UNITED STATES v. DAVID MATTHEW HICKS

FIRST REPORT OF THE INDEPENDENT LEGAL OBSERVER FOR THE LAW COUNCIL OF AUSTRALIA – SEPTEMBER 2004

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TABLE OF CONTENTS

Appointment

1. On 10 August 2004, I was invited to act as the independent legal observer for the Law Council of Australia (LCA) at what was expected to be a "directions hearing" in the case of *United States v David Mathew Hicks* to be held at the US Naval Station at Guantanamo Bay, Cuba on 25 August 2004. I agreed to do so conscious of the significance of the case. This is obviously a preliminary report and deals principally with the preliminary directions hearing which was held on 25 August 2004. At that hearing the future of the case against David Hicks was debated, motions foreshadowed and some directions given by the Presiding Officer.

This Report

2. This report is primarily written to inform as to what occurred at the hearing before the military commission on 25 August 2004. However I have included some information concerning the procedure to some limited extent in order to set the context against which I understand the trial of David Hicks will be conducted – now in January 2005. I also intend this report to be some indicator of the form of a broader and more detailed report at the conclusion of the trial. I have set out under headings, in summary form, some of the issues which are important and are likely to remain so during the forthcoming trial. I should emphasise that this report has been written to provide the basic information to the LCA at the earliest opportunity so they may consider their role and attitude to the case in an informed way. This report is by no means a complete analysis of the case against Hicks or of all the relevant law which will apply to or be relevant in the trial.

3. With those qualifications and having attended the directions hearing on 25 August 2004 and considered the rules under which this trial will take place, I have reached some conclusions which are set out in more detail at the conclusion of this report. Central to those conclusions is that, as a matter of

fundamental principle of criminal justice, these proceedings are, and will be, flawed and that a fair trial of David Hicks in the military commission is virtually impossible. This is brought about by several factors including the structural nature of this particular military commission process. In addition, however, there is also a demonstrated lack of independence of the military commission from the executive arm of the US government coupled with the appearance of a lack of impartiality and/or the appearance of predisposition on the part of some members of the commission. The result of what I have seen so far leads me to a view which I know is shared by other observers that a miscarriage of justice in this case is highly likely.

4. On Friday 27 August 2004 I did provide an overview of what occurred in Guantanamo Bay on 25 August 2004 to the President of the Law Council of Australia, Bob Gotterson QC and outlined some of the opinions I had formed.

Approach to the Role of Legal Observer

5. Although I am not a military lawyer, I have approached the role of being an observer on the basis that my point of reference would be whether there is sufficient application of basic principle for any criminal justice process to raise a significant prospect that miscarriages of justice can be avoided. I have endeavoured to familiarise myself with the specific procedures which will apply to the military commissions. Obviously my primary role is to comment on the fairness of the process and to come to a view as to whether the trial of David Hicks has been a fair one. As a starting point for that assessment, reference can be made to Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights which establishes certain minimum guarantees for the defence in a criminal case.

6. I had originally considered, as I had said in the media on several occasions, that the real test of this process will be the trial itself and how it actually

functions once it has commenced. However, I have come to the view that apart from other criticisms made about impartiality and the qualifications of members, the process is so lacking in the genuine independence required for criminal justice and so *ad hoc* and effectively dependent on the procedural improvisation of the Presiding Officer, that now is the time to articulate those criticisms on a preliminary basis because the process appears fundamentally flawed.

Media

7. Once the fact of me going to Cuba was publicly known it generated some public interest. Public comment was made both by me and by the acting President of the Law Council of Australia, Steve Southwood QC. The Law Council has taken the view, correctly, that my involvement in this matter should be a matter of public record subject to first reporting to them. The Council has also said that any report I prepare will be made public.

8. Following the announcement of my role as the independent observer I participated in several media interviews. I have approached them on the basis that my views were not at that stage informed and that it was necessary to see the process functioning before being able to make a proper judgment of the fairness of the process. In those interviews I did indicate agreement with the broad misgivings that the Law Council of Australia had about the military commission procedure and identified those about which, as a civilian criminal lawyer, I had particular concerns.

9. After the proceedings on 25 August 2004, I participated in a media conference. Presentations were made by Mr. Terry Hicks with his Adelaide solicitor Stephen Kenny, the defense team, a representative of the Department of Foreign Affairs and, briefly, me. I was followed by the various American Bar Association and human rights observers. In answering questions I indicated that I was not prepared to make other than general

comments about the process and that I would reserve my specific judgment until a later time. In any event, detailed criticism of the process had already been made by the defense team earlier in the media conference and was followed by comments from human rights representatives and other legal observers.

