Exceptional Populism and David Hicks: State of Exception in Australia's War on Terror

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The War on Terrorism began after the events of September 11, 2001. Countries like Australia immediately expressed their support for the military response that would follow. To one Australian, David Hicks, this support meant that his Australian citizenship and the legal protection associated with it, became irrelevant. Instead, populist narratives were employed about terrorism and David Hicks himself to justify placing him in a state of exception by allowing him to languish alone in the American Military Detention Centre at Guantanamo Bay. This work will analyse the parameters of the David Hicks case, including the controversial nature of the term terrorism, declaring war on social phenomenon and the consequences of the case for Australia.

Terrorism: We know it when we see it.

The term *terrorisme* first made its debut in common French language in the late 18th Century. The origins of the word can be traced back to a specific, particularly violent period during the French Revolution. This brief but volatile analogue in history known as the Reign of Terror and its practitioners as terrorists. Both labels were derived from a French adaptation of the word terror into *terrorisme* (Sinclaire, 2003). Although initially utilised to denote a specific and defined governing strategy and leadership, the term has evolved as an ambiguous and problematic term.

Although terrorism is referred to regularly in political, academic and public circles, a definition of the term is infamously elusive. In fact the development of a universally accepted definition of terrorism has not been accomplished despite decades of effort. Despite ongoing attempts to define this social phenomenon, participants have thus far been unsuccessful in reaching a consensus. There are a number of issues with the word and its use that impede a universally accepted definition.

Firstly, terrorism implies, by its nature, a conflict. Any conflict is constituted by competing actors, parties, doctrines, philosophies. Consequently the debate becomes lodged in a politically charged catch twenty-two when attempting to define terrorism. For every action labelled terrorism, and for every individual labelled as a terrorist, there is an opposite judgement rendered. One man's terrorist is unavoidably another man's freedom fighter (Ganor, 2001). Complicating matters further, language currently used in attempts to define terrorism are themselves points of contention. Terms such as innocent victims, violence and political intentions have contributed to muddying the waters, rather than clarifying the issue (Coady, 2003). Due to the lack of a concise, internationally sanctioned definition, media and state officials have filled the void with self-serving and sensationalist terms.

The difficulty in defining and agreeing on a definition of terrorism did not dissuade its use by journalist and politicians particularly after 9/11. The term is simply employed as a populist label that implies both a need to act and to dehumanise perpetrators as evil and vile. By employing this populist jargon, the Bush administration entrenched a proven populist framework approach in responding to 9/11. President George W. Bush qualified the opposing sides of the conflict by stating, "Either you are with us, or you are with the terrorists." (The White House, 2001). He identified a much needed enemy by invoking illusions of World War II and declared the existence of an "Axis of Evil" (The White House, 2001). By promoting a populist approach to terrorism, the US administration has declared war on a social phenomenon rather than a visible entity.

Populism and the War on Terror

Populist "tough on crime" ideologies are deeply entrenched in western democratic tradition and in criminological policies and practices. In the United States, this philosophy is manifested by the War on Crime and its descendent, the War on Drugs; both of which set a disturbing precedent for responding to the events of September 11, 2001. Crime and drug use are social phenomenon that do not easily lend themselves as a target of warfare. There are no easily distinguishable enemies or common uniforms that people wear if they have broken a law or used illicit drugs. Crime, in fact, is a social construct, a normal symptom of legalistic society. However, in order to wage a war against this type of social phenomenon two components are necessary, motivation and a perceived enemy.

In the War on Crime and the War on Drugs, fear became the predominate motivation for action. The media played a central role in the production of a fear of crime by sensationalising crime by giving constant and repeated media exposure of the most violent offences. This manufacturing of consent, as Noam Chomsky (1988) has expressed, results in the empowerment of the state to use extreme measures in combating an implied increase in dangerous crime despite consistent statistical evidence to the contrary.

The other essential component to social phenomenon warfare is the identification of a credible enemy to the public eye. In the case of the WOC the common criminal became a threat to social fabric. However criminally active individuals are not readily identifiable in the community. This further entrenches a fear of crime and criminals as a hidden enemy within.

The War on Terror relies heavily on both fear and the perception of a hidden enemy to perpetuate its development. Policy makers have used worst case scenarios and the further threat of attack to maintain high levels of fear. Terminologies such as “dirty bombs” and “Weapons of Mass Destruction” have become common in media reports and security measure debates. However, it is the idea of the enemy within that has provoked a great deal of fear and an impetus to restrict freedoms in the name of counter-terrorism.

Much like the WOC, the WOT does not have an obviously identifiable target. The idea of the enemy within has been used by policy makers to justify intrusive and restrictive legislation in the name of preserving freedom and unity. In the US, the Patriot Act has increased powers of police and state to circumvent civil rights of those simply suspected of affiliation with a terrorist group. Suspicion is enough to suspend the civil liberties of citizens, not only in the US, but in Australia as well.

With subjective legislation and populist criminological policies, states have legislated themselves the power to extra-judicially target classes of unpopular citizens. The debate in the WOT has been simplified into a good versus evil qualification. Citizens caught in the debate that do not easily fit on either side of the debate have been swept under the carpet and marginalised. Such is the case with Australian citizen David Hicks.

David Hicks: A brief history

David Hicks represents an anomaly for Australia, much in the same way that John Walker Lindh did for the United States (US). He is, by all accounts a ‘typical Aussie bloke’ (Quadara, 2004). There is no defining moment in his childhood that distinguishes him from any other rebellious teen, and yet he became one of ‘them’; labelled a terrorist in the eyes of the government and the media.

Hicks first strayed from conformity in 2000 when he travelled to Tirana Albania, and joined the Kosovo Liberation Army (KLA). He fought there for six weeks, and decided to convert to Islam. Upon Hicks’ returned to Adelaide, he began study at an Islamic college. A contact there put him in touch with a college in Pakistan where he journeyed to continue his studies. While there he travelled to Kashmir to fight alongside Pakistan forces. This trend seemed to escalate as he crossed over the border into Afghanistan to join the Taliban. While in Afghanistan he received military training at an Al Qaeda sponsored camp (Amnesty International [AI], 2004).

At this point, his life was to be forever changed by the attacks of September 11th. On October 7, 2001 Operation Enduring Freedom was initiated and David Hicks found himself on the unpopular side of an US lead and Australian supported invasion. He fought in the north of Afghanistan against the Northern Alliance and was captured by them at a check point at Pul-e-Khumri in the beginning of December. He was handed over to US forces on December 12th (Bonner, 2003).

Subsequent to his turn-over, Hicks was airlifted to an American warship where he was interrogated by the CIA and Australian authorities. Both the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP) exploited the opportunity to question Hicks (National Security Australia, 2004) while he was in custody on the USS Peleliu. On December 12, 2001 David Hicks was transfer to Guantanamo Bay.

From the beginning the Australian government was reluctant to address the issue and publicly dismissed Hicks. Foreign Affairs Minister, Alexander Downer clarified his position on Hicks when he remarked that People who "muck about" with groups like al Qaeda were "bound to get into trouble"(Alcorn, 2002). This mild condemnation is representative of the government's morally based policy development in the WOT.

State of Exception and Guantanamo Bay: Populist Exception in practice.

Various academics assert that the emergency legislation enacted across western democracies after 9/11 represent a permanent formation of practices that threaten and undermine the rule of law. The practices of the US government are the central focus of a majority of academics that argue in this vein (Archibugi and Young 2002; Schurmann 2002; Agamben 2003; Dyzenhaus 2003; Munster 2004; Bunyan 2005; Diken and Bagge Lausten 2005; Whyte 2005; Satterthwaite 2006; Parry 2005; Welch 2007). These academics point to a deliberate attempt to undermine the rule of law in favour of a permanent expansion in executive power using populist narratives and generalisations that confuse the boundaries between increased mechanisms of surveillance and control and public safety. A prime example of this is extraordinary rendition conducted by the US government as how the rule of law is circumvented in responding to terrorism. The Bush administration "worked hard to clear a space for actions free of the legal constraints placed on it by human rights and humanitarian law" (Satterthwaite 2006, 2). Parry also identifies a shift in the processes of criminal justice. He points to a shift in executive power, licensed state violence and transformed citizen-state relationships as evidence of a new criminal justice process based on extraordinary powers such as counter-terrorism powers. Parry also contends that war and policing have had an influential effect on each other, resulting in policing that resembles war and war that resembles policing (Parry 2005, 2).

Many of the above mentioned authors base their criticisms on a theoretical framework laid out by Giorgio Agamben in two related works *Homo Sacer: Sovereign Power* (1995) and *State of Exception* (2005). In the first volume, Agamben points to two different aspects of human existence in society. The first is the natural life common to all living things or a biological existence (zoe) (Agamben 1995, 1) that encompasses a citizen's existence in society (accessing and participating in markets and informal aspects of society that do not require the individual to contribute to the guidance of society). The second aspect of life according to Agamben is political existence (bios) (Agamben 1995, 1). Bios is the reciprocal participation in the political entities of society, including participation in democratic processes (elections) and enjoying the protections of the rule of law. Each citizen in a liberal democracy possesses both characteristics; however, under a "state of exception", the sovereign seeks to limit or strip citizens of bios, resulting in the political exclusion of segments of society. Once a citizen has no bios identity, they lose all protections of civil society and the rule of law. Consequently, Agamben argues that respect for human rights must rise from respect for civil liberties. If citizens in democratic societies are stripped of civil liberties, then all reference to democracy becomes empty. In fact, he argues that the sovereign, or government power, exists within and is created by a legal framework, but when employing methods of exception, the sovereign creates power for itself outside of juridical accountability. The importance of extra-juridical power and its effect on bios is central to Agamben's concepts. To this end, Agamben draws from the works of Carl Schmitt and Walter Benjamin and relies heavily on examples from Nazi Germany and the Holocaust.

In Agamben's later work, *State of Exception* (2005), Agamben develops his ideas about the state of exception in the context of western society. He argues that states of exception exist not only in fascist states like Nazi Germany but also in modern democracies as well. Agamben warns that the suspension of the rule of law and the lessening of legal accountability of the sovereign was one of the conditions that lead to the establishment of concentration camps. His argument plainly leads one to the conclusion that if the potential to undermine the rule of law still exists so does the potential to establish concentration camps or perhaps even worse. In this regard, Agamben gives examples from both sides of the conflict in WWII, citing concentration camps and internment camps alike. The comparison allows the reader to see that states of exception are not specifically bound to the tyrannical; they can and have and still exist in western democracies (Durantaye 2009).

It should be noted that a state of exception, as an abstract theoretical concept, is not as clearly defined as one would like. This is not a point that will be beleaguered here but as a means to gain complete command of the concept, this is a point that must not be ignored. Agamben acknowledges the difficulty in clearly defining a state of exception and points to a couple of factors that complicate matters. First, a state of exception is closely related to other phenomena like civil war, insurrection and violent political resistance. These phenomena are similar to a state of exception in that they are essentially a reversal of the norm, both rejecting and trying to overcome the established legal and political condition. The primary difference, however, is the level at which the reversal of the norm takes place. Civil war, insurrection and resistance are generally instigated against the sovereign and established legal processes, whereas a state of exception is instigated by the sovereign within legal strategies that place the sovereign outside of credible legal accountability. A state of exception becomes akin to a legal civil war:

> Modern totalitarianism can be defined as the establishment, by means of a state of exception of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system. (Agamben 2005, 2)

Agamben points to the military order by American President George Bush on November 13, 2001 that authorised indefinite detention and trial by military commission of noncitizen suspected terrorists as a clear example of the aforementioned strategy. He chose this example because the military order removed any "legal status of the individual, thus producing a legally unable and unclassifiable individual" (Agamben 2005, 3). Consequently, the state of exception can be seen as a top-down strategy to limit or remove the rule of law's protection of suspect peoples.

Agamben also points to the terminology used in this particular area of study as an impediment to a clear definition of the state of exception. He doubts the ability of existing terminology to adequately explain or explore a state of exception. Furthermore, he cautions readers not to think of the state of exception as a type of law (martial, for example) because a state of exception is a "suspension of the juridical order itself, (and so) it defines law's threshold" (Agamben 2005, 4). Consequently, a state of exception can be seen as the zone where the protections offered by the rule of law cease and the sovereign's impunity begins.

Perhaps unfairly, *State of Exception* focuses solely on the United States as its main example of a contemporary state of exception. The American military internment camp in Guantanamo Bay is a clear example of the state of exception, and Agamben does not hesitate to draw a comparison between it and Nazi concentration camps. The intended purpose of Guantanamo is not to exterminate human life; rather, it is to alienate the detainees from legal recourse and the protection of international humanitarian law. According to Agamben, this institution represents a mobile and probably lethal state of exception that applies itself through the global reach of the (permanent) War on Terrorism: "When the state of exception…becomes the rule, then the juridico-political system transforms itself into a killing machine" (p. 86). This line of logic is evident in the era of the Holocaust, and, as Agamben points out, the potential for the west to partake in such an event has not dissipated; rather, it increases with the continuance of the War on Terrorism. Domestically, Agamben references the PATRIOT Act as indicative of a state of exception in that it attempts to remove legal protections from American society, but he does not cite any other contemporary examples in other western countries like Canada and Australia.

Many liberal Democracies, during periods of military conflict, have enacted populist policies that have resulted in 'exceptional' consequences. Notably this took place during WWII with Japanese, German and Italian Internment Camps in Australia, the US and Canada. Despite collective remorse expressed when recounting these events the United States has chosen not to learn from its own history and has re implemented internment camps in the War on Terror. The emergence of the US military detention centre for unlawful or enemy combatants, in Guantanamo Bay, Cuba has been one of the most detrimental developments of the WOT. The significance of this development has the potential to impede human rights protection for generations to come.

The fact of the matter is that the base in Guantanamo bay is no stranger to detainees. In order to stem the tide of Cuban, and Haitian immigrants in the mid 1990's American officials housed them at Guantanamo Bay until other means could be derived to deal with them (Bilski, 1994). However, in this present situation there is no 'ends to the means'. The Bush administration had no intention of bringing the practice to an end in the foreseeable future. Defence Secretary Donald Rumsfeld publicly remarked that the 'detainees may be held until the effort against terrorism ends' (Lewis, 2003).

In fact, rather than being a temporary solution to a problem, as was the case in the 1990's, it quickly evolved into a strategic practice. Labelling the detainees as 'illegal' or 'enemy combatants' permits the US abuse of foreign nationals' guaranteed rights under the Geneva Convention. This has resulted in a problematic and controversial 'legal void' in which the detainees reside.

Initially named Camp X-ray, it housed it prisoners in open air, wire cages with concrete floors and a simple bed matt for sleeping. Amnesty International expressed deep concern at this type of treatment citing that the US may be violating the detainee's rights by holding "people in conditions that may amount to cruel, inhuman or degrading treatment, and that violate other minimum standards relating to detention" (AI, 2002). As a result of photos being leaked to the media depicting conditions and treatment of detainees, the US government constructed a new and improved Camp Delta ("In depth Guantanamo Bay", 2004, August 5). However, human rights groups still express unease over the deprivation of several essential rights. Amnesty International continues to express concern over the treatment of prisoners alleging inappropriate treatment ranging from lengthy interrogations with no legal counsel, to torture (AI, 2004a; AI, 2014). The US government's consistent rebuttal is to label detainees as enemy or unlawful combatants, not entitled to such protections. This practice is consistent with populist practice by ostracizing targets from the general public.

Enemy/Illegal Combatants as Populist Exceptional Labelling

The term Unlawful Combatant was initially phrased in World War II, to describe German Saboteurs that were brought before US military commissions. Due to the illegal nature of their actions, they were not offered protection under rules of war and were usually executed. However, due to the implementation of the Geneva Convention in 1949, the term largely fell out of use until it was re invoked by the Bush administration (Hoffman, 2004).

The Bush administration asserted that Enemy or Illegal Combatants do not merit protection under the Geneva Convention because the failed to abide by four specific conditions as laid out in Article 4(2) of the Geneva Convention. The first of which is that they be "Commanded by a Person Responsible for his Subordinates". The US maintains that Al Qaeda and the Taliban simply did not organise themselves into cohesive military units that followed a command structure (Elsea, 2002, p.23). Secondly, the Geneva Convention States that a military is entitled to the defence of the Geneva Convention if it "Uses a Fixed Distinctive Sign Recognizable at a Distance". In this regard the US government insists that the Taliban and Al Qaeda did not use identifiable uniforms and therefore do not qualify for protection under Article 4(2) b (Elsea, 2002, p. 26). Thirdly, Article 4(2) c. states a military will qualify for protection under the Convention if it "Carries Arms Openly". The US avows that the nature of terrorism precludes them from carrying arms openly and that they frequently use clandestine attacks against their targets. Consequently, Al Qaeda and the Taliban do not qualify for this protection (Elsea, 2002, p 27). Finally, the US claims that Article 4(2) d. "Conducts its Operations in Accordance with The Laws of War", does not apply as Al Qaeda is by nature a terrorist group and not a state party bound by the Laws of War (Elsea, 2002, p.28). In the beginning 2002, the Bush Administration changed their view of Taliban soldiers, but not by much.

By depriving the people legal classification under the Geneva Convention the US government is further dehumanising the issue. Based on the four tenuous criteria listed above, targets are being legally classified as undeserving of legislated protection. Coupled with public condemnation, the targets are morally portrayed as threats or at least deserving of policies and treatment that will prevent further victimisation. Essentially, they are portrayed as outsiders unworthy of protectionism.

Modus Operandi: Softening up the Targets

In populist doctrines, the objectives are clear. There is little consideration to the long term effects of policies that endanger 'others'. Once the labels of good versus evil have been clarified, traditional rules of fair engagement become compromised. That is to say, the good become empowered, through morality to act immorally if the cause is seen to be just. Such is the case in detention camps used in the WOT.

Enemy Combatants started to arrive in the camps around the end of 2001, just months after the September 11th attacks. From the beginning, human rights organizations accused the US of disregarding international humanitarian legal traditions and degrading human rights protection (Human Rights Watch [HRW], 2004).

The International Committee of the Red Cross (ICRC) has expressed concern not only about the international implications of Guantanamo but the implication of this type of incarceration on individuals as well (International Committee if the Red Cross [ICRC], 2004).

The ICRC has openly expressed concern for the health and wellbeing of detainees in both Camp X-Ray and Camp Delta. The ICRC has a tenuous mandate of access and supervision for people in detention in conflict zones all over the world. However, in exchange for the access and influence they exercise over international detention issues the ICRC is bound by confidentiality as not to potentially embarrass offending states. It is this balance between influence and action that allows the ICRC access even the most controversial detention camps like Camp X-ray and it successor Camp Delta in Guantanamo Bay (ICRC, 2004). However, at times the ICRC is forced, usually by inaction or escalation to release reports publicly condemning actions of states. Such was the case with Camp Delta.

In October of 2003, a representative of the Red Cross broke with the traditional silence to criticize US policy in Guantanamo Bay. Christophe Girod, of the Washington Office of the Red Cross, openly criticised the US's lack of action in dealing with several of the Red Cross's concerns over Camp Delta ("Red Cross Blasts Guantanamo", 2003, October 10). Furthermore, in its January 1, 2004 Operational Update, the ICRC outlined its concerns over the deterioration of the psychological state of some of the detainees due to the indeterminate nature of their stay at Camp Delta (ICRC, 2004a).

Human Rights Watch (HRW), on the other hand has been more vocal in its condemnation of the US's policies in dealing with the detainees in both Cuba and Iraq. HRW has consistently condemned the actions of the US administration in their treatment of detainees in the War on Terror. Issues ranging from interrogation techniques (Human Rights Watch [HRW], 2004) to the 'disappearing' of suspects by the CIA (HRW, 2004a) have been publicised by HRW. Furthermore reported instances of attempted suicide in the camp indicate a far more desolate situation than the Americans imply. In December 2003, the BBC reported that there had been 32 suicide attempts in the camp up to August 2003. At that time the criteria was changed. The administration implemented a new category to medical reporting, manipulative self-injurious behaviour (SIB). In the subsequent months leading up to the end of the year, there was only one more attempted suicide. There were however, 40 SIBs (Newsnight, 2003, December 23).

Despite the repeated warnings of mistreatment and detrimental circumstances of the detention camps, nothing was done by the US administration to curb the problems. The targets of the mistreatment were after all targets in the WOT and had little moral value in a conflict based in morality. It was not until the Abu Ghraib controversy became publicised that world would see the impact of populist policy implementation.

In April 2004, the US investigative journalism Television programme, 60 Minutes, released the first few pictures of seeming torture and abuse filtered into mainstream media. The world sat up and took notice of what Human Rights Watch had been warning about for some time. Despite the immediate reaction of the US military to offer up low level troops implicated by the pictures themselves, there was a reluctance to chase the issue farther up the chain of command (Jones, Fay, 2004). A subsequent US Army investigation into the abuses found that the incidents were far more dramatic than even the photos depicted. However, it neglected to blame anyone in direct command of the soldiers. Instead it blamed the incidents on a number of factors including individual criminal tendencies and a 'dysfunctional relationship between commanders (Jones, et all, 2004).

An independent panel investigation was also convened by the Secretary of Defence on the same matter that came to some very different conclusions. This panel investigated allegations of abuse in Iraq, Afghanistan and Guantanamo Bay. It found that there were at least fifty-five credible claims of abuse in Iraq, three in Afghanistan and eight in Guantanamo Bay. However, there were still 145 cases being investigated when that number was shared. Abuse ranged from physical and sexual assault of females and males to murder (Schlesinger, Brown, Fowler, Horner, Blackwell, 2004). It however, did not rest the blame solely on the shoulders of low level soldiers. It placed blame all the way up the chain of command to the Pentagon.

The Pentagon may indeed hold a great deal of responsibility for the culture of abuse that is evolving in its military detention centres. Two government documents leaked to the press outline a concerted effort to justify the use of torture like tactics in order to facilitate intelligence gathering (Office of the (US) Assistant Attorney General, 2002; United States Department of Defence, 2003).

They imply the moral argument that the detainees, as terrorists are less deserving than POWs. Furthermore, they demonstrate centralised policies that would shift the focus of the detention centres to that of intelligence gathering centres were being employed.

Seymour Hersh of the New Yorker Magazine reported that in October 2003, a team of experts from Guantanamo Bay travelled to Iraq to review the 'Army program'. The recommendation was simple and to the point, "that Army prisons be geared, first and foremost, to interrogations and the gathering of information needed for the war effort" (Hersh, 2004). A pattern gradually materialises demonstrating a militaristic question of supply and demand. The executive branches of the war on terror demanded better and faster intelligence and the military detention camps were expected to adapt and to supply. It follows then that this systematic abuse is the direct result of populist policies designed to morally undermining International Humanitarian Law.

It may be beneficial to reflect on a populist framework at this point. The war on terror has an enemy; an enemy that is responsible for 9/11. Detainees and others still at large symbolically fill both the role of the perpetrator and a populist dramatization of something being accomplished in the WOT (putting the perpetrators in a legal black hole or a state of exception). By labelling the detainees as enemy combatants, the US executive and military are implying that they have already committed acts qualifying them as a threat or perpetrator. It also implies that they are less than soldiers (at least the populist western narrative of what a soldier is), less than citizens deserving protection of International Humanitarian Law and consequently deserving to be in a state of exception. This dehumanisation provides motive for guards and soldiers to mistreat detainees and motive for the public to accept this mistreatment as justified for the moral good.

Under International Humanitarian Law these centres would be far less capable of indefinite detentions, seclusion and impunity that nurture this type of clandestine abuse. The simple gathering and concentrating of enemy combatants into security facilities such as these provides opportunity. When provided with motive and opportunity by high ranking officials and policies, low level soldiers are simply embodying the modus operandi of populist policies that take advantage of the state of exception created by the WOT.

David and Goliath Revisited

At this point it is important to revisit the case study at hand. Given the potential implications it represented for the rule of law in Australia, it is a particularly important one. Not only does it represent injustice and inhumanity on a micro level, but it also represented the undermining of International Humanitarian Law on the macro level.

Domestically the David Hicks case represents a dramatic detour around the rule of law. Hicks was abandoned into the state of exception in Guantanamo Bay for five years. During that time there were concerns expressed about his wellbeing and allegations of abuse. However, the Australian Government has been less than responsive. An Amnesty International report released October 27, 2004, outlines claims that an Australian captive at Guantanamo Bay was subject to torture and abuse. It does not identify the individual; however it does describe the treatment. According to the report the prisoner was kept awake for several days and began to bleed from his nose and ears (AI, 2004a). There are also personal accounts from other detainees of both Hicks and Mamdouh Habib, the only other Australian detainee, were mistreated. A former cell mate of David Hicks' came forward with allegations that Hicks was beaten up by the guards at Guantanamo Bay ("Hicks Lawyers Hint at Prison Abuse", 2004, May 20).

Despite growing concerns from reputable NGOs and evidence of a systematic implementation of torture, Australian Prime minister John Howard remained cynical over the allegations in the Hicks case. On the 20th of May 2004, Howard told reporters that Australian officials had been "repeatedly" assured by the US that claims of abuse were absolutely false. Furthermore he reminded them that the accusations were being alleged with regard to a "Taliban sympathiser...and (allegations) coincided with revelations of US abuse of prisoners in Iraq and had not been raised earlier" ("Howard Plays Down Hicks Abuse Claim", 2004, May 20). This qualification seems to infer that the claims are not credible, implying that they are simply opportunistic. However, it would seem that it is indeed the Howard government that acted opportunistically. Through constant reminders that this individual was a member of the Taliban, Howard is linking him to a major clandestine target in the WOT, and consequently to terrorism itself (ABC, 2011). This is a tenuous position due to the fact that Hicks was in no way linked to the leadership of the Taliban or any acts of terrorism. However, it does represent a form of populist moralism that Howard and many other members of the government employed even after Hicks was released and exonerated.

This factual manipulation results in the development of a culture of fear and hatred through defining the moral enemy or target. In doing so, it is more difficult to build mainstream sympathy and support for someone like David Hicks. There are some tenuous strategic advantages for the government's desire to undermine public support for Hicks. Primarily by alienating and labelling Hicks, they reinforce the 'Us against Them' stereotype that has contributed to fear, hatred and the excesses of Abu Ghraib and Guantanamo Bay. This in turn opens the door for a moralistic explanation of why the War on Terror is permitting these excesses. Consequently strategies of exception are justified as simply the right thing to do in order to stop 'evil doers'.

Another important reason the Australian government was reluctant to bring Hicks home is directly due to the fact that there was no legal mechanism for dealing with David Hicks if he were returned home. In a media interview on Sept 15, 2004, John Howard stated "That is an unrealistic proposition. If [Hicks] is brought back to Australia, [he goes] free because there is no crime under Australian law with which [he] can be charged" (Prime Minster's Office, 2004). Essentially the legal principle of *nullum crimen sin liege* (no crime in the absence of law) prevents the government from passing legislation to criminalise Hicks' past actions. Consequently the government was willing to allow an ally to do what they could not, imprison an unwanted citizen as far away from the protection of the rule of law as they could. Domestically, this represents a problematic, populist strategy by the Australian Government: intentional unwillingness to advocate for unpopular or inconvenient citizens. This equated to a perspective shift in domestic legal policies in which the state thus evolves from a protective body, using the rule of law to preserve the civilian and collective rights, to an offensive actor citing security needs and the greater good (as defined by populist policy such as the WOT) over the individual citizen, collective civil rights, and consequently the rule of law itself.

Hicks, although in the custody of a foreign power, still maintained a legally protected relationship with Australian civil rights and protections. The state was negligible to disregard those rights simply by labelling him a terrorist. In fact, the support they have exhibited for his detention implicates them in the illegality of the treatment, and indeterminate nature of his detention. Furthermore when former Australian Attorney General Daryl Williams confirmed that ASIO and the AFP had interrogated (Attorney General, 2003) Hicks while in foreign custody, the Australian government became morally implicated in the circumstances of his treatment and the 'softening up' tactics employed by his captors. Essentially they benefited from criminally inhumane treatment of an Australian citizen, resultant in de facto torture and abuse.

On the international stage, this case foreshadows trouble for Australian Citizens. By permitting a foreign power to detain and abuse an Australian citizen with a minimum level of advocacy, the Australian Government set a precedent that will inevitably devalue Australian Citizenship in the eyes of other states. This will potentially open the door for further abuses by foreign and even allied states in the name of international security or other social phenomenon warfare like the war on drugs. Furthermore, the David Hicks case, and others like it, represents an erroneous milestone in International Humanitarian legal traditions. By condoning the trial of Hicks by Military Commission at Guantanamo Bay, the Australian Government advocated the circumvention of international law. The Law Commission of Australian has considered the Hicks case and echoes these very concerns.

In mid-September 2004, the LCA released a damming report on the Military Commission in Guantanamo Bay. First and foremost the report concludes it was impossible for David Hicks to get a fair trial. It outlines the LCA's criticisms in several points. These include, but are not limited to a lack of independence from the executive of the US government, commissioners not being legally qualified, a lack of legal framework for rules of evidence, and absolutely no independent source for appeal.

In the beginning of September the Attorney General Phillip Ruddock, and the Minister of Foreign Affairs, Alexander Downer, issued a joint press release stating that they would "discuss improvements to the Guantanamo Bay Military Commission Process" with US officials (Attorney General's Office, 2004). However just a few weeks later, Ruddock openly expressed his satisfaction with the military commission's decision to proceed with only three commission members after the removal of three others due to bias against the defendants ("Ruddock Stands By Guantanamo Trials", 2004, October 22). In fact Ruddock speculated at the possibility of Guantanamo type military commissions being established in Australia in the case of a terrorist attack like that of September 11, 2001 (Gibbs, 2004). This is a curious position that stands in contrast majority of the world. While others advocated for open legal tribunals, Australia advocated for the rule of morality in place of the rule of law.

In February 2007, due to increasing public outcry against David Hick's treatment in Guantanamo Bay, the US government negotiated with Australian officials to bring Hicks back to Australia for a "fair go". After more than six years of time spent wallowing in a state of exception where he was routinely mistreated and tortured, Hicks was offered a plea deal by the military tribunal. Hicks consented to plea, using an Alford Plea, to 'material support for terrorism". He was sentenced to seven years (six years and four months of that was given as a suspended sentence) to be served at Yatala Prison, South Australia. However, this physical move did not limit the Australian Government's attempts to alienate Hicks from his legal rights. While in Yatala Prison, Hicks was kept in solitary confinement. Once released the Government imposed a one year gag order (one year to minimise the case's effect on an upcoming Australian federal election) on David Hicks. Hicks was also subject to a Control Order by the Australian Federal Police for one year that limited his mobility, who he could speak to and when he could leave his home.

Finally in 2012, The United States Appeals Court ruled the charge of "Material Support for Terrorism" invalid. The court found that the charges were applied retrospectively, contravening the legal principle of nullum crimen sin liege. Simply put, at the time of committing the offending behaviour, the law prohibiting it did not exist, and therefore no crime had been committed by Mr. Hicks. Despite this seeming clear vindication of Mr. Hicks, Australian political leaders continued to cast aspersions on David Hicks. The Prime Minister of the day, Tony Abbott, went so far as to say: "Let's not forget whatever the legalities... he was up to no good on his own admission." (Australian David Hicks 'relieved' after terror conviction quashed, 2015, 19 February).

Conclusion

As has been argued throughout this paper, the War on Terror continues to represent a threat to international humanitarian legal traditions. By adopting a populist warfare model in dealing with terrorism, the coalition of the willing is attempting to prioritise national security over the rule of law and civil liberties creating legal black holes or states of exception. As with David Hicks, citizens and their wellbeing become secondary to the interests of the state. Ordinary citizens with unpopular associations are relinquished to processes normally outside the realm of legal state power. A moralistic dialogue of right versus wrong, and good versus evil is employed to justify the methods of exception and doubters are labelled as sympathisers.

In the Hicks case, clandestine detention centres have come to represent morally (instead of legally) based institutions in the War on Terror. They are established, not for the purposes of legally detaining foreign citizens as POWs, but to objectify, manipulate and exploit detainees as resources both symbolic and practical. These morally based institutions set a dangerous precedent for the rights of war time detainees by undermining the Geneva Convention and are proving very difficult to disband once established.

On a macro level, the justifications for this type of detention and denial of the application of the Geneva Convention are weak and tenuous at best. They potentially open the door for other countries, both friend and foe, to ignore International Humanitarian Law. However due to the size and influence the United States has, it is unlikely that there will be any politically or legally based challengers from outside the US justice system. Furthermore, on a micro level the moral vilification of targets in the War on Terror result in systematic and centralised policies that actively encourages a culture of fear and hatred both domestically and institutionally. Both Abu Ghraib and Guantanamo Bay have exhibited these symptoms and credible claims and evidence of abuse and torture have been the result.

Australia, by surrendering its citizens into the morally based War on Terror sanctioned its policies. It thus sanctioned the undermining of civil rights and the rule of law on both a domestic and international level. Furthermore, by not advocating for immoral or politically unpopular citizens Australia is directly responsible for the outcomes of those policies. This includes the use of torture and deprivation of basic legal protections. Ironically the Australian Government's position represents a very interesting and important contradiction; it opposes a morally deprived enemy with morally reprehensible policies.

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