



Progress of the United States Military Commission trial of David Hicks¹

What has happened so far

According to the United States (US) Military Commission charges filed against him,² David Hicks is alleged to have undertaken military training with terrorist groups in Pakistan and Afghanistan in 2000-01, including al Qaeda. Whilst in Afghanistan he is alleged to have met Usama Bin Laden and other senior al Qaeda leaders. Following the invasion of Afghanistan by coalition forces in October 2001, he was captured by the Afghan Northern Alliance and turned over to US forces. He has been incarcerated at Guantanamo Bay since early 2002.

In July 2003, David Hicks was listed as eligible for Military Commission trial. Fourteen other persons have also been declared eligible, although only four (including Hicks) have been charged and subject to pre-trial hearings.³ Three specific charges were laid against David Hicks in June 2004. Mr Hicks has been accused of:

- conspiracy to commit murder, attack civilians and civilian objects and terrorism,
- attempted murder, and
- aiding the enemy.

He has pleaded not guilty to all charges.

In August 2004 pre-trial hearings commenced, followed by further hearings in November 2004. As part of these hearings, a *voir dire* took place, which is the opportunity for the defence and prosecution teams to question individual Commission members to establish their impartiality. As a result of defence challenges, two members plus an alternate member were disqualified, leaving only three members to hear the case.⁴ Subsequent to the August

hearings, the defence filed various motions challenging the jurisdiction of the Commission and the validity of the charges and trial process under US and international law. The prosecution filed rebuttals. At the November hearing, the Commission deferred ruling on the motions. At the request of the defence, it did however postpone the commencement of the trial until at least March 2005.

In November 2004, a US District Court brought down a decision that may have significant implications for the Military Commission trials. In *Hamdan v Rumsfeld*,⁵ the court firstly ruled that a person cannot be tried by a Military Commission until it is duly established that he or she is not entitled to prisoner of war (POW) status.⁶ The court also found that the Military Commission rule that allowed for the exclusion of the accused from parts of the trial, and the withholding of evidence from him, was unlawful.⁷ Thus the court found a Commission trial under these circumstances could not go ahead. However, in relation to the Hicks trial, Australia and the US have agreed that no evidence will be introduced that would require his exclusion, so it is unclear what implications this second part of the ruling has for Hicks. An appeal by the US government against the *Hamdan* decision is due to be heard in March 2005. A number of other civil suits, including the recently decided *In re Guantanamo Detainees Cases*, are challenging the US Government's ability to detain persons who have not been charged and brought before the Commission.

The Military Commission

The Commission was created by the US President in his constitutional capacity as Commander In Chief of

the US military. The relevant Presidential Order does not have any *explicit* basis in legislation or other Congressional authorisation.⁸ Military Commissions have not been used by the United States since the 1940s.

Only non-US citizens can be tried by the Commission. Under the Presidential order, any non-citizens who are current or former members of al Qaeda or any person that has aided or conspired to commit acts of international terrorism against the US or its interests are eligible for trial. Persons knowingly harbouring such al Qaeda members or terrorists are likewise eligible for trial.

The Commission hearing David Hicks' case consists of three senior military officers. The senior Commission member ('the Presiding Officer') is a judge advocate, but the two others have no legal training. Another key official is the Appointing Authority, who is a retired senior US military lawyer. Amongst other matters, the Appointing Authority is the decision-maker on key pre-trial issues such as jurisdiction, validity of charges and *voir dire* challenges to Commission members.⁹

Under the Commission rules, evidence can be admitted if, in the opinion of the Presiding officer,¹⁰ it would have 'probative value to a reasonable person'.¹¹ Thus the relatively strict rules of evidence as known in Australian (and US) law do not apply.¹² The Commission rules also provide that the accused is presumed innocent until proven guilty. The standard of proof is the same as for civilian criminal trials, that is, a Commission member must be convinced beyond reasonable doubt on the admitted evidence that the accused is guilty. However, a

majority vote is sufficient for a verdict.