10. However, as I have already said, I have now formed some views on the functioning of this military commission process which are unlikely to change and it is appropriate to communicate them first to the Law Council of Australia before they are shared with the media.

The Attitude of the Australian Government

11. Appropriately the Australian Government was represented at the Guantanamo Bay hearing by both representatives of the Attorney-General's Department and the Department of Foreign Affairs and Trade (DFAT). The government continues to be criticised in some quarters for failing to criticise the military commission process in which David Hicks' trial will be conducted and also not requesting that David Hicks be returned to Australia. In speaking to the media at Guantanamo Bay, the designated DFAT spokesman, Matthew Francis, said that the Australia government is satisfied with the fairness of the process after negotiations with the US government.

12. It is true that the negotiations between UK, Australia and the US have produced important outcomes. The most important feature of the agreement was that the US has agreed that based on the evidence against David Hicks, they would not seek the death penalty although on the outline of the case articulated in the charge sheet, it is difficult to imagine that the death penalty could ever be contemplated even <u>if</u> the conduct could in some way be regarded as criminal. Other points of agreement between the US and Australia included:

(a) The US will not monitor conversations between David Hicks and his defense counsel.

(b) The US will not rely on evidence in its case-in-chief which would require closed proceedings from which Hicks could be excluded.

(c) If Hicks is convicted and sentenced to imprisonment, he will be able to serve that sentence in Australia in accordance with Australian and US law[1].

13. However in my opinion, and despite those important concessions, the Australian Government's contention that it is satisfied with the fairness of the process is untenable. Although it is early in the process and it does remain to be seen how it functions at trial, all the indicators for a fair trial are negative for the reasons to which I have already referred and will be expanded upon in the balance of this report. It is to be noted that in June 2004, Britain's Attorney-General Lord Goldsmith made it clear that in his opinion the use of this process was unacceptable because it would not provide a fair trial by international standards[2]. That criticism followed well publicised comments by Lord Steyn[3] in which he said that the military commission process was "a pre-ordained arbitrary rush to judgement by an irregular tribunal, which makes a mockery of justice"[4].

Military Commissions – Brief Background

14. As is well known, on 11 September 2001 attacks were launched on civilian targets in the United States as a result of which almost 3,000 people were killed and phenomenal damage caused. The President of the United States was subsequently authorised by Congress to use military force in response[5].

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1 US Department of Defense News Release – 25 November 2003.
2 Associated Press report 24 June 2004 "British Official Rips US Guantanamo Plan"
3 Rt Hon the Lord Steyn, Lord of Appeal in Ordinary.
4 The Age – 27 November 2003.
5 Authorisation for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat.224.

15. David Hicks was captured in December 2001 during hostilities between the United States and the Taliban in Afghanistan. Since then, he has been in custody at Camp X Ray, Camp Delta and now Camp Echo at Guantanamo Bay in Cuba with about 600 other detainees. That naval station base is 45 square miles of land on the southeast coast and is occupied pursuant to a lease agreement between the US and Cuba[6]. The details of that arrangement are not relevant for the purpose of this report although they were for the purpose of the proceedings in *Rasul v Bush*[7] .

16. I3 November 2001, a Military Order was signed by President Bush[8]. Under that order certain individuals (including David Hicks) who were described as "subject to this order" were authorised to be detained and a process for the trial of those people was set out. The procedure enunciated was trial by military commission. Thus, a military procedure was formulated for the purpose of dealing with alleged terrorists rather than the use of the criminal law. Since then 6 Military Commission Orders (MCOs) have been issued by the US Department of Defense – the sixth of them issued for the purpose of revoking the fourth. In addition, there have been nine Military Commission Instructions (MCIs) which have outline in more detail than the original Presidential Military Order, various aspects of procedure before the military commissions.

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6 The details of that agreement are of no immediate relevance but are set out in detail in the Opinions of the Supreme Court of the United States in *Rasul & Ors v Bush* (28 June 2004).;

7 Supreme Court of the United States – 542 US _ (2004).

8 The order was entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"[8] was issued by the President of the United States.

17. The following table summarises the Orders and Instructions:

Date	Designation	Subject
13 November 2001	Military Order of the President of the United States	This is the fundamental order dealing with the detention, treatment and trial of certain non-citizens in the "war against terrorism." Section 4 deals with the process of trial by military commission and establishes, *inter alia,* the principle of conviction and sentence by a two thirds majority.
21 March 2002	Military Commission Order Number 1	This order is signed by Donald Rumsfeld, Secretary of Defense, and makes provision for jurisdiction of the commissions, commission personnel, procedures accorded to the accused, conduct of the trial (including the provisions concerning evidence), proceedings during trial, voting, sentence and post trial procedures.
21 June 2003	Military Commission Order Number 2	This designates the Deputy Secretary of Defense as the Appointing Authority.
5 February 2004	Military Commission Order Number 3	This order deals with communications that are subject to monitoring and how the product might be used.
30 January 2004	Military Commission Order Number 4	Stipulates that Brigadier Hemingway of the US Air Force is the Deputy Appointing Authority.
15 March 2004	Military Commission Order Number 5	Revokes Military Commission Order number 2 and designates John D Altenburg Jr. as the Appointing Authority.
26 March 2004	Military Commission Order Number 6	Revokes the effect of Military Commission Order Number 4.
30 April 2003	Military Commission Instruction Number 1	Establishes policies for the issuance and interpretation of Military Commission Instructions. It includes reference to the "non-creation" of a right.
30 April 2003	Military Commission	This "provides guidance" for

Date	Designation	Subject
	Instruction Number 2	crimes that may be tried before a military commission. It includes applicable principles of law and crimes and elements.
15 April 2004	Military Commission Instruction Number 3	This establishes the responsibilities of the Office of Chief Prosecutor and components thereof.
15 April 2004	Military Commission Instruction Number 4	This establishes the responsibilities of the Office of Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel and Civilian Defense Counsel.
30 April 2004	Military Commission Instruction Number 5	This establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel.
15 April 2004	Military Commission Instruction Number 6	Concerns supervisory and performance evaluation relationships for military commission personnel.
30 April 2003 [sic]	Military Commission Instruction Number 7	This is the instruction that deals with sentencing those found guilty by a military commission.
30 April 2003 [sic]	Military Commission Instruction Number 8	This is the trial procedure Instruction dealing with Commission personnel, Interlocutory questions, implied duties of the Presiding Officer and Disclosures.
26 December 2003	Military Commission Instruction Number 9	This establishes the process of review of the military commission proceedings by the Appointing Authority, Review Panel and Secretary of Defense.

18. MCIs apply throughout the Department of Defense and are issued by the Department's General Counsel. Compliance with these instructions is described as the *"professional responsibility"* in the practice of the law within the Department. However, MCI No. 1 specifically states that although these Instructions must be complied with, they do not create any right enforceable against the United States or its entities and non-compliance with the MCIs

does not constitute error or give rise to judicial review or establish any right in an accused or other person.

19. It is important to note early that there is a significant distinction to be drawn between this military commission process and the more usual court martial process under the Uniform Code of Military Justice (UCMJ). Although I have not studied the UCMJ in detail, as I understand it, the latter is a genuine system of military justice with qualified, experienced and independent military judges and a proper appellate process. Those features are missing in the process that applies to David Hicks. Major-General Altenburg was asked on 17 August 2004 at a media conference[9] why the US chose military commission over a UCMJ court martial for these cases. The response is significant and should be noted – it was in the following terms:

> *Q You talked about the history of tribunals and commissions and justification for them. The defense attorneys, the military defense attorneys who work under you, say that there's no reason to have a commission when you could do this under the Uniform Code of Military Justice, which was created in '51, after the last military commission, in part in response to these kinds proceedings. What's the reason for a having a military commission as opposed to doing a court-martial?*
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> *MR. ALTENBURG: Okay. Well, first of all, I want to make sure I clarify that the defense lawyers don't work for me, they work for their client. They're absolutely independent. We are all part of the same organization. The prosecutors don't really work for me either. I am the appointing authority. It's a unique role. And the prosecutors put together their cases.*
>
> *The defense lawyers' allegiance is solely to their client. And -- although I do have a role with the defense lawyers in trying to make sure that they are resourced adequately, and I've worked hard from the very beginning to make sure that their office space was secure; I've supported them in several regards in trying to get them, you know, the interpreters they need and get additional defense lawyers so that there could be a second defense lawyer in each case, and the like. And I've worked closely mainly with Colonel Gunn in that regard. So, I mean, as the appointing authority, I have a role to play there in helping them get support, but they don't work for me in any way. And again, their sole allegiance is to their client. And*

[9] Defence Department briefing on military commission hearings – John Altenburg Jr – Appointing Authority for the Office of Military Commissions.

that's consistent with representing a client, that they would prefer that it be done at a trial -- by court martial rather than commission.

And the answer to the question of why did the government choose commissions rather than courts martial is that is a better opportunity, if you will, to protect national security interests and to be careful about what kind of protected information is presented at trial and at open hearing. And I think that was the driving concern, was the national security interest. When they balanced those two, they felt commissions were the most efficient way to accomplish that.

Yes, sir?

Q What are the advantages besides being able to close a portion of the hearing, which I understand you can do under a court martial as well?

MR. ALTENBURG: The fact that a military commission is calculated to try only war crimes and no other types of crimes, and therefore you get the requisite experience and expertise in addressing issues of the law of armed conflict and the like. And so commissions have always been special for that purpose, as opposed to court martials, which can try cases like that, but court martials for the most part are concerned with felony crimes and uniquely military crimes; you know, the disciplinary types of crimes. (emphasis added)

20. Bearing in mind the complete lack of legal experience of at least five of the commission members in performing any duty previously involving making legal determinations this rationale for the selecting the military commission process seems absurd.

Establishment of Military Commissions

21. On 21 March 2002 (four months after the capture of David Hicks) the US Secretary of Defense, Donald Rumsfeld, signed Military Commission Order No. 1. That Order was to establish procedures for the trials before Military Commissions. The purpose of the implementation of the procedures was said to be to ensure that "…*any such individual receives a full and fair trial before a military commission*….". Some of the important features of the commissions are:

    (a) The "Appointing Authority" is the Secretary of Defense or a "designee" and that authority appoints the Commissions [para 2]

– thus the control exerted by the Department of Defense over what purports to be a system of military criminal justice is clear;

(b) Such a commission has jurisdiction over persons subject to the President's Military Order and who are alleged to have committed offenses referred to the commission by the "Appointing Authority";

(c) Each commission will have a presiding officer to control the proceedings who is a judge advocate of the US armed forces and, in total, between 3 and 7 members with alternate members who will be commissioned officers of the US armed forces [para 4];

(d) The presiding officer is required to ensure expeditious proceedings and the *"accommodation of counsel"* shall not be allowed to delay the proceedings unreasonably.

(e) The Chief Prosecutor is required to be a judge advocate of the US armed forces and prosecutors and assistant prosecutors will be professionally qualified;

(f) There is an office if the Chief Defense counsel with "detailed defense counsel" being the military lawyers to be assigned to defend.

(g) The accused may select a military officer to defend him and a civilian lawyer who will not be paid for by the US Government provided that lawyer is a US citizen and is admitted to practice in a state of the US or federally. Such a lawyer would also be required to be eligible to have access to information at the level "secret" or higher.

Procedures

22. The order also imports the following procedures to the military commission process [see para 5]:

    (a) The accused must be given the charges he faces in a comprehensible form;

    (b) He is presumed innocent;

    (c) The standard of proof is proof beyond reasonable doubt although there does not seem to be a specified onus of proof[10];

    (d) The accused must have access to evidence to be led at his trial and any evidence which exculpates him;

    (e) The accused is not required to give evidence and no adverse inference is permitted to be drawn if he does not do so;

    (f) Investigative and other resources are to be made available to the accused;

    (g) Interpreters are required to be provided if necessary;

    (h) The accused may be present unless he is disruptive;

    (i) Unless the commission orders otherwise evidence to be led at sentencing proceedings shall be provided to the accused;

    (j) The trial of an accused must be open to the public except when the presiding officer decides otherwise.

23. It is interesting to note that plea agreements mandating a sentence limitation may be submitted for approval by a commission.

24. The description of the duties of the commission during the trial commences with the exhortation that the commission shall provide the accused with a "full

[10] It is possible that provisions about the onus of proof are absent because it is open to the commission itself summon and hear witnesses at its own initiative. It may also be that if this issue were raised the Presiding Officer in his discretion could simply direct that the onus is on the prosecution.

and fair" and "expeditious" trial without "irrelevant evidence" or "unnecessary interference or delay".

Rules of Evidence

25. In relation to evidence, the MCO[11] provides that evidence shall be admitted "..*if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person*". The US Department of Defense provides a rationale for this rule in the following terms:

> This standard of evidence takes into account the unique battlefield environment that is different than traditional peacetime law enforcement practices in the U.S. For example, soldiers are not required to obtain a search warrant when someone is shooting at them from a cave. This standard of evidence allows both the defense and the prosecution to admit evidence that was acquired during military operations.[12]

26. I frankly do not understand this rationale and in my view it is nonsensical. It is open to conclude that the real purpose of such a brief, non-specific and non-regulatory rule is to ensure that evidence which would never be admissible in a civilian criminal court will find its way into the record in these commission hearings.

27. The rule, such as it is, is important for several reasons. Firstly, of course, it is important for its brevity and lack of specificity. Under this section there are no genuine rules of evidence and no guidance on how questions of admissibility should be dealt with. That such an absence of proper rules to regulate the evidence should be allowed to occur is, in my view, a fundamental unfairness. As becomes apparent later in this report, a matter of significance in the conduct of this commission is that only the Presiding Officer has legal qualifications. The other four members have no such qualifications or

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11 Military Commission Order No. 1 – 1 March 2002 - section 6 D (1).

12 Department of Defense Fact Sheet – Military Commission Procedures.

experience and therefore will be required to make judgments of their own about a large list of legal issues, including evidentiary issues, without knowledge or experience of the pitfalls of, for example, evidence of alleged confessions or evidence of identification. They will have to make judgments about how they can use (if at all) out of court statements of persons who will never give evidence before them. On its own, this *ad hoc* approach to such important issues almost guarantees that a "full and fair" trial cannot occur.

28. Secondly, the ruling of the Presiding Officer on the admissibility of evidence can be effectively over-turned by a vote of the majority of the commission presumably both in relation to a ruling to admit evidence and a ruling not to admit. The question, of course, that arises is whether it is realistic to expect that the ruling of an experienced military judge would ever be challenged by the unqualified members. On the other hand it also means that the ruling of the Presiding Officer refusing to admit evidence where the prejudice to the accused far outweighed its evidentiary value could be similarly overturned and the non legally qualified members of the commission would have to make their own decision as to how they could use the evidence.

29. The procedures also permit either prosecution or defense to request that witnesses be called and, importantly, the commission may also summons its own witnesses "..*of its own initiative"*. Witnesses may be sworn or affirmed. If they refuse to do either their evidence may still be given. The lack of an oath may affect the weight to be given to the evidence.

30. There are provisions concerning the protection of information which include the limiting of disclosure to the defense (para 5(b)) upon motion of the prosecution or *sua sponte.* It does appear that this procedure envisages that even "detailed defense counsel" (i.e. the military officer defending) may be deprived of access to such information but that the commission may nonetheless rely on the evidence as part of the trial.

31. An important issue that may arise in the case against David Hicks and in several of the other cases is the use by the prosecution of alleged confessions by the accused to terrorist activity or association with terrorist organisations such as al Qaida and, further, evidence of detainees against accused making similar allegations. The reliability of this evidence will obviously be open to question given the allegations made by a number of former detainees against the officials who conduct the prison at Guantanamo Bay and the alleged methods of interrogation. Presumably there must be some form of *voir dire* into the voluntariness of any alleged confession if the issue is raised by the defence but how that might be dealt with remains to be seen. Will it be the case, for example, that the non-legally qualified members of the commission would hear the substance of the impugned confession and then be forced to participate in some ruling about its admissibility? On the other hand, would such an issue be an interlocutory question and at the discretion of the Presiding Officer, be referred to the Appointing Authority at the Department of Defense for resolution under MCI No.8? The lack of clear and well tested rules on such important issues is a matter of great concern.

32. Interestingly the Appointing Authority, Major General Altenburg seems to think the issue will arise. On 18 August 2004, prior to my departure from Australia, my attention was drawn to reported comments on the case reported through Reuters/AAP:

> "MIAMI, Aug 17 - Australian terrorist suspect David Hicks is expected to argue that interrogators coerced him to give false confessions when he faces a preliminary hearing next week.
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> ****
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> The army officer who determined there was probable cause to try the four suspects, Major General John Altenburg, said today he expected the hearings to address whether potentially self-incriminating statements made by the accused were voluntary and could be used as evidence.

> ``*I think that that will be an important issue in at least some of the trials,"* Altenburg said at a Pentagon briefing.
>
> ``*To the extent that evidence presented by the prosecution is statements made by accused persons, you know, the issue of the nature of the interrogation will be critical."*
>
> ****
> Several former Guantanamo prisoners have said they were tortured, held in isolation, subjected to bright lights and freezing temperatures, and chained in stressful positions for hours.
>
> US military officials and interrogators have repeatedly denied that any prisoners at Guantanamo were abused.
>
> Altenburg said he expected defence lawyers to argue that even if the defendants were not mistreated, they may have involuntarily confessed because they feared such treatment.
>
> ``*The conditions of any interrogations and the conditions under which any statements that have been made are used in evidence will be looked at scrupulously by the defence lawyers and the presiding officer,"* Altenburg said.

33. Whether in fact that issue arises was not yet clear from the proceedings on 25 August 2004 and I am unaware of the nature or extent of any confession alleged to have been made by David Hicks.

Conduct of the Trial

34. The actual procedures for the trial are also set out in Military Commission Order Number 1. The MCO contains the following matters of interest:

- The Appointing Authority may approve plea agreements mandating a sentence limitation or other consideration in exchange for a plea of guilty;
- The Commission has powers to summons witnesses, administer oaths, require the production of documents and designate special commissioners to take evidence.
- The Commission must provide a “full and fair trial”;
- Irrelevant evidence is to be excluded;
- The proceedings are to be open except in particular circumstances;

- The rules in relation to evidence are set out (see more detailed reference hereunder);
- In summation, the prosecution appears to have an entrenched right of reply;
- It is not clear that in announcing a verdict of guilty the commission is required to do any more than announce that verdict. The particular rule does refer to the announcement of "findings" but whether that requires an analysis or judicial style process of reasoning is unclear – I suspect that such will not occur.
- The commission is required to announce its findings and verdict. A finding of guilty can be made on a two thirds majority or may vote to convict of a lesser charge. The only time the commission is required to be unanimous is if a sentence of death is to be imposed.

Crimes and the elements

35. The elements of the crimes chargeable before the commissions are established by Military Commission Instruction Number 2 dated 30 April 2003. At that stage David Hicks had been in custody for about 17 months. The order seeks to avoid problems of retrospectivity by stating that the Instruction is "declarative" of existing law and therefore does not preclude trial for crimes that occurred prior to its effective date. There will be an issue about whether such rules are in fact "declarative" of the existing law.

36. It will be important to analyse the provisions of this Instruction dealing with the offences with which Hicks is charged. I have not considered that necessary or appropriate at this stage since the nature of the case against Hicks is not yet a matter of public record beyond what is in the charge sheet. I have dealt with that in the section of this report dealing with the specific charges David Hicks faces. I expect that at some point in the proceedings the sustainability of a broad conspiracy charge such as the one faced by Hicks will be the

subject of challenge based on international criminal law and possibly based on the jurisprudence from the UN tribunals dealing with crimes in connection with the former Yugoslavia and with Rwanda.

Sentencing

37. Military Commission Instruction Number 7 deals with sentencing. It specifically provides for a military commission to have *"wide latitude"* in sentencing[13]. The most fundamental problem is that the crimes which are charged do not carry specified sentences. The Instruction carries a brief reference to bare fundamentals of sentencing principle and then qualifies that with the provision that sentences are to be *"grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general".*

38. Although it is premature to be concerned with matters of sentence there are two matters that are concerning. Firstly, the rules seem to provide that in a case like that of David Hicks, he could be found guilty of both the charge of conspiracy and the charge of attempted murder which may both arise from the same evidence and certainly from the same course of conduct and yet be separately convicted and separately punished. It seems clear enough that the allegation of attempted murder is also said to be an overt act of the count of conspiracy. Secondly, it is clear that unlike a civilian criminal justice process, certainly in Australia, if David Hicks is found guilty of any offense and sentenced to imprisonment his pre-trial detention (a period of 2 ½ years in most difficult conditions) will not count toward the sentence imposed[14]. These matters will the subject of greater attention as the case proceeds.

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13 Section 3.

14 Military Commission Instruction No. 7 Section 3A

Appeal

39. An important criticism of this military commission procedure is that there is no genuine appellate process and that is clearly correct. The *"Post Trial Procedures"* are set out MCO No. 1, section 6H and they effectively provide that:
    - After the conclusion of the trial the record of the trial is to be provided to the Appointing Authority.
    - The decision of the commission does not become final until a final decision is made by the President or the Secretary of Defense.
    - The President or Secretary of Defense appear not to have the power to reverse a verdict of not guilty.
    - A Review Panel is to be established by the Secretary of Defense containing three military officers, one of whom is required to have experience as a judge. Their role seems to be to review the trial and either refer the matter to the Secretary of Defense with a recommendation as to disposition or return the case to the Appointing Authority for further proceedings.
    - The Secretary of Defense shall also review the proceedings and either return the case for further proceedings or forward it to the President with a recommendation.
    - The President ultimately makes the final decision about the case.

40. None of this process represents any form of genuine appeal and, indeed, the particular personnel involved admirably demonstrate the lack of independence of the process, such as it is. This is a matter of considerable concern. Finally, and briefly, on the topic of post-trial procedures an acquittal will not necessarily lead to the release of David Hicks.

The Charges against Hicks

41. The crimes that may be tried by a military commission are set out in Military Commission Instruction Number 2 dated 30 April 2003. Hicks has been charged with three offences which I summarise:

    (a) Between 1 January 2001 and on or about December 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Muhammed Utef, Said al Adel, Usama bin Laden and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission:

        i) attacking civilians;
        ii) attacking civilian objects;
        iii) murder by unprivileged belligerent;
        iv) destruction of property by unprivileged belligerent; and
        v) terrorism.

    (b) Between 11 September 2001 and 1 December 2001, as a member of the above conspiracy, attempted to murder divers persons by directing small arms fire, explosives, and other means intended to kill American, British, Canadian, Australian, Afghan and other Coalition forces, while he did not enjoy combatant immunity and such conduct taking place in the context of an associated with armed conflict.

    (c) Between 1 January 2001 and 1 December 2001 intentionally aiding the enemy, to wit: al Qaida and the Taliban, such conduct taking place in the context of an associated with armed conflict.

42. The charge sheet contains a section entitled “Background” and is presumably intended to summarise the factual basis for the charges. That background combined with the charges themselves reveals no more than the following allegations:

- Hicks had joined the KLA in Kosovo in 1999 having had military training and engagement in hostile action;
- He converted to Islam in 1999;
- In early 2000 he joined Lashkar e Tayyiba (LET) in Pakistan – a terrorist organisation;
- He trained for two months at an LET camp in Pakistan;
- He engaged in hostile action on the Pakistani side of the dispute with India over Kashmir;
- In January 2001, he travelled to Afghanistan to attend al Qaida training camps;
- In January 2001 he went to an al Qaida guest house;
- He later travelled to al Qaida’s al Farouq training camp and completed an eight week course;
- In April 2001 he completed a further seven week al Qaida course;
- He had a conversation with Usama bin Ladin about translating training camp manuals into English;
- In June 2001, Hicks travelled to Tarnak Farm for an urban training course;
- In August 2001, Hicks is alleged to have participated in an advanced al Qaida course in Kabul dealing with information collection and surveillance;
- It is alleged that he was asked whether he would take part in a martyr mission although his response is not alleged;
- After being in Pakistan on 11 September 2001, he returned to Afghanistan “to rejoin al Qaida associates”;
- During hostilities with US forces, Hicks had been stationed at Qandahar airport and guarded a Taliban tank;

- On or about 9 November 2001 Hicks, with John Walker Lindh, engaged in combat with US forces;
- In December 2001, he was arrested.

43. It is worth noting in passing that the Final Report of the National Commission on Terrorist Attacks Upon the United States notes[15] that from 1996 until 11 September 2001, the total number of fighters who underwent instruction in Bin Ladin supported camps in Afghanistan was between 10,000 and 20,000. It is also noteworthy that John Walker Lindh, cited in the event outlined in the charges and being a US citizen has been dealt with within the US civilian criminal justice system. Presumably Lindh will be a witness against Hicks[16].

44. Under section 6 of the Department of Defense Military Commission Instruction No. 2, proof of conspiracy requires proof that Hicks entered an agreement to commit a substantive offense or offenses triable by a military commission or joined a common criminal purpose that involved at least in part the commission of an offense triable by military commission. It must also be proved that the accused knew the unlawful purpose of the agreement or common purpose and joined it willfully – i.e. with intent to further the unlawful purpose. It must also be proved during the existence of the agreement or enterprise one of the members of the enterprise committed an overt act in order to accomplish the purpose or object.

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15 At page 67.

16 According to the Department of Defense information dated 15 July 2002, *"As part of his plea bargain signed early Monday, American Taliban John Walker Lindh has agreed to cooperate with U.S. military officials to combat Al Qaeda terrorists. Lindh, 21, could serve up to 20 years in prison after pleading guilty to two of 10 charges leveled against him. He pleaded guilty to aiding the Taliban terrorist regime and possessing explosives in the commission of that crime. Had he been convicted of all 10 charges against him, he would have spent life in prison. Lindh also withdrew charges that he was mistreated while in military custody. Lindh is to cooperate "fully, truthfully and completely" with the United States, said Justice Department officials. He has agreed to testify at grand juries, trials or other proceedings, including military tribunals. He has agreed to be available for debriefing by law enforcement and intelligence officers and for pre-trial conferences with government attorneys. Lindh also agreed to take lie detector tests."*

45. The charge of conspiracy is subject to several criticisms. A person would be guilty of conspiracy if he "joined an enterprise of persons who shared a common criminal purpose" which involved in part the intended commission of an offence triable by military commission. An "overt act" must have been committed by one of the enterprise members but not necessarily by the accused and, indeed, it appears that the one "overt act" may have been committed before the accused joined the enterprise. The Australian Red Cross Professor of international humanitarian law at the University of Melbourne, Professor Tim McCormack, describes this as no more than "guilt by association"[17] and points out that conspiracy is usually considered an alternative basis for criminal responsibility, but not in this case. Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy and both the conspiracy and the substantive offense may be charged, tried and separately punished[18].

46. As I have noted elsewhere, in the time available and with the material available it has not been feasible for me to analyse the charges by reference to the case against David Hicks because the nature of that case was not demonstrated by the preliminary hearing and I have not had any access to the prosecution brief. I do not suggest that I should have.

Criticisms of the Military Commission Procedure

47. The military commission process has not been used since World War 2. The military commissions that were used then were authorized by legislation passed by the US Congress. As the critics of this military commission point out, since World War 2, "…*principles of international law, embodied in treaties to which the United States is a party, have prohibited ad hoc tribunals or*

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17 "Hicks: a case of guilt by association" – Professor Tim McCormack – The Age – 12 June 2004

18 DoD MCI No. 2 April 30, 2003.

special commissions like those used in that war. Both the Geneva Conventions which regulate military law, and the International Convention on Civil and Political Rights say that people can only be tried by regularly constituted tribunals that give full and fair hearings and that are impartial" (emphasis added)[19]

48. The fundamental criticism of this procedure made by, among others, the American Bar Association[20] is one of the process not being impartial and/or independent in that under these arrangements, the US Military is captor, jailer, prosecutor, defender, judge of fact, judge of law and sentencer with no appeal to an impartial and independent judicial body.

49. Again, as Michael Ratner puts it, *"The President and the Pentagon have decided that they will define the crimes, prosecute people, adjudicate guilt, and dispense punishment. This is unchecked rule by the executive branch. It dispenses entirely with our system of checks and balances."*[21] To me, this opinion is almost indisputable. I do not understand why, with two Australian nationals facing this process, the Australian government is not troubled by the process.

50. Other relevant criticisms are as follows:
    - Guantanamo Bay is, in effect, no more than an interrogation camp;
    - At Guantanamo Bay, prisoners have been maltreated and tortured;
    - The US Government has effectively decreed that the Geneva Convention does apply to the detainees at Guantanamo Bay;
    - The laws of war are being applied selectively to the detainees.

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19 *Guantanamo – What the World Should Know* – (Scribe) Michael Ratner and Ellen Ray – page 74.

20 American Bar Association – Report of the Task Force on the Treatment of Enemy Combatants – August 2003 – at page 2.

21 Ibid page 73.

Other criticisms of the process became apparent during the hearing on 25 August 2004 and are referred to in some detail hereunder.

The Proceedings on 25 August 2004

51. I now set out in reasonable detail what occurred in the hearing on 25 August 2004. I do so because I consider it informative as to the more practical procedural problems with the military commission process. This account of proceedings is based on my notes. I understand that transcript will be available but, as yet, I have not been able to locate it on the internet and it has not been provided in hard copy although we requested it. I allow for the possibility that my notes are incomplete or that I have not correctly heard all that was said. However I am reasonably confident the important substance is correct. I should add that counsel for Hicks had access to proceedings on 24 August 2004 when, in another case, challenges were made to members of the commission and those challenges were adopted and relied upon by counsel.

Initial Proceeding

52. On Wednesday 25 August 2004 at 9:30 am, the case of *USA v David Hicks* commenced before the military commission – a Presiding Officer and four members. The Presiding Officer is Colonel Brownback. The other members are Colonel Sparks, Colonel Bright, Colonel Bogdan, Colonel Toomey and Lt. Colonel Cooper. Lt. Colonel Cooper is the alternate member and will not deliberate or vote unless he becomes a member of the commission.

53. The proceedings commenced with various instruments of jurisdiction being marked as exhibits in the hearing. These included the Presidential determination that David Hicks is eligible to be dealt with by military commission and the charge sheet. The prosecutor, Lt Colonel Brubaker, then announced that the prosecution was ready to proceed.

54. The next requirement was that officers of the commission were to be sworn. Following that the Presiding Officer addressed David Hicks directly to deal with his entitlement to representation and, after some discussion about earlier requests, to establish that he is satisfied with his present representation. Hicks said he was so satisfied. The defense team is Joshua Dratel as the lead counsel. He is also the civilian defense counsel. The detailed defense counsel are Major Michael "Dan" