



United States v David Matthew Hicks

Report of the Independent Legal Observer for the Law Council of Australia

Lex Lasry QC

July 2005

UNITED STATES v. DAVID MATTHEW HICKS

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Background

1. On 30 August 2004 I provided my first report as the Law Council of Australia's independent legal observer. That report was given to the Law Council and after due consideration subsequently was made public by them in September 2004.
2. As at the time of writing this second report the trial of David Hicks before the Military Commission at Guantanamo Bay, Cuba has not taken place although in view of recent developments in the United States the trial may, all of a sudden, be imminent. As my first report noted¹, at the hearing at Guantanamo Bay on 25 August 2004 two dates were fixed. The first was a date for hearing of motions on 3 November 2004 and the second was a trial date for 10 January 2005. The motions hearing did proceed in November 2004 and is referred to subsequently in this report. On 10 December 2004, the Appointing Authority ordered that the trial of David Hicks be held in abeyance pending the outcome of the appeal in *Hamdan v Rumsfeld*. That appeal was argued before the United States Court of Appeals for the District of Columbia Circuit on 7 April 2005. Judgment was delivered in favour of the US government on 15 July 2005. I will deal with that judgment later in this report.
3. Following my first report there have been a number of developments most of which have been concerned with litigation in the nature of *habeas corpus* applications by a number of Guantanamo detainees in the civilian courts in the United States following the judgment of the Supreme Court of the United States in *Rasul v. Bush* [542 U.S. (2004)] and *Hamdi v Rumsfeld* [542 U.S. (2004)]. Those include *Hamdan v Rumsfeld* (8 November 2004, Civil action number 04-1519), *Khalid v. Bush* (19 January 2005, Civil Action No. 04-1142) and *Re Guantanamo Bay Detainees Cases* (31 January 2005, 11 coordinated habeas corpus applications). In addition to that litigation there have been a number of developments within the US government and the

Department of Defense in particular. Importantly, a number of detainees at Guantanamo Bay have been released and I am informed that some of them are, or were, to be witnesses in the case against Hicks. Also significant from an Australian point of view was the release in January 2005 of Mamdouh Habib who has now returned to Australia amidst significant publicity. It is worth noting that his release occurred despite the fact that on the available material, he at least suggested he made “numerous” confessions all of which were false and which are said to have been made by him in response to interrogation techniques alleged to include torture. He made a number of allegations of torture in the public media on Sunday 13 February 2004. Whatever did occur and whatever he may have told the interrogators the fact remains that he was released without being charged.

4. It appears from the media that the question of whether or not David Hicks or Mamdouh Habib have been “abused”² has more recently been investigated and reported on by the US Naval Criminal Investigative Service (NCIS). That organisation has apparently reported that there was no evidence found to support the allegations made by either Hicks or Habib. That report appears to have been accepted by the Australian government. The report is not yet publicly available and is not referred to on the website of the NCIS at www.ncis.navy.mil.

This Report

5. On 1 February 2005, the President of the Law Council of Australia, Mr. John North wrote to me making reference to the developments since my last report and seeking my views on them. In addition, Mr. North said:

“Specifically, the Law Council is interested in your views as to the risk of prejudice as a result of these developments, and, in addition to your previous advice, the likelihood of Mr. Hicks receiving a fair trial.”

6. This report is my response to that request from the Law Council. It was provided in draft to the Law Council and it was agreed that its finalisation should await the outcome in *Hamdan v Rumsfeld* since the future conduct of the military commissions appeared to depend on the outcome in that case.

7. I should make it clear at this stage that there is important material that I have not seen and may never have access to. The prosecution brief against Hicks, for example, is something I would not expect to have access to. In addition there is undoubtedly other material which is sensitive and classified which I would likewise not expect to be shown. It is thus obvious that I am no position to make a judgment about the strength of the case against Hicks. In many respects that is beside the point. If there is properly admissible evidence to suggest that he has committed criminal offences and the process by which he is to be tried is properly constituted, independent and fair then there can be no complaint. However, I dealt with some of those issues in my first report. The concept of “properly admissible” evidence, appropriately formulated charges and a fair and independent process are all problematic in this case.

8. In my opinion it is important to state at the outset of this second report that interesting and all as the various legal issues surrounding these cases are, David Hicks has now been imprisoned at Guantanamo Bay without trial and without even the certainty of a trial date for 3 years and 7 months. As at the time of this report being finalised there remains some risk that if his trial before the military commission proceeds, it will not occur before he has been in custody for more than 4 years – i.e. some time after December 2005. The length of his pre-trial detention is a serious injustice which, without more, may prevent him receiving a fair trial for reasons I have already referred to in my first report. The delay and consequential prejudice through loss of access to exculpatory information as well as fading memories have long been

recognised by the High Court of Australia, for example, as creating the risk of unfair trial such as to justify the intervention of courts by staying proceedings an abuse of process³.

9. In this report, I will refer to some of the main litigation which is occurring in relation to a number of the Guantanamo Bay detainees some of which remains unresolved. I do this because these cases (some of which involved Hicks directly) provide an important contextual illustration of the fundamental unfairness of the processes which prevail at Guantanamo Bay both in relation to the circumstances of the incarceration of the detainees and the lack of due process as well as the flaws in the Military Commission process itself.

10. In addition it is also important to consider by way of background the documents which are now in the public forum relating to the debate from 2001 onwards involving the White House, the Department of State and Department of Defense on the methods of interrogation at Guantanamo Bay; whether the Geneva Conventions should apply and what conduct would constitute torture. In my opinion, this material accurately identifies the intent of the US government in its approach to interrogation operations at Guantanamo Bay. Apart from allegations made by individual detainees, some of whom have been released, this information leads directly to the question of whether David Hicks or any other detainee can obtain a fair trial before the Military Commission where such cases are or may be based on information to be put forward as evidence which on any civilian test would be tainted because it was obtained as a result of physical and/or mental coercion. Apart from the law's concern for persons in the custody of the Executive and that they be properly treated, it is axiomatic that confessions or information obtained by the use of such physical or mental coercion, or both, will rarely, if ever, be reliable or probative. The additional issue that may arise in the Military Commission cases is whether the physical or mental coercion used amounts to torture. I will

deal with the background to that issue first because it is chronologically appropriate to do so.

The Interrogation and Torture Issue

11. Notwithstanding the view of the Naval Criminal Investigative Service or the Australian government, a significant question in the military commission trial of David Hicks may be whether or not during whatever interrogations of him occurred, he was “tortured” whilst in custody in Afghanistan, Pakistan or at Guantanamo Bay. Whether treatment which would ordinarily be regarded as torture was meted out to him is a factual question still to be decided with evidence still to be evaluated. The debate as to what amounts to torture so far as the law of the United States is concerned has been affected by events since 11 September 2001. There are now publicly available documents released by the White House, Department of Defense or leaked to the media which illustrate that an effort was being made by those advising the White House to raise the level at which particular treatment might be regarded as torture. These documents now appear on the internet and can be examined by anyone who cares to read them⁴. It is not necessary to analyse all of these documents but I refer to some which are relevant because they are indicative of the way in which the interrogations at Guantanamo Bay were intended to be carried out. That in turn is relevant because the product of those interrogations, whether it be information from other detainees or so-called confessions, is likely to appear as “evidence” in the Military Commission process.

12. Two weeks after the attacks on 11 September 2001 counsel for the President of the United States sought advice on the President’s authority to conduct military operations against terrorists and those countries that supported them. In November 2001, the use of military commissions to try terrorists was already being discussed though the detail appears not to have been released. By December 2001 the US

Defense Department had concluded that the civilian courts of the United States did not have jurisdiction over any habeas petitions brought by detainees at Guantanamo Bay although of course that outcome could not be guaranteed.

13. The US government was concerned about the manner in which the customary international law of armed conflict might affect the US government in the way it detained and tried members of al Qaeda or the Taliban. The first step in attempting to avoid the protections of the Geneva Conventions came in January 2002 when Secretary of Defense Donald Rumsfeld issued a memorandum to combatant commanders informing them that the US has determined that al Qaeda and Taliban detainees were not entitled to prisoner of war status for the purpose of the Geneva Conventions. However the direction included a requirement that detainees be treated humanely and consistently with those Conventions.

14. The problem was that the Taliban at least had the appearance of being the government of Afghanistan and Afghanistan is a party to the Geneva Conventions and has been since 1956. The Third Geneva Convention is an acknowledged part of the law of war. In a memorandum dated 22 January 2002, the Department of Justice offered advice to then White House Counsel Alberto Gonzales⁵ that the Geneva Conventions could not apply to al Qaeda because it was not a State based organisation, but that the issue about its application to Taliban fighters was more difficult. The solution, which was later debated in the litigation to which I have referred below, was that the President could suspend the operation of the Convention and do so on the basis that Afghanistan was a “failed state” whose territory was held by a violent militia rather than by the government of the country. As a “failed state” Afghanistan could be regarded as a country without an operating government capable of fulfilling its international obligations. That advice appears to have been accepted.

15. A complication in the debate was created by the Department of State and Secretary of State Colin Powell. On 26 January 2002, he wrote to the President on the issue outlining the “pros” and “cons” of determining that the Geneva Conventions will not apply to al Qaeda or Taliban detainees. He was particularly concerned that the President clearly understood the options and consequences of either applying or not applying the Geneva Conventions. In so doing he identified the advantages of applying the Conventions including providing the “strongest legal foundation” for future military action and preserving the “credibility and moral authority” of the United States and protecting US forces and officials from criminal investigations. A few days later a further memorandum was written from the Department of State which emphasised the advantages of applying the Geneva Conventions to the conflict in Afghanistan.

16. The President’s determination was made on 7 February 2002. He determined that none of the Geneva Conventions applied to the conflict with al Qaeda in Afghanistan or anywhere else in the world. He determined that the provisions of the Geneva convention would apply to the conflict with the Taliban at least for the time being. He also determined that Common Article 3 of Geneva⁶ does not apply to al Qaeda or Taliban detainees because it only applies to conflicts “not of an international character”. He also concluded that based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, Taliban detainees are “unlawful combatants” and therefore do not qualify as prisoners of war under Article 4 of Geneva.

17. Finally, in this phase of discussion about interrogations the Assistant Attorney General Jay S Bybee⁷ advised that for the purpose of Military Commissions the requirement for a *Miranda* warning in relation to self incrimination would not apply for violations of the law of war.

18. With that background, the only other document I will refer to is the now infamous 1 August 2002 memorandum from Jay S Bybee, Assistant Attorney-General, to Alberto Gonzales, Counsel to the President. The memorandum can be read by those interested to do so but it deals with the standards of conduct under the Convention Against Torture and Other Inhuman and Degrading Treatment or Punishment as implemented by particular sections of the United States Code. The Convention defines torture in the following terms:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

19. The question dealt with in the memorandum of advice is what the Code actually prohibits and Bybee concluded that for an act to constitute torture it must inflict pain that is difficult to endure and “severe” physical pain will not amount to torture unless it is equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death. For “severe” mental pain or suffering, Bybee concluded that to amount to torture it must result in significant psychological harm of significant duration perhaps lasting for months or even years and the harm must result from one of the predicate acts in the statute namely:

- Threats of imminent death;
- Threats of infliction of the kind of physical pain that would amount to torture;
- Infliction of physical pain as a means of psychological torture;
- Use of drugs to disrupt the senses or threatening to do so.

20. Near the end of this memorandum, it was suggested that the relevant section of the US Code might be unconstitutional if its enforcement interfered with the President's direction of such core war matters as "the detention and interrogation of enemy combatants [and] thus would be unconstitutional".

21. On 30 December 2004 the August 2002 memorandum was withdrawn and a modified interpretation put forward by Acting Assistant Attorney-General Daniel Levin in a memorandum to James B Comey, Deputy Attorney-General. This approach lowered the standard of conduct that could amount to torture and specifically disagreed with the earlier interpretation of what was meant by the definition of it. However, the earlier approach had prevailed for two years and it can be assumed that interrogations were conducted in accordance with its analysis. It does not seem to me to be open to serious contradiction that the US government intended to use severe physical and mental pressure on those they interrogated and hoped that it could be argued that such measures fell short of the latest Justice Department interpretation of the words in the Convention Against Torture as implemented by the United States Code. Further, since the detainees were in Cuba and not in the US, they were outside the protection of the US Constitution and the US courts to uphold that protection.

22. The nature and extent of any physical and/or mental coercion at Guantanamo Bay may become clearer during the military commission trials.

Developments & Litigation since August 2004 – The Effect

The Continuing Consequence of *Rasul v Bush* and *Hamdi v Rumsfeld*

23. Although I have already mentioned it in my first report it is appropriate to refer again to the judgment of the US Supreme Court in *Rasul et al.*

v Bush et.al. 542 US (2004). On 28 June 2004, the majority of the Court (Stevens, O'Connor, Ginsburg and Breyer JJ) held that the United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and held at Guantanamo Bay (Rehnquist CJ, Scalia and Thomas JJ dissented).

24. The petitioners in that case included both David Hicks and Mamdouh Habib. The others were twelve Kuwaiti citizens and two British citizens including Shafiq Rasul whose name appears in the regularly cited title to the case. However by the time the Supreme Court delivered its judgment the two British citizens had been released.
25. The petitioners had applied under the general federal habeas corpus statute alleging various breaches of their rights and claiming remedies which included, in the case of Hicks and Habib, release from custody as well as access to counsel and freedom from interrogation. The question to be determined was whether the US federal district courts could hear the applications of the detainees. As the court pointed out, historically the writ of habeas corpus has served as a means of reviewing Executive detention “...and it is in that context that its protections have been strongest.” The real question was whether the remedy could be pursued by aliens at Guantanamo Bay which the court described as territory over which “...the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty’”.
26. Finding that the district courts did have jurisdiction, the majority distinguished the judgment of the court in *Eisenstrager v Forrestal* 174 F. 2d 961, 963 (CADC 1949)⁸ on which the respondents had relied on the basis that they are “differently situated” because unlike that case, these petitioners were not nationals of a country at war with the United States; they denied they had engaged or plotted in acts of aggression against the United States and they had never been afforded access to any tribunal. Further, they had not been charged or found guilty of any wrong-doing and had been incarcerated in a place where the United

States exercises exclusive jurisdiction and control. Further, the statutory basis on which applications could be made had broadened since the judgment of the Court in *Eisentrager*.

27. The respondents had also relied on a presumption against extraterritoriality but conceded that the habeas statute would apply to an American citizen held at Guantanamo. The court concluded that that being so, there was no reason to assume that the geographical coverage of the habeas statute varied according to the citizenship of the detainee.
28. The court thus decided that federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrong doing.

***Hamdi v Rumsfeld* 542 US – (2004)**

29. I have not previously referred to this case. On the same day that the US Supreme Court delivered its judgment in *Rasul*, it also delivered judgment in the related case of *Hamdi v Rumsfeld*. Unlike *Rasul*, that case concerned an American citizen who had been captured in Afghanistan by the Northern Alliance, handed over to the US military and taken to Guantanamo Bay. Three months after his arrival there it was discovered that he was an American citizen and he was taken firstly to Norfolk, Virginia and then to Charleston, South Carolina but he remained classified as an "enemy combatant". Hamdi's petition was filed by his father and the petition claimed that Hamdi had been in Afghanistan for only two months to do relief work and could not have received any military training. An important question arising in this case was whether Hamdi's incarceration could be justified on the basis of the "Mobbs Declaration" – a declaration by Michael Mobbs who was a special advisor to the Under Secretary of Defense for Policy. This was the only evidentiary basis for Hamdi's detention and set out the

allegations of Hamdi's involvement with the Taliban but, as the District Court had held, did so in a "generic and hearsay nature" and was "little more than the government's say-so".

30. The majority (Rehnquist CJ, Kennedy, Breyer and O'Connor JJ, O'Connor J delivering the judgment) concluded that a citizen detainee seeking to challenge his classification as an "enemy combatant" must receive notice of the factual basis for his classification and a fair opportunity to rebut the government's assertions before a neutral decision maker. Their Honours also took the view that once the government put forward credible evidence that the habeas petitioner met the "enemy combatant" criteria (which may need to include hearsay) the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. It is important to note that the government's submission to the Court that separation of powers principles mandate a heavily circumscribed role for the courts in the current circumstances was rejected. As the judgment said, "*We have long since made it clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens*". If ever the fundamental importance of an independent judiciary was able to be acutely demonstrated, it was by this statement of principle.

31. In the course of the judgment some attention was paid to what "enemy combatant" actually meant. Their Honours noted there was some debate as to the "proper scope" of the term but relying on the government's original definition from their brief, it meant an individual who was "*part of or supporting forces hostile to the United States or coalition partners*" in Afghanistan and who "*engaged in an armed conflict against the United States there*" [note the emphasis]. It will be seen that subsequently that definition was significantly broadened.

32. There remained dissent in the Court on the question of whether if Hamdi's designation as an enemy combatant was correct his detention was authorised by the AUMF (Authorisation for the Use of Military Force). The "plurality" thought it was but Souter J dissented on that issue.

Combatant Status Review Tribunals

33. The reaction of the Department of Defense to the judgments in both *Rasul* and *Hamdi* was the establishment of a Combatant Status Review Tribunal (CSRT) which "...will provide detainees at the Guantanamo Bay Naval Base with notice of the basis for their detention and an opportunity for them to contest their detention as enemy combatants."⁹ The order creating to CSRT was issued on 7 July 2004 by the Deputy Secretary of Defense and defined "enemy combatant" in the following terms:

For the purpose of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces, that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense. [emphasis added].

34. The process they established had three features which subsequently have been heavily criticised:
- Firstly the CSRTs are not constituted by a neutral decision maker – they are constituted by military officers. In order to find in favour of the detainee, those officers would be required to put themselves at odds with their own chain of command including the President who had already made a determination about that person's status.
 - Secondly, the delay between apprehension of detainees and the time of the hearing before a CSRT (a period of years) will have meant that evidence on which the status of a detainee

as an “enemy combatant” could be contested will have been lost.

- Thirdly, whilst the detainee could have a “personal representative” for the hearing, that person would not be a lawyer and communications between the detainee and the representative would not be confidential¹⁰. In addition there was a presumption in favour of the government’s conclusion that the detainee was in fact an enemy combatant which was rebuttable in accordance with *Hamdi*. How such a presumption was supposed to be able to be rebutted by a detainee in custody without the assistance of counsel is very difficult to fathom.
- Finally, the CSRT was entitled to consider classified evidence supporting the conclusion that the particular detainee was an “enemy combatant” but in such a case the detainee himself was not entitled to have access to that evidence or be told the detail of it.

35. In December 2004, the Department of Defense briefed the media on progress in the hearings of the CSRT. As at that date, there had been 507 CSRTs out of a possible total of 550. Of the 507, 292 detainees agreed to participate and as at December 2004, there had been 230 determinations. Of that 230, only two had been found not to be enemy combatants and were released. On the face of it these are amazing figures and create a perception of unfairness in the process. Not having been in a position to analyse the cases one by one, the perception is all I can make an observation about. However the process of the CSRTs was examined in particular detail by Judge Joyce Green in *In re Guantanamo Detainee Cases* - a judgment delivered on 31 January 2005. I will deal with the detail of that case and the judge’s conclusions later in this report. It is sufficient to say at this stage that there is a strong argument to suggest the CSRT

procedure does not fulfill the rights of due process under the 5th Amendment to the US Constitution. Judge Green so found.

36. David Hicks' status as an "enemy combatant" was considered by a CSRT on 17 August 2004 and on 22 September 2004 confirmed his designation. On 30 September 2004, the Director, Combatant Status Review Tribunals, concurred in the decision of the CSRT¹¹.
37. Before returning to the CSRT issue, it is first appropriate to consider the next stage in the process which is the judgment of the US District Court in *Hamdan v Rumsfeld* and the conclusions reached by the judge at first instance in that case.

Hamdan v Rumsfeld

38. The judgment of United States District Judge James Robertson in the case of *Hamdan v Rumsfeld* was delivered on 8 November 2004. Salim Hamdan petitioned for a writ of habeas corpus challenging his prospective trial before the military commission rather than before a court martial convened under the Uniform Code of Military Justice (UCMJ). His petition was granted in part by the court on 8 November 2004.
39. A number of important issues were dealt with. If Hamdan is a prisoner of war and entitled to the protections of the Third Geneva Convention then the law makes it clear he cannot be dealt with by military tribunal. However, the government had argued that Hamdan's capture did not occur in a conflict with Afghanistan but in a separate conflict with al Qaeda. As His Honour pointed out, the separation of the Taliban from al Qaeda for Geneva Convention purposes is not supported by the wording of the conventions themselves which are "*triggered by the place of conflict, and not by what particular faction a fighter is associated with*". His Honour was of the view that at some level the

Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities.

40. The government also argued that even if the Third Geneva Convention applied, Hamdan was disqualified from its protection because he did not carry arms openly or operate under the laws and customs of war. However that judgment can only be made by a competent tribunal dealing with a specific determination of Hamdan's status under the Geneva Conventions. That was not the role of the CSRT and therefore whatever determinations they made did not resolve the present issue.
41. The argument put by the government and said to be its most persuasive was that the Third Geneva Convention was not "self executing" and did not give rise to a private cause of action without additional "implementing legislation". The judge disagreed. In doing so he found that:
 - The Geneva Conventions were written to protect individuals;
 - The US government had implemented the conventions for fifty years without questioning the absence of implementing legislation;
 - There is nothing in the Third Geneva Convention itself to demonstrate the contracting parties' intention that implementing legislation would be needed before it became effective in domestic law.
42. Finally, Judge Robertson concluded that in one particular respect the Military Commission process was fatally contrary to, or inconsistent with, the procedures of the UCMJ. In particular, the relevant Military Commission Order permits the accused to be excluded during the giving of evidence where the Appointing Authority or Presiding Officer thinks it necessary¹². Whilst detailed military defense counsel may be present for that evidence they would be forbidden from disclosing it to their client. The judge cited the relevant articles from the UCMJ. His

Honour noted that these complaints were not speculative since Hamdan had already been excluded from the *voir dire* hearing and the government had already indicated that for two days of his own trial he would not be present and they would “...*put on the evidence at that point*”. It is, I think, worth quoting Judge Robertson’s concluding remarks on this issue:

A tribunal set up to try, possibly convict, and punish a person accused of crime that is configured in advance to permit the introduction of evidence and the testimony of witnesses out of the presence of the accused is indeed substantively different from a regularly convened court-martial. If such a tribunal is not a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” it is violative of Common Article 3. That is a question on which I have determined to abstain. In the meantime, however, I cannot stretch the meaning of the Military Commission’s rule enough to find it consistent with the UCMJ’s right to be present. 10 U.S.C. § 839. A provision that permits the exclusion of the accused from his trial for reasons other than his disruptive behavior or his voluntary absence is indeed directly contrary to the UCMJ’s right to be present. I must accordingly find on the basis of the statute that, so long as it operates under such a rule, the Military Commission cannot try Hamdan.

43. The orders made as a result were in the following terms:

“For the reasons set forth in the accompanying memorandum opinion it is ordered that the petition of Salim Ahmed Hamdan for habeas corpus [1-1] is granted in part.

“It is further ordered that the cross-motion to dismiss of Donald H. Rumsfeld [1-84] is denied.

“It is further ordered that, unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, he may not be tried by Military Commission for the offenses with which he is charged.

“It is further ordered that, unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military Justice Article 39, 10 U.S.C. § 839, petitioner may not be tried by Military Commission for the offenses with which he is charged.

“It is further ordered that petitioner be released from the pre-Commission detention wing of Camp Delta and returned to the general population of Guantanamo detainees, unless some reason other than the pending charges against him requires different treatment.

“And it is further ordered that petitioner’s remaining claims are in abeyance, the Court having abstained from deciding them.”

44. Not surprisingly, the US government appealed. The progress of the Military Commission process was stalled whilst the appellate process in this case was finalised, the Appointing Authority ordering the cases to be held in abeyance pending the outcome.

45. The appeal was argued on 7 April 2005 and on 15 July 2005 the United States Court of Appeal for the District of Columbia Circuit delivered its judgement in favour of the US government. In essence, the court concluded as follows:
 - a) Hamdan raised a jurisdictional challenge to his proposed hearing before a military commission and therefore it was appropriate for the court to deal with the matter;
 - b) The establishment of the military commissions by the President does not breach the separation of powers inherent in the US Constitution. The military commission that will try Hamdan is authorised by the US Congress;
 - c) The provisions of the 1949 Geneva Convention protecting individual rights are not judicially enforceable;
 - d) Hamdan is not a “prisoner of war” and, in any event would not be entitled to the protections of the Geneva Convention;
 - e) The Geneva Convention does not apply to al Qaeda or its members;
 - f) The provision that permits the exclusion of Hamdan from his military commission trial during the hearing of particular evidence which is classified or in other specified ways sensitive, is not a jurisdictional argument and on this point he must first exhaust his military remedies following which he might contest his conviction in federal court;

- g) Military commissions do not need to comply in all respects with the requirements of the Uniform Code of Military Justice (UCMJ);
 - h) The President of the United States is a “competent authority” and the military commission a “competent tribunal” for determining the issue of Hamdan’s asserted prisoner of war status and the applicability of the Geneva Convention to his circumstances.
46. The result was that the judgment of the district court was reversed which means that Hamdan’s petition for habeas corpus fails and the cross-motion to dismiss of Donald H. Rumsfeld is granted. The orders which required that unless and until a competent tribunal determines that Hamdan is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, he may not be tried by Military Commission for the offenses with which he is charged are presumably discharged. In addition the order that unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military Justice Article 39, 10 U.S.C. § 839, Hamdan may not be tried by Military Commission for the offenses with which he is charged would also be discharged.
47. The outcome of this case is already having an effect on the case against David Hicks to the extent that the US government appears to have decided to reactivate the military commission hearings in the near future. As appears below, in the Hicks case there are a significant number of pre-trial motions to be dealt with first. In addition to that, in the media Hicks’ legal team have pointed out that he has his own proceedings before the federal court which presumably he may now seek to pursue.

Khalid & Ors v Bush

48. In a later judgment (19 January 2005) of the same court by a different judge (Judge Richard Leon), the court was dealing with petitions by seven foreign nationals held at Guantanamo Bay all of whom were arrested in October 2001 in Bosnia. Khalid was the one exception to that – he was arrested in Pakistan in the last quarter of 2001.
49. The first plank in the petitioner’s challenge was that the President of the United States did not have the authority to issue the detention order under which they were being indefinitely held. The second plank was that even if the President did have that authority, their continued detention violates certain rights which accrue under the US Constitution, certain statutes and treaties to which the US is a signatory. Judge Leon disagreed finding there was no “*viable legal theory under which [the court] could issue the writ [the petitioners] seek*”. His Honour specifically found that the Detention Order was lawful under the Authorization for Use of Military Force (AUMF) of 18 September 2001.
50. Judge Leon rejected the notion that the petitioners had any viable basis to seek a writ of habeas corpus based on their rights under the US Constitution. He regarded them as “*non-resident aliens, captured in a foreign territory, and held at a naval base, which is located on land subject to the ‘ultimate sovereignty’ of Cuba.*” It followed that His Honour quarrelled with the proposition that the judgment of the US Supreme Court in *Rasul* over-ruled *Eisentrager*. In his opinion the only consequence of the judgment in *Rasul* is that non-resident aliens at Guantanamo have a right to judicial review of the legality of their detention under the habeas statute but did not determine that the petitioners had any independent constitutional rights. In Judge Leon’s opinion, the outcome in *Eisentrager* and subsequent consequential judgments remains the law.

51. Finally, Judge Leon concluded that the petitioners failed to identify any US law or treaty the violation of which would provide a viable basis to grant a habeas petition. Included in that reasoning was a conceded lack of application of the Geneva Convention since none of the petitioners were captured in the zone of hostilities in and around Afghanistan. In any event His Honour was also of the view, contrary to the view of Judge Robertson in *Hamdan* that treaties, as a general rule, are not privately enforceable.
52. For these and other similar reasons, the respondent's motion to dismiss was granted.

In re Guantanamo Detainee Cases

53. This is a judgment of United States District Judge Joyce Green delivered on 31 January 2005. The judgment relates to eleven habeas cases by detainees at Guantanamo Bay and Her Honour concluded that the petitioners had valid claims under the Fifth Amendment to the US Constitution and that the process implemented to confirm that the petitioners were "enemy combatants"¹³ violated their rights of due process. Her Honour also held that some petitioners had valid claims under the Geneva Convention.
54. The first question that Judge Green examined was whether there was an extraterritorial application of the US Constitution to aliens. It will be recalled that Judge Leon held that all the judgment of the US Supreme Court in *Rasul* decided was that the petitioners do have a right to judicial review of the legality of their detention under the habeas statute but did not determine that the petitioners had any independent constitutional rights. After a detailed analysis (which does not need to be rehearsed in this report) Judge Green disagreed. In her opinion the Fifth Amendment right not to be deprived of liberty without due process applied to the petitioners and in her view Guantanamo Bay should be

considered as the equivalent of a US territory in which fundamental constitutional rights apply.

55. Judge Green then considered the specific requirements of the Fifth Amendment Due Process clause. In her view, according to the judgment of the US Supreme Court in *Hamdi* an individual detained on the basis of being an “enemy combatant” must receive notice of the factual basis of his detention and a fair opportunity to rebut the factual basis for his classification before a neutral decision maker. A presumption in favour of the original classification was acceptable so long as it was clear that it was rebuttable. Despite the argument of the government that the CSRT would represent compliance with the Fifth Amendment Due Process requirements, Judge Green disagreed. In her view, there was a general defect in all the cases she considered being the failure to provide detainees with access to material evidence on which their “enemy combatant” status was confirmed and, separately, a failure to permit the assistance of counsel. In the evidence before the Court, in each case where the “enemy combatant” status had been confirmed by the CSRT, there had been substantial reliance on classified material none of which was made known to the detainee. Her Honour’s judgment then contains alarming examples of how this worked in practice in hearings before the CSRT.
56. Finally, Her Honour examined some defects that may have arisen in specific cases which included reliance on statements obtained through torture or other coercion. The allegations about this made by Mamdouh Habib were outlined by the Court. This included the allegation by Habib that he had been sent to Egypt and tortured there including routine beatings to the point of unconsciousness. The allegations included the claim that he had also been locked in a room gradually filled with water to just below his chin as he stood on the tips of his toes. He also claimed that he had been suspended from a wall with his feet resting on a large electrified cylindrical drum which caused

either pain by hanging from his arms or from the electric shock. He said he made numerous “confessions” that proved false.

57. Given the stage of litigation it was, in Her Honour’s view, premature to make any determination as to whether any information obtained from the detainees under consideration and relied upon by the CSRT was the result of torture or mistreatment. Her Honour was of the view that the petitioners had made sufficient allegations that that was the case to survive the government’s motion to dismiss.
58. Her Honour also noted that definition of “enemy combatant” in the order the CSRT made was somewhat broader than that which had been discussed in *Hamdi*. Here the situation becomes almost farcical as the following portion of the judgment reveals:

“This Court explored the government’s position on the matter by posing a series of hypothetical questions to counsel at the December 1, 2004 hearing on the motion to dismiss. In response to the hypotheticals, counsel for the respondent argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: [a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities.’ Transcript at 25, a person who teaches English to the son of an al Qaeda member, id.at 27, and a journalist who knows the location of Osama bin Laden but refuses to disclose it to protect her source.”

59. In relation to claims under the Geneva Convention the government again submitted that those conventions are not “self executing” and claims based on them must be dismissed because Congress has not enacted any separate legislation specifically granting individuals the right to file private law suits based on the conventions. Alternatively, the government argued that even if that submission is wrong, they do not apply to members of al Qaeda because that organisation is not a state party to the Conventions. Finally the government admitted that since Afghanistan is a state party to the Conventions and therefore they would apply to those detainees, they contend that President Bush has determined that Taliban fighters are not entitled to prisoner of war

status under the Third Geneva Convention and his decision is the final word on the matter. In Judge Green's opinion such a determination by the President was not authorized by the Convention or Army regulations. On this matter, Judge Green further found the Conventions are self executing and adopted the reasoning of Judge Robertson in *Hamdan* (see above). In the result, Judge Green denied the government's motion to dismiss addressing the Geneva Convention claims of those petitioners who were found to be Taliban fighters.

60. Now the question is how this case should proceed further and an order was made that that issue be the subject of further argument on Thursday 3 February 2005. At the time of writing, I am unaware of how that matter proceeded. In many respects, Judge Green's conclusions concerning the Geneva Convention have been overtaken by the judgment of the US Court of Appeals for the District of Columbia Circuit in *Hamdan* which has articulated opposite conclusions.
61. The important point to be remembered about all this litigation is that whilst it has had the effect of exposing the flaws in the process at Guantanamo Bay it has now disabled progress of the Military Commission hearings and may do so for years. The cases which have been before the US Federal District Court have been decided only on preliminary questions of whether, for example, the government's motion to dismiss should be upheld. Further, as I understand it, in *Hamdan* there are other issues which were argued before Judge Robertson at first instance and which, depending on how he decides them, will have to go through the appellate process.
62. The further important point to remember is that the actual trials of these actions have not yet been held – no evidence has been given and no final determinations of the litigation have occurred. When that finally happens that result may also travel up and down the appellate ladder. Played out to its fullest extent this process could take many years and throughout this period the detainees, including David Hicks, remain

incarcerated. That this can be allowed to occur is genuinely outrageous. This situation could never be replicated in an Australian criminal court. A delay of this nature would have resulted in a grant of bail to an accused on the basis of “exceptional circumstances” years ago. In the case of David Hicks, apart from any other consideration, for all we know, he may be approaching a period in custody which would exceed the likely sentence to be imposed on him if found guilty, bearing in mind the point I made in my first report that time spent in custody awaiting trial cannot be taken into account in determination of the sentence which is ultimately imposed¹⁴.

63. It is worth recalling that there are no US citizens at Guantanamo Bay. Those captured as “enemy combatants” who were US citizens have been detained in the United States rather than at Guantanamo Bay and, at least in the case of John Walker Lindh, have been dealt with through the US civilian court system with proceedings finalised by way of a plea agreement¹⁵
64. I will return to the consequence of the litigation insofar as it reveals an overall flaw in the detention of so-called “enemy combatant” and their prospective trial before the Military Commission in my conclusion to this report.

The Military Commission Process Itself

Appointing Authority Decision on Challenges for Cause

65. On 19 October 2004, the Appointing Authority for the Military Commission published its decision on the challenges for cause that had been made against members of the Military Commission panel during the hearing on 25 August 2004. The result was that the challenges for cause against the Presiding Officer and Colonel Sparks were denied. The challenges for cause against Colonel Bright, Colonel

Toomey and Colonel Cooper were granted and they were excused from duty in all future Military Commissions. Importantly, no additional members or alternate members would be appointed. That decision is significant. Under Military Commission Order No. 1, for a finding of guilt in a Military Commission trial, a two thirds vote is required. If the panel contained five members that would require four of them to vote for a guilty verdict before it could be reached. However with a panel of only three (the minimum) only two need to be persuaded before such a verdict could be reached. If three new members had been found who were nearer to genuine independence (i.e. without direct involvement in the war in Afghanistan, transporting detainees to Guantanamo Bay or personal views that all detainees at Guantanamo Bay were terrorists) then the level of fairness and, perhaps, objectivity might have been raised.

66. I dealt with my observation of the debate about these matters in my first report and a transcript of the August 2004 proceedings is now available on the Department of Defense Military Commission web site.

67. An important matter in this debate was that the Appointing Authority declined to uphold the challenge for cause against the Presiding Officer on the basis of his relationship with the Appointing Authority. The Appointing Authority expressed the view that the evidence in the voir dire on 25 August 2004 did not demonstrate the existence of actual bias by the Presiding Officer on the basis of his relationship with the Appointing Authority or even “implied” bias (also known as “apprehended bias”) because a well-informed member of the public would understand the social relationships between military officers. In support of that conclusion the Appointing Authority then referred to a variety of cases which deal with the social relationships between judges and lawyers which of themselves do not require a judge to disqualify him or herself from a case in which the particular lawyer appears. I am not a military lawyer but it does seem to me that the circumstances in this case are somewhat different. In the case of a

friendship between judge and lawyer which is thought to be problematic, both are in the court room and able to deal with the issue. Any overt effect of the relationship between judge and lawyer can, if necessary, be observed in the court room or at least debated with all the participants present. In this case, Mr. Altenburg is not part of the court process and not open to the consequent scrutiny. Although he is empowered to make decisions counsel has no audience before him. In addition, a friendship between a judge and a lawyer would not have as a consequence a circumstance where the judge was required to answer to the lawyer. The only question would be whether the friendship with the lawyer was of such a quality as to improperly affect the judge's decision or an apprehension that it might do so. However, in this case the Appointing Authority is for all intents and purposes controlling aspects of the proceedings from outside the court room and is effectively the Presiding Officer's superior. One of my complaints about this whole process is that it is by no means independent and part of that criticism is the role played in the conduct of the proceedings by the Appointing Authority. An example of the authority of the Appointing Authority occurred on 10 December 2004 when Mr. Altenburg issued an order under MCO No. 1 section 6B(4) halting the Military Commission process until the outcome of the appeal in *Hamdan v Rumsfeld*. As already noted, not only the Presiding Officer but also the Appointing Authority may exclude the accused from his own trial when classified evidence is to be presented under Military Commission No. 1.

68. The other basis on which it was sought to remove the Presiding Officer was his comment in a meeting with counsel on 15 July 2004 that the accused in a Military Commission had no right to a speedy trial. The Appointing Authority has concluded that the Presiding Officer does not have a predisposition which will affect his ruling on speedy trial motions but was rather making the point, although "not artfully done", that there are no published commission procedures concerning the subjects of arraignment or speedy trial. Thus, this basis for the objection to the

Presiding Officer also failed. On any view the Presiding Officer's comments were highly inappropriate given the length of time that the accused has spent in custody. Even the Appointing Authority observed that the Presiding Officer had been "*too casual with his remarks*".

The Motions Hearing – November 2004

69. The actual hearing of the numerous motions filed on behalf of David Hicks before the Military Commission resumed on 1 November 2004 and continued until 3 November 2004. As far as I am aware no transcript has been made available of the proceedings. Reports on the proceedings published by the Department of Defense indicate that the following occurred:

- i) A defense request for the testimony of expert witnesses on the law of armed conflict was declined by the Commission. It had been argued that the law on the matter was complex and the Military Commission should have the benefit of law professors and those with such expertise to assist them in understanding and applying that law. After a brief deliberation, the panel ruled that such expert testimony was not needed at this time but reserved the right to hear such evidence in the future.
- ii) A motion by the defense to dismiss was also declined having been brought on the basis that the reduction in number on the Military Commission panel to three members meant that Hicks could not receive a "full and fair trial".

- iii) As to the second day of hearings, the Department of Defense Military Commission web site summary records it in the following terms:

U.S. NAVAL BASE GUANTANAMO BAY, CUBA – The military commission trying the case of U.S. v. Hicks continued hearing arguments on pretrial motions today.

The proceedings began with the commission’s announcement of rulings on certain motions heard yesterday. The commission denied defense motions to declare the commission improperly constituted and improperly selected, two motions for a continuance, and a motion to dismiss that argued charges were improperly referred. The commission also disagreed with the defense position on the manner in which certain questions are required to be submitted to the appointing authority for his determination.

Although the commission heard arguments on numerous defense motions today, no other rulings were announced. Before ruling on those motions, the panel members will further consider the respective arguments and legal sources cited by counsel and, on some motions, the proposed findings submitted by counsel.

Among the defense motions argued today were those which challenged whether the military commission may consider certain offenses and whether the government had actually stated such offenses in certain charges. Included was an argument by the defense that terrorism should be struck from the charges as an offense under the law of armed conflict.

The defense also argued that any charges should be limited to conduct during the period of conflict in Afghanistan which, according to the defense, did not begin until Oct 7, 2001, when U.S. forces began bombing operations there. Maj. Michael D. Mori, one of the defense counsels, further argued, “there is no armed conflict against al Qaida.”

Other defense motions related to issues of speedy trial and David Hicks’ pretrial detention.

The defense also argued that the President’s Military Order establishing the military commissions fails to afford equal protection under the U.S. Constitution. The Defense then argued a series of motions related to the commission’s jurisdiction, its composition, and the authority of the appointing authority

The day’s proceedings involved in-depth legal arguments. Occasionally, those arguments turned quite spirited. As was the case in yesterday’s proceedings, each panel member—in particular, the two non-lawyer members—were fully engaged in the legal discussions. It was

apparent to observers that the panel had carefully reviewed the written materials and had come prepared to ask questions. At no time were they hesitant to do so.

- iv) Finally, on 3 November 2004, the Department of Defense summary of the proceedings is in the following terms:

U.S. NAVAL BASE GUANTANAMO BAY, CUBA – The military commission hearing the case of U.S. v Hicks returned to the courtroom for a brief session this afternoon.

Then, to the surprise of observers, they recessed until March 15, 2005.

The panel members spent the morning reviewing the materials and legal sources that counsel had submitted and considering the respective arguments of counsel. Upon returning to the courtroom this afternoon, Col. Peter Brownback, the presiding officer, explained what was meant by “authentication of the record of trial” under the applicable military commission order.

He also stated that the defense motion to declare the commission improperly constituted will not be certified as an interlocutory question to the appointing authority. Interlocutory questions are those questions on legal matters that the panel elects to defer decision on and sends to the appointing authority for a decision.

Brownback then announced that the commission had carefully considered numerous defense motions. However, he said, the commission will defer ruling on those motions until some future date.

Included were:

- a) the defense motions to dismiss charge one for failure to state an offense triable by military commission,*
- b) to dismiss charge one regarding destruction of property by an unprivileged belligerent,*
- c) to modify certain charges for lack of subject matter jurisdiction because the alleged offenses did not occur during an armed conflict,*
- d) to dismiss for lack of subject matter jurisdiction because the armed conflict in Afghanistan has ended,*
- e) to seek appropriate relief based on improper imposition of pretrial detention under international law,*
- f) to dismiss for denial of the right to a speedy trial,*
- g) to dismiss for lack of jurisdiction because the President’s military order violates equal protection under the U.S. Constitution,*
- h) to dismiss for denial of fundamental rights in criminal proceedings,*
- i) to dismiss for lack of subject matter jurisdiction because the President’s military order is invalid under U.S. and international law,*
- j) to dismiss for lack of jurisdiction because the commission system will not afford a full and fair trial,*
- k) to object to the structure and composition of the commission.*

At the conclusion of the afternoon's proceedings, Brownback announced that he was granting, over the prosecution's objection, a defense request to delay the proceedings until March 15, 2005. The proceedings lasted approximately twenty minutes before recessing until March.

70. It is appropriate to set out the list of motions many of which remain outstanding:

Hicks Court Motions

Defense Request for Witness: Prof. Michael Schmitt

Defense Request for Witness: Prof. Jordan Paust

Defense Request for Witness: Prof. Tim McCormack

Defense Request for Witness: Prof. George Edwards

Defense Request for Witness: Prof. Antonio Cassese

Defense Request for Witness: Prof. Cherif Bassiouni

Stipulation of Fact

Defense Request for Trial Date of 15 March 2005

Defense Reply to Government Response to Motion for a Bill of Particulars

Withdrawal of Defense Motion D2

Prosecution Reply: Motion to Exclude Attorney and Legal Commentator Opinion Testimony Concerning their Views of the Law

Defense Reply to Government Response to Motion for Appropriate Relief

Defense Reply on Motion to Dismiss Charge 1 for Failure to State an Offense Triable by Military Commission

Defense Reply on Motion to Dismiss Charge 3 for Failure to State an Offense

Defense Reply to Government Response to Motion to Dismiss for Denial of Fundamental Rights

Defense Reply to Government Response to Motion to Dismiss: Improper Panel Selection Methods

Defense Reply Regarding Motion to Dismiss Charge 2

Defense Response to Prosecution Motion to Exclude all Expert Witnesses

Motion to Dismiss: Improper Panel Selection Procedures

Prosecution Response to Defense Motion: Armed Conflict in Afghanistan has Ended

Prosecution Response to Defense Motion Alleging Improper Pretrial Detention Under International Law

Prosecution Response to Defense Motion Alleging Improper Selection of Commission Members

Prosecution Response to Defense Motion to Dismiss

Prosecution Response to Defense Motion for Dismissal for Denial of a Right to a Speedy Trial

Prosecution Response to Defense Motion to Dismiss Charge 1 for Failure to State an Offense Triable by Military Commission

Prosecution Response to Defense Motion to Exclude all Expert Witnesses

Prosecution Response to Defense Motion to Dismiss Charge 2

Prosecution Response to Defense Motion to Dismiss Charge 3

Prosecution Response to Defense Motion to Dismiss Charge 1

Prosecution Response to defense Motion Challenging Commission's Jurisdiction at Guantanamo Bay, Cuba

Prosecution Response to Defense Motion to Dismiss

Prosecution Response to Defense Motion to Dismiss all Charges for Denial of Fundamental Rights in Criminal Proceedings

Prosecution Response to Defense Motion to Dismiss for Lack of Jurisdiction

Prosecution Response to Defense Motion to Dismiss for Lack of Jurisdiction

Prosecution Response to Defense Motion to Modify Charges-Lack of Subject Matter

Prosecution Response to Defense Motion to Strike the Word Terrorism from Charge 1

Prosecution Response to Defense Objection to the Structure and Composition of the Military Commission

Prosecution Response to Defense Objection (Presiding Officer & Assistant Role on Legal Advice and Instructions)

Defense Motion to Dismiss all Charges as the Commission is Improperly Constituted

Defense Motion to Strike The Word "Terrorism"

Defense Motion to Dismiss-Lack of Jurisdiction

Defense Motion to Dismiss for Lack of Jurisdiction: President's Military Order of 13 November 2001 is Invalid Under United States and International Law

Defense Motion to Modify Charges-Lack of Subject-Matter Jurisdiction-Offenses must be Committed During International Armed Conflict

Defense Motion to Dismiss for Lack of Jurisdiction: The Armed Conflict in Afghanistan has Ended

Defense Motion to Dismiss Charge 3 for Failure to State an Offense

Defense Motion to Dismiss Charge 2 for Failure to State an Offense Triable by Military Commission

Defense Motion to Dismiss Charge 1 for Failure to State an Offense Triable by Military Commission

Defense Motion to Dismiss Charge 1 Offense of "Destruction of Property by an Unprivileged Belligerent"

Defense Motion to Dismiss all Charges for Denial of Fundamental Rights in Criminal Proceeding

Defense Motion to Dismiss for Lack of Jurisdiction: Commission System will not Afford a Full and Fair Trial

Defense Motion to Dismiss for Denial of the Right to a Speedy Trial

Defense Motion to Dismiss all Charges as the commission has no Jurisdiction at Guantanamo Bay, Cuba

Defense Motion for Appropriate Relief: Imposition of Improper Pre-Trial Detention Under International Law

Response to Defense Motion for a Bill of Particulars

Defense Notice of Motion for Bill of Particulars

Prosecution Response to Defense Brief on Standard for Good Cause Challenge

Defense Brief on Standard for Good Cause Challenge of Commission Members

Defense Response to Prosecution Challenge for Cause Submission

Prosecution Reply: Prosecution Challenge for Cause Submission

Defense Objection to the Presiding Officer or his Assistant Instructing Providing Advice to the Commission on the Law

Defense Objection to the Structure and Composition of the Commission

Motion for Docketing

Motion Request for Protective Orders

Motion Pre-Admission of Evidence

Motion Conclusive Notice

71. In summary, little progress has been made and nothing has occurred which in any way ameliorates the high risk of unfairness and prejudice to the trial of Hicks to which I have referred in my first report.

The Effect of Release of Other Detainees

72. At the suggestion of the Law Council of Australia, on 18 February 2005, I requested some limited information from the Military Defense Counsel for David Hicks, Major Dan Mori on the question of whether relevant witnesses in the Hicks case who are detainees at Guantanamo Bay have been released and therefore are unavailable. There are obviously limits on what I can be told but he has informed me that there are several witnesses who were detainees at Guantanamo Bay and who were to be called by the prosecution relevant to the case against his client but who have now been released. The prospects of them

being available in person to give evidence and be cross examined as prosecution witnesses is obviously extremely low. Both in relation to the information from these detainees and any statements which may be claimed by the prosecution to have been made to them by Hicks, there may well be questions concerning the method of interrogation by which the evidence was obtained from them affecting the voluntariness of the statements and their probative value.

73. Under this Military Commission process there is no question that pursuant to the rule of evidence in Military Commission Order Number 1 the evidence referred to above could be given despite the absence of the witnesses and the palpable unfairness of doing so. Either a record of what the witnesses said to an interrogator could be read to the commission or a witness who was told some or all of what they said could relate that to the commission from the witness stand. In both cases that material, though inadmissible by virtually any other standard, would be admitted as evidence of the truth of the assertions made.

74. As I previously reported in August 2004:

The rules of evidence are all but absent and such rules as exist seem to me to exist to facilitate the admission of evidence which will never be able to be tested by cross examination and should, ordinarily, be devoid of any probative value. As I have already said in this report, the consequence is a likely unfairness that goes to the root of the fair trial issue. In my view rules of evidence are fundamental to any genuine application of the criminal standard of proof. If the rules that apply in this military commission will not regulate evidence such as that of accomplices, witnesses who for one reason or another may be unreliable or the multiplicity of errors that law had recorded in identification then the true meaning of "beyond reasonable doubt" is removed. Such rules underpin that standard.

75. I agree with the President of Law Council of Australia in his letter to me requesting this report when he expresses the Law Council's concern that "live testimony" on important issues might not be available in the case against Hicks resulting both in the loss of the ability to confront

adverse witnesses or using their evidence in support of the defense case. Mr. North notes that lack of “live testimony” may also insulate the prosecution against inquiry into the methods by which the evidence was obtained.

Conclusion

76. In my opinion in many respects the circumstances now faced by David Hicks at Guantanamo Bay are worse than they were in August 2004. In part that is because the extended litigation has severely delayed the progress of his case exacerbated by the fact that the delay has not had the effect of making the process any fairer. Further, in the particular case of David Hicks he apparently risks a trial at which important evidence on which the prosecution will rely will not come out of the mouth of the witness of the fact but from someone else who was told about it or from an “un-cross-examinable” piece of paper.

77. When one examines all the objections to this process since it was commenced which create an impossibility of achieving fair trials for those detainees nominated for trial and which are referred to both in this report and my earlier report, the following list develops:

- i) The original intention of the US government was exclude detainees at Guantanamo from access to US civilian courts in order that any rights they may have under the US Constitution or under international conventions would be denied to them.
- ii) In particular the US government, itself a state party to the Geneva Conventions, has gone to some effort to prevent the application of the protections of those Conventions to all detainees at Guantanamo Bay despite the concerns of State Department. With the recent appellate judgment in *Hamdan* those efforts have been successful.

- iii) A clear issue of fact has arisen about whether detainees at Guantanamo Bay, including Hicks, were tortured either for the purpose of providing evidence against other detainees or for the purpose of obtaining confessions;
- iv) In order to maximise the effect of their interrogation techniques, the US government has sought to alter the definition of the standard of conduct amounting to torture so as to raise the standard for constituting torture to an absurdly high level although it appears that reasoning has now been abandoned.
- v) There are numerous allegations by detainees who have since been released, of torture for the purpose of obtaining information or confessions which, it must be said, largely remain unproven.
- vi) (i) to (v) above are important indicators of the intent with which detainees were removed to Guantanamo Bay and also of the intent as to how they would be treated once incarcerated there.
- vii) The US government has responded to the measured and carefully considered opinions of the US Supreme Court in *Rasul* and *Hamdi* with a flawed Combatant Status Review Tribunal process which is demonstrably unfair and has already been found to be a breach of the 5th Amendment entitlements to Due Process;
- viii) Following the release of the detainees who are apparently relevant witnesses in David Hicks' case there is a significant risk that their information will be presented as "evidence" in a totally unacceptable, un-testable, unreliable hearsay format. The result of that procedure will be to make an adequate defence of his case and consequent fair trial impossible;
- ix) There is at least the risk that apart from the absence of the relevant witness as to the facts, that same information was originally obtained by physical and/or mental coercion and

the absence of the witness may well prevent that issue being litigated;

- x) The response of the Appointing Authority to the voir dire of 25 August 2004 was to remove 3 members of the commission and not replace them with more independent and legally experienced officers.
- xi) In the absence of detailed rules of procedure and evidence, the ad hoc approach to Military Commission procedures prejudice even the possibility of a fair trial;
- xii) In particular, aspects of Military Commission Order Number 1 which entitle the Presiding Officer or the Appointing Authority to exclude the accused from hearing or from being aware of particular information given against him has been found to be unconstitutional. Of course, those provisions apply to the Hicks case and, according to the defense motion to dismiss on the basis of a denial of fundamental rights, Hicks has already been excluded from portions of the August 2004 hearing pursuant to this Order.
- xiii) As mentioned above, Hicks has been in custody since December 2001 and remains deprived of the certainty of a trial date. As I have already stated it is in my opinion highly likely that significant prejudice to his Military Commission trial will flow from this delay and his incarceration.
- xiv) The following criticisms made by others and by me in my first report remain:
 - Lack of independence and apprehension of lack of impartiality, the process being the creation of the Executive of the US government;
 - The Commission will function with two members who are legally unqualified and inexperienced but who will be required to make findings not only of fact but of law;

- The “rule“ of evidence remains unchanged and totally inadequate for the reasons already given;
- The charges against Hicks remain and arguably represent a misuse of those charges;
- There remains no viable appellate process that can impartially correct errors and remedy a miscarriage of justice.

78. I would, of course, agree that the Law Council should make further representations to the Australian government with a view to attempting to persuade them to request Hicks’ repatriation as they ultimately did with Habib. Under the present structure not only is the Military Commission process unfair but it seems to be unworkable with relevant detainees being released from time to time and a total lack of certainty created by the whole process having been thoroughly bogged down in litigation. Rather than attempt to remedy some of the injustices which are obvious in the process as it stands, the US government appears determined to defend and apply it to those nominated for trial. If the issues raised in *Hamdan* and other similar cases brought by detainees were brought before the US Supreme Court, it is hard to imagine that they would not find the logic of Judges Robertson and Green difficult to resist after their conclusions in *Rasul* and *Hamdi*. But even if the Court were to eventually confirm each of those judgments changes would need to be made to the process to accommodate those findings. As was demonstrated with the CSRT, the implementation is still likely to be open to further challenge in the courts which will mean a further lengthening of an already offensive delay. In any event the present US government approach is to expedite the hearing of the military commission, certainly in relation to the case of David Hicks.

79. The Law Council should urge the Australian government to examine these matters very carefully. This is much less about David Hicks than it is about a grossly unfair process and in many ways Australia's own moral authority is at risk if it continues to condone this process as "fair or just".

LEX LASRY QC
Latham Chambers
MELBOURNE

19 July 2005

End Notes

¹ Paragraph 82.

² The Age – 18 July 2005.

³ See, for example, *Jago v District Court of NSW* (1989) 168 CLR 23; *Walton v Gardiner* (1993) 177 CLR 378 and see generally *Barton v R* (1980) 147 CLR 75; *Holdem v Bitar* (1987) 47 SASR 509 (as to prosecution destroying evidence).

⁴ At <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/>.

⁵ Recently confirmed as the new Attorney General of the United States following the departure of John Ashcroft.

⁶ “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

⁷ Later nominated by President Bush as a judge of the United States Court of Appeals for the Ninth Circuit.

⁸ That case concerned habeas applications by German prisoners captured in China, tried by a military commission in Nanking and incarcerated in occupied Germany.

⁹ Department of Defence announcement at www.pentagon.mil/transcripts/2004/tr20040707-0981.html .

¹⁰ See generally the criticisms summarized at http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm.

¹¹ Stipulation of fact – 3 November 2004.

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MCO Number 1 6(b)(3) reads as follows:

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order.

Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.

The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an ex parte, in camera presentation by either the Prosecution or the Defense.

A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof.

Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate

time. Proceedings should be open to the maximum extent practicable.

Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

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Combatant Status Review Tribunal.

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Paragraphs 37 and 38 of the First Report of the Independent Legal Observer - September 2004 and see Military Commission Instruction Number 7.

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<http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf>