

BOOK REVIEW*

Guantánamo: What the World Should Know

By MICHAEL RATNER and ELLEN RAY

(Australia: Scribe Publications, 2004) pp165

Recommended retail price A\$25.00 (ISBN 1 920 76927 7)

On 28 June 2004 the United States Supreme Court handed down three important decisions, each dealing with the competence of the American Courts in relation to the Bush Administration's so-called 'war against terror'.¹ The essence of the Court's findings means that both US and non-US citizens held as 'enemy combatants' have the right to challenge the legality of their detention in American Courts.

The decision in *Rasul v Bush, President of the United States*² ('*Rasul*') in particular has been described as 'the most important civil liberties case in half a century'.³ Two of the 12 petitioners for certiorari in the case – all non-US citizens – were the Australian detainees, David Hicks and Mamdouh Habib. In relation to the claims made on behalf of Mr Hicks in the case, Michael Ratner, President of the Center for Constitutional Rights, played an important role as co-counsel. He has had significant experience in claims of this type, having acted in the early 1990s as principal counsel representing Haitian refugees who were imprisoned in an HIV camp at Guantánamo Bay Naval Station in Cuba.

This book largely represents the views of Mr Ratner in relation to the circumstances surrounding the Guantánamo Bay facility. It contains his insights into the plight of detainees there, as well as commenting on some broader aspects of the war on terror. His first-hand experience in many of these matters puts him in an excellent position to do so. No doubt, however, there will be critics who will complain about the lack of objectivity, and the failure to provide much specific detail in the book. It certainly is not intended to be a detailed explanation of all points of view, but that does not, in my opinion, detract from its value.

Guantánamo was written before the decision in *Rasul* and the other two cases, and only contains a brief afterword in response to the Supreme Court's findings.

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1 *Hamdi v Rumsfeld, Secretary of Defense*, No 03-6696 (Supreme Court of the United States, 28 June 2004); *Rasul v Bush, President of the United States*, No 03-334 (Supreme Court of the United States, 28 June 2004); *Rumsfeld, Secretary of Defense v Padilla*, No 03-1027 (Supreme Court of the United States, 28 June 2004).

2 No 03-334 (Supreme Court of the United States, 28 June 2004).

3 Adam Liptak and Michael Janofsky, 'Scrappy Group of Lawyers Shows Way for Big Firms', *The New York Times* (New York), 30 June 2004, 14, quoted in Michael Ratner and Ellen Ray, *Guantanamo: What the World Should Know* (2004) 94.

This is not, however, a major concern, since the book serves to provide some factual background to the Bush Administration's use of Guantánamo Bay and the tactics employed by US military and intelligence personnel against detainees from the campaigns in Afghanistan and elsewhere, which took place in response to the attacks on American soil on 11 September 2001.

The first thing that strikes the reader about the book is the style in which it is written. The main body of the text is in the form of an interview between Ellen Ray, President of the Institute for Media Analysis (as interviewer) and Michael Ratner. As a result, it reads as a 'conversation', making the book readily accessible for lawyer and non-lawyer alike. At first, this may be a little disconcerting, since the casual language may seem, to some, to belie the gravity of the subject matter, particularly when Mr Ratner describes some of the interrogation techniques used on the detainees. However, it is not long before the reader becomes comfortable with the way the information is presented.

The book has a close Australian connection over and above the fact that it is published in Australia. Stephen Kenny, the Australian lawyer acting for David Hicks, has written an introduction, in which he describes how he became involved with Mr Hicks' case, his relationship with Michael Ratner and the Center for Constitutional Rights and his (brief) reaction to the *Rasul* decision – 'a very significant step forward for all those of us who believe in the rule of law'.⁴

Stephen Kenny also writes of the 'appalling' role played by the Australian Government in relation to both David Hicks and Mamdouh Habib.⁵ Indeed, it is quite clear that efforts by our Government to protect the rights of these Australian citizens have been less strenuous than those of other countries, such as the United Kingdom, which has secured the release of five of the nine United Kingdom citizens that had been detained at Guantánamo Bay. Even more disturbing, the response to date by the Australian Government gives the impression that it holds little real concern for the plight of Australian nationals who may have been subject to torture and inhumane treatment, and are to be subject to legal processes that fall well short of the standards operating under Australian – and indeed US – criminal law and procedure.

The introduction is followed by a brief preface by both Ellen Ray (as interviewer) and Michael Ratner (as interviewee). Both of them make reference to the recently released images from the Abu Ghraib prison in Iraq, which confirmed some of the 'stress and duress' tactics employed by US military officials against detainees. Both Ms Ray and Mr Ratner point out the close connection between Abu Ghraib and Guantánamo Bay – Major General Geoffrey D Miller, who had been the commander of Guantánamo facility, had been transferred to Iraq in the autumn of 2003 by the Pentagon's intelligence chief to 'Gitmoize' Abu Ghraib prison.⁶ In essence, the Guantánamo Bay facilities have

4 Ratner and Ray, above n 3, xiii.

5 Ibid xiv.

6 Ibid xviii. The transcript of a US Department of Defence News Briefing in February 2004 involving Major General Miller is also included: ibid 133–50.

been used as a 'model' for Iraq.⁷ For Mr Ratner, this is a further confirmation (if any were needed) that abuses are regularly committed at Guantánamo Bay.

The book then sets out the dialogue between interviewer and interviewee under a number of headings. Chapter One (Guantánamo and Rule by Executive Fiat) begins by explaining the nature of the Guantánamo Bay facility from its early history as a US base following a lease between the US and the newly independent Cuba in 1903.⁸ In more recent times, particularly following the 11 September attacks, Ratner describes how the Bush Administration has attempted to create a 'legal black hole' at the facility. Indeed, he claims that the failure of the United States to recognise and apply the 1949 Geneva Conventions to the detainees, coupled with the abuses inflicted on detainees, represents the 'end of the rule of law',⁹ replaced by 'rule by executive fiat'.¹⁰ In this regard, it is interesting to note the Administration's own description of the detailed processes it undertakes when scrutinising each detainee sent to Guantánamo Bay, as outlined by Paul Butler, Principal Assistant Secretary of Defense.¹¹ It seems, at least from the viewpoint of the Administration, that there has in effect been a very complex legal process put into place, thus bringing into question the role of law and lawyers in creating a detention facility which at the same time it claims is beyond the reach of the US (or any other country's) courts.

The book then deals with the use of torture and other inhumane treatment against Guantánamo detainees in Chapter Two (Abuse and Torture). Ratner describes how there are 300 interrogations per month at the facility, often involving tactics that are in breach of international law. He dismisses the argument raised by prominent American lawyer Alan Dershowitz, that the use of torture is defensible and even appropriate in certain circumstances.¹² In this, Ratner is absolutely correct – it is well recognised that the crime of torture represents a *jus cogens* norm, meaning that there is no legal justification for violating the prohibition.¹³

The attempts of the Administration to 'redefine' the crime are not acceptable and do not alter the legal position.¹⁴ Reference is made to a telling statement, made by a US official and cited in *The Washington Post*: 'If you don't violate

7 Ibid 58–9.

8 See *ibid* 98–105 for excerpts from the lease and other amending documents.

9 Ibid 12.

10 Ibid 15.

11 Ibid 133–50. Paul Butler was present at the same Defense News Briefing referred to above n 6.

12 Ibid 34.

13 See, eg, *R v Bow Street Metropolitan Magistrate and Others; Ex parte Pinochet Ugarte (Amnesty International and Others Intervening) (No 3)* (1999) 2 All ER 897 (HL); *Prosecutor v Anto Furundžija (IT-95-17/1-T)* International Criminal Tribunal for the former Yugoslavia, Trial Chamber, 10 December 1998.

14 A memorandum prepared by US Administration lawyers in March 2003 concluded not only that President Bush was not bound by federal anti-torture legislation, but also provided a much narrower definition of torture than is included in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987) and which has been accepted at customary international law: Neil A Lewis and Eric Schmitt, 'Lawyers Decided Bans on Torture Didn't Bind Bush', *The New York Times* (New York), 8 June 2004, 1.

someone's human rights some of the time, you probably aren't doing your job'.¹⁵ Ratner also explains the policy of 'rendition' – where arrested persons are sent by the US authorities to third countries whose authorities are known to carry out torture. Recent reports have suggested that Mamdouh Habib was 'rendered' to Egypt before being transferred to Guantánamo Bay.

In any event, Ratner makes the valid point that any 'intelligence' that comes out of Guantánamo Bay should be regarded as 'garbage', since it has been gained through coercion and torture.¹⁶ In this sense, he raises a fundamental question as to exactly what the US is seeking to achieve through the detention of people of interest at the facility.

Chapter Three (Guantánamo: Testimony and Case Details) highlights some of the specific cases. Particular reference is made to David Hicks as well as the five British citizens recently released. After arriving back in the United Kingdom, these five were detained by British authorities for 24 hours and then set free. They are now contemplating lawsuits against not only the US Government but also the British Government itself for complicity in the abuses inflicted upon them at Guantánamo and for collaborating with the US Administration to keep them in prison there. It will be interesting to see the view of the Australian detainees in this regard if either (or both) of them are ever repatriated to Australia.

Chapter Four (Military Commissions and the Supreme Court) describes the serious legal flaws associated with the use of specially established military commissions to try detainees. At the time of writing this review, Mamdouh Habib had just been designated for a Military Commission hearing (though no charges had been laid) and David Hicks was about to make his first public appearance before a military commission to face charges of conspiracy to commit war crimes, attempted murder, and aiding the enemy. Ratner describes these military commissions as 'courts of conviction'.¹⁷ They are essentially operated in all respects by the Executive, with no right of appeal to the judicial system.

Moreover, the rules by which evidence can be presented to the judges of these commissions (all military appointees) allow for the inclusion of uncorroborated and hearsay evidence that would clearly be inadmissible in an Australian criminal trial. In addition, the identity of prosecution witnesses, and even specific prosecution evidence, can be kept confidential from the accused, if it is considered to be in the US national interest. An accused may even be barred from seeking to adduce evidence for the same reason. Even more remarkably, in the event that he is found not guilty, David Hicks might still *not* be released, given the ongoing nature of the so-called 'war' against terrorism. Indeed, Secretary of Defense Donald Rumsfeld has already 'prejudged' Mr Hicks as one of the 'worst of the worst'.¹⁸

Nor are the other military panels established at Guantánamo Bay any more satisfactory. Once the Supreme Court had decided that it would hear the *Rasul*

¹⁵ Ray and Ratner, above n 3, 47.

¹⁶ *Ibid* 43.

¹⁷ *Ibid* 71.

¹⁸ *Ibid* 55.

case, the US Administration began to set up Review Panels, ostensibly to assess on an annual basis whether detainees still represented a threat to the US. Ratner describes how these ‘one-sided’ panels offer no real legal protection to detainees and are simply window-dressing measures designed to give the impression that the Administration was responding to increasing criticism of the detentions at Guantánamo.

Even more cynically, following the Supreme Court’s finding in *Rasul* that the detainees were entitled to challenge their detention in US courts, the Defense Department has begun to establish a series of ‘Combatant Status Review Tribunals’ at the Guantánamo Bay facility. This appears to be a contravention of the orders of the Supreme Court. In the meantime Ratner confirms that many detainees are – through the Center for Constitutional Rights – filing cases in District Courts on the mainland.¹⁹

Ratner concludes, in Chapter Five (Conclusion), with the assertion that ‘Guantánamo represents everything that is wrong with the U.S. war on terrorism’.²⁰ The actions of the Bush Administration following 11 September 2001 were ‘a descent into barbarism’²¹ which ignore fundamental human rights that can be traced back to the Magna Carta in 1215. Despite such emotive language, Ratner does not give up hope – the (then impending) Supreme Court decisions were cause for optimism. Indeed, in the final chapter (Afterword) following those decisions, Ratner highlights the significance of the Court’s rulings as a major step in restoring the rule of law. Yet, he is realistic enough to point out that there is still much work to be done in this regard. The Supreme Court decisions are really the beginning of the next phase of legal actions designed, ultimately, to give detainees at Guantánamo Bay and other US facilities all over the world, access to basic rights for the accused.

Following the narrative between Ms Ray and Mr Ratner, the book contains a useful collection of relevant documents to which Ratner refers throughout his discussion. These contain some source documents, as well as what I found to be a most informative document, a letter written by Shafiq Rasul and Asif Iqbal (two former British detainees at Guantánamo Bay) to the US Senate Armed Services Committee.²² This provides a more detailed account of the process that these two men were forced to endure and helps place in context some of the general comments made by Mr Ratner throughout the book.

This is a very interesting and topical book, of interest to anyone who has been following the events of terrorism and counter-terrorism over the past few years. It is, as the authors point out, crucial that we understand what Guantánamo Bay is, and how it operates in relation to accepted international norms. Obviously Ms Ray and Mr Ratner have strong views – based on significant experience – as to the extent of the illegal actions undertaken by the US Administration. It is almost impossible not to be outraged by some of the descriptions of the plight of detainees.

19 Ibid 95.

20 Ibid 92.

21 Ibid 92.

22 Ibid 154–8.

Yet there is a danger in presenting a book in the format chosen by the authors. There are many references made to specific detainees but not much detail provided (with the exception of the letter from the two British detainees mentioned above). This is quite probably due to the desire of the authors (and publisher) to distribute the book immediately following the Supreme Court's decisions at the end of June 2004. As a result, it would be relatively easy for someone seeking to discredit the book to claim that it is full of generalities, does not tell the full story and is itself, so 'one-sided' as to lose objectivity. Despite the description on the back cover, this book is probably not a 'definitive account' of the legal situation at Guantánamo Bay.

However, Michael Ratner and Ellen Ray do provide some important insights into the effect of the actions taken by the US Administration in its war on terror – reflecting upon the idea that basic human rights law, international humanitarian law, natural justice, principles of fairness to accused, due process and public accountability have been unacceptably compromised. The book leaves one with an overwhelming sense of injustice; a feeling that the very nature of law itself is at issue, as to whether, and in what way, it will apply to the enormous complexities of modern times. The book reminds us all that, without respect for the rule of law, it is impossible to distinguish between conduct that is acceptable and conduct that is unacceptable.