war crimes. They are alleged to be "other offences triable by military commission". They were first defined in writing by an instruction on 30 April 2003,[38] but are alleged to be offences which existed as part of the general law of war prior to the conduct in question. On this theory it ought to be possible to attempt to demonstrate non-existence of the offences by reference to law books, but the instruction was binding on all lawyers involved in the commissions. Quite how the United States has the right to try someone for offences defined by itself after the event and not alleged to have been committed against Americans or on American territory has not been explained.

Finally on this point, it was impossible to know what penalty might have been imposed in any particular case. Because the charges were based on the vague notion of the laws of war, there was no defined penalty for any particular offence. The commissions were to exercise an unfettered discretion to impose anything up to and including the death penalty. One must assume that in the case of Hicks, where the government has promised Australia that the death penalty will not be enforced, no commission would have the temerity to impose it.

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33 *Lateline*, 30 June 2006.

34 "Bush Willing to Use Diplomacy", Fox News, 21 June 2006.

35 *Hamdan v Rumsfeld* No 05-184, 29 June 2006.

36 The charges can be viewed at http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf.

37 Lugosi: *loc cit*, p 340.

38 Military Commission Instruction No 2, 30 April 2003.

Lastly there is the question of a timely trial. The original purpose of the Guantanamo Bay facility was interrogation. Charges were deliberately delayed until mid-2004. To date only 10 people out of more than 600 have been charged.[39] No trial will be held until 2007 at the earliest. Inevitably the trial process will be tarnished by this delay, which could have been avoided had a court-martial been used or the commissions structured to confer equivalent protections. Witnesses forget some of the things which once they knew. They die or disappear. They become prone to reconstruction. And the effect of the delay on the prisoners is substantial. Quite apart from the psychological impact, the commission instructions explicitly provided that time spent in custody as an enemy combatant did not fulfil any term of imprisonment imposed. This presumably referred to all imprisonment prior to conviction, and certainly to imprisonment prior to the laying of the charges. Despite this, the Australian government is currently negotiating with the Americans to have the time counted. Why Hicks should be treated differently from others in this regard has not been explained.

I asked earlier, "Are we giving up the very thing for which we are fighting?" To the extent that we have supported the use of military commissions for the trial of David Hicks, I think the answer is "Yes". Terrorism must undoubtedly be countered, and some derogation from the methods by which we have traditionally applied the rule of law is probably inevitable. I certainly would not want to suggest that the current model of procedure for a criminal trial in Australia, or even for a court-martial, either is perfect or represents an irreducible minimum for a system under the rule of law. Some compromise is unavoidable. However the system previously in place for trial of prisoners at Guantanamo Bay was inappropriate and unnecessary. Australians - especially those of us who were or are soldiers - should scrutinise whatever is put in its place with great care. We are fighting terrorism in Afghanistan and our soldiers are at risk. We should be clear on why we are doing it. May I again quote Lord Goldsmith:

> "In the war on terrorism, we are fighting for more than the safety of our citizens, though that is a huge objective for us. We are fighting for the preservation of our democratic way of life, our right to freedom of thought and expression, and our commitment to the Rule of Law, for the liberties which have been hard won over the centuries and which we hold dear. These are the very liberties and values which the terrorists seek to destroy, not only through mass murder and destruction of property, but also through the climate of fear that their actions create, and are intended to create."[40]

Early in my remarks I referred to General de Gaulle's retirement. Shortly after that momentous event, the general and his wife were lunching with former British Prime Minister Harold Macmillan and his wife. Yvonne de Gaulle was asked what she was most looking forward to in the future. After a moment's thought she answered, "A penis."

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39 For their names and particulars, see http://www.defenselink.mil/news/commissions.html.

40 Goldsmith, Peter Lord: "Terrorism and the Rule of Law", (2005) 35 *NML Rev* 215 at p 221.

There was a stunned and rather embarrassed silence, broken only when the general intervened: “My dear, I don't think the English pronounce the word like that. They say ’appiness.”

Our happiness depends upon the rule of law. That, I suggest, is why we fight wars.