Following completion of the trial, the cases will be reviewed 'for material errors of law' by a three-member Review Panel. Three of the four persons appointed to the Panel 'pool' are civilian judges, albeit commissioned as military officers for the purpose of the Commission proceedings. Should the Panel find that a material error of law occurred, the case is to be returned to the Commission, although it is unclear whether the Panel could direct charges to be dismissed. Once the trial finding has completed the Review Panel stage, either the President or Secretary of Defense (if delegated by the President) makes the final decision whether to approve the finding. A guilty (but not a not guilty) verdict can be rejected, and a sentence can be reduced, commuted or suspended. Unlike the US military court martial system, there is no appeal to the civil court system.

As a result of an agreement between the US and Australia, the US has committed to certain undertakings for the Hicks trial:

- conversations between Mr Hicks and his lawyers will not be monitored
- the prosecution does not intend to rely on evidence that will require Mr Hicks or his civilian lawyer to be excluded from proceedings
- subject to security requirements, Mr Hicks' trial will be open, the media allowed to attend and Australian officials will be able to observe proceedings
- an independent legal expert sanctioned by the Australian Government will be able to observe the trial/s, and
- if Mr Hicks is convicted, arrangements will be made for him to serve any sentence in Australia 'in accordance with Australian and U.S. law'.¹³

The charges

As mentioned above, Mr Hicks has been accused of conspiracy to commit murder, attack civilians and civilian

objects and terrorism; attempted murder; and aiding the enemy.

In brief, the prosecution contend the charges stem from the following allegations against Mr Hicks:

- 1st charge (conspiracy)—Hicks participated in al Qaeda military and terrorism training exercises. By doing so, he joined an enterprise that he knew had the express common purpose to carry out terrorist attacks against the US.
- 2nd charge (attempted murder)—during the coalition invasion of Afghanistan, he joined with al Qaeda and Taliban forces in armed resistance of the invasion.
- 3rd charge (aiding the enemy)—Hicks aided the Taliban and al Qaeda who are enemies of the US.

Under the Presidential Order, charges against accused must be based on the existing international laws of war. One of the reasons for this is that the charges that Hicks and others face largely relate to their actions before the making of the Presidential order.¹⁴ Thus if the charges were not based on existing international law, the order would effectively retrospectively criminalise certain activities.

Although yet to make a detailed reply to these allegations, a petition put before a United States civil court by Mr Hicks' defence team states:

At no time did Hicks engage in any criminal or terrorist conduct. Nor did he kill, injure, fire upon, or direct fire upon, any U.S. or Coalition Forces, or the Northern Alliance forces initially responsible for his seizure. Nor did he attempt any such conduct. He did not at any time commit any criminal violations, or any violations of the law of war. Nor did he ever enter into any agreement with anyone to do so.¹⁵

Comment on the charges

The conspiracy charge is problematic in that, except in relation to genocide, there is some doubt as to whether conspiracy is an offence known to international law. Also, the defence has questioned whether the charge properly reflects a technical

distinction between conspiracy and common criminal purpose.

In relation to attempted murder, Mr Hicks has denied that he attempted to kill or injure anyone. If it was demonstrated that he had tried to do so, presumably it would also have been demonstrated that he did not have what is termed a soldier's 'combat immunity'¹⁶ or that the attempt was done in a way that was against international law.¹⁷

The aiding the enemy charge is controversial. The major issue is whether international law recognises such an offence by a foreigner living in a foreign land that is not occupied by a third country. Clearly, Mr Hicks did not legally owe any allegiance to the US (as opposed to Australia) whilst living in Pakistan or Afghanistan. That Australia was an ally of the US in the invasion of Afghanistan does not alter this fact.

The relevance of international law to the Hicks Trial

The international body of law known as the 'laws of war' places limits on how war may be waged, and grants protections to, amongst others, persons captured or interned during war. These protections cover such matters as a prisoner's conditions and length of detention, what (if any) crimes they can be charged with, and minimum standards for any trial. The laws of war are contained in both international customary law and treaty law.

The most significant treaties on the laws of war relevant to the Hicks case are the Third and Fourth 1949 Geneva Conventions (GCIII and GCIV).¹⁸ These apply during an international armed conflict between States that are parties to the Conventions.

The US has taken the view that, since al Qaeda is not a State, its members (as Hicks is alleged to be) are not legally entitled to the benefit of any of the protections of the Geneva Conventions.¹⁹ However, the alternative view is that the Conventions *do* apply in relation to the invasions of Afghanistan in 2001 and Iraq in 2003, and persons

captured by the United States and its allies in the course of these international conflicts are, *prima facie*²⁰, entitled to protections under the Geneva Conventions.²¹ This latter view was adopted by the US District Court in *Hamdan*.²²

However, Hicks' legal team have taken the position that the Geneva Conventions do not apply to Mr Hicks, preferring to rely on the International Covenant on Civil and Political Rights (ICCPR). By contrast, the military lawyers prosecuting the Hicks case contend that the 'laws of armed conflict' apply to Mr Hicks, displacing any procedural rights he may have had with respect to the ICCPR. However, they also seem to take the view that such laws provide no 'protective' rights that may be enforced by Mr Hicks – only rights specifically contained in US legislation, or the various rules in the Commission orders, are capable of such enforcement. At least in respect to GCIII (ICCPR was not argued), the *Hamdan* court rejected this view and concluded that GCIII applies and is 'self-executing'. Mr Hicks' lawyers contend that that whilst the ICCPR could not, for example, form a basis for a damages claim in civil courts, the Commission is nonetheless bound like any other US 'criminal tribunal' to issue a remedy for a violation of ICCPR safeguards. Mr Hicks' team consider dismissal of all charges to be the appropriate remedy.

In relation to trial standards, Article 14 of the ICCPR states:

In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ... and to be tried without undue delay ... Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law

Common Article 3 of both GCIII and GC IV require a:

regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

There is likely to be some argument as to whether the fact that the Military Commissions were created,²³ and their procedures set out by a Presidential Order rather than Congressional legislation or resolution, conforms to these requirements. This is likely a matter for the Appointing Authority to decide.

The same jurisdictional question marks hangs over the 'delay' issue. However, as a matter of interest, the Geneva Conventions generally provide that both POWs and interned civilians that have not been convicted of any crimes are required to be released as soon as practicable, which generally means the end of the armed conflict. However, the US considers the Guantanamo detainees to be prisoners captured in the open-ended 'war on terror', and thus it need only release them when they are no longer considered to be a threat to US national security. According to this view, the question of whether there is sufficient evidence to charge the detainees with crimes is largely irrelevant to the issue of whether they should continue to be detained.

Will the trial be fair?

The answer to this question cannot really be determined until the trial proper starts and the review process, if required, also has a chance to operate. However, it may be useful to consider the initial report of the Australian independent legal observer to the trial, Mr Lex Lasry QC.²⁴ Mr Lasry was nominated to the position by the Australian Law Council.

After attending the preliminary hearing, Mr Lasry concluded that there was an 'unacceptably high risk that there will be a miscarriage of justice' in Hicks' trial. His main concerns were:

- the lack of independence of the Military Commission from the US Administration and the war against terror generally
- the fact that the majority of the Commission members do not have legal qualifications or experience

- the lack of an impartial appeal process
- uncertainty over what sources of evidence are likely to be admitted and how evidence can be tested by cross examination, and
- the fact that the conspiracy charge 'is so broad and so easily facilitates a conviction as to arguably represent a misuse of that charge'.

As mentioned above, three of the six Commission members have been excluded following *voir dire*, mainly because of their involvement in the Afghanistan and Iraq conflicts and/or past statements about the Guantanamo detainees.

The Australian Government has also since requested that the US clarify certain matters, such as the admission of evidence. However, no response from the US has been made public to date.

The lack of legal qualifications and experience in two of the three remaining Commission members will likely be an issue given that much of the defence and prosecution motions address complex technical issues about the application of international law and the interpretation of US legal precedent.

On the appeal process, the Review Panel is quite separate from the pool of officers that make up the Military Commission. Panel members cannot be dismissed from their positions during the review proceedings except for 'good cause'. Whether this makes the Panel 'impartial' is arguably a question of subjective opinion. On more procedural issues, whilst the agreement between the US and Australia provides that the Australian Government may make submissions to the Review Panel, it is unclear on what grounds the Panel might exercise its discretion to consider written submissions by the prosecution and defence, and hear oral arguments. Also, the fact that the Panel must normally provide its review within 30 days²⁵ of it receiving the Commission's written decision may make it difficult for the defence to prepare a detailed submission.

What happens now?

The Military Commission trial is scheduled to commence on 15 March. However, the Appointing Authority will first have to rule on most of the various pre-trial motions submitted to the Commission by the defence. If the Authority rules in favour of some of the motions, it might force some charges to be dropped or altered or the Commission process to be substantially modified.

On the civil front, the appeal on the *Hamdan* case is to be heard on 8 March 2005. An attempt by Hamdan's lawyers to transfer the case directly to the US Supreme Court was refused by that court in December 2004. At a minimum, it is likely that two matters will be considered in the appeal. The first is to what extent international law applies to the detention and trial of detainees such as Hamdan and Hicks, and whether such laws can form the basis of any relief from the detention and Commission process. The second issue is whether the Commission trial must be consistent with the US Uniform Code of Military Justice in all major respects. The result of the *Hamdan* appeal may be critical to whether David Hicks' trial proceeds to finality.

1. The author gratefully acknowledges the comments of Professor Hillary Charlesworth on a draft of this note. Any errors remain the responsibility of the author.
2. The charges are listed at <http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf>
3. The Australian Mamdouh Habib had been declared eligible for trial, but the US has recently repatriated him to Australia without charge on the basis that Australia 'accept[s] responsibility for [Habib] and will work to prevent [him] from engaging in or otherwise supporting terrorist activities in the future' (US Department of Defense, *Guantanamo Detainees to be Transferred*, Media Release, 11 January 2005). As is the case for David Hicks, the Australian Government has long conceded that Mamdouh Habib was

- unlikely to be successfully prosecuted for his alleged actions under Australian law – see for example the interview given by the Hon. Phillip Ruddock, *Sunday*, 22 February 2004.
4. The defence unsuccessfully challenged two other members, including the Presiding Officer.
5. Civ. No. 04-1519 (JR) (D.D.C.).
6. The Court decided that the Geneva Convention on POWs (GCIII) applied to the case. The Court said that the US could not unilaterally decide a class of persons were not entitled to POW status – it would have to convene what is known as an 'Article 5 tribunal' to decide on individual cases. If a person was entitled to POW status, it would be contrary to international law to try them before the Military Commission, since the Commissions cannot try US military personnel, and such discrimination would be contrary to the GCIII.
7. Mainly on the basis that the exclusion/withholding was 'contrary or inconsistent' with the US Uniform Code of Military Justice (UCMJ).
8. The Presidential Order is at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>. The question of whether the President had the legal power to create the Commission is an issue being argued in motions before the Commission.
9. Note that the Appointing Authority reports directly to the Secretary of Defense.
10. The Presiding Officer can be overruled by a majority of the Commission members: *Military Commission Order 1*, section 6(D)(1).
11. 'Probative' means providing proof of a relevant thing.
12. By way of comparison, the admissibility of evidence before the International Court of Justice depends largely on a weighing up of *both* its probative value on the one hand, and its prejudicial value with respect to fair trial or evaluation of a witness' testimony, on the other – *Rome Statute*, Article 69(4).
13. US Department of Defense, *US and Australia announce agreements on Guantanamo*

- detainees*, Media Release, 23 November 2003.
14. The order was made on 12 November 2001.
15. *Hicks v Bush et al.* US District Court of the District of Columbia Civ. Act. No.1:02-cv-00299-CKK
16. This immunity means that, for example, where a soldier kills an enemy in combat, they cannot be prosecuted for that act – it is lawful killing.
17. For example, the attempted killing of a prisoner.
18. These treaties, which have almost universal membership, also represent international customary law.
19. *US Presidential Memo*, 7 February 2002. Note that if David Hicks is considered to be a captured civilian rather than a prisoner of war, it is arguable that he is not entitled to the protections contained in GCIV because he is a national of one of the States that invaded Afghanistan: Article 4, GCIV.
20. See the comment in endnote 19.
21. These protections apply even if they are accused of 'crimes' committed before the commencement of the relevant conflicts that invoke the provisions of the Conventions.
22. This view was apparently shared by the US Department of State – *Memo of the Department of State Legal Adviser*, 2 February 2002.
23. As opposed to authorised.
24. The Report is available at <http://www.lawcouncil.asn.au/re/ad/2004/2403092446>.
25. This can be extended.

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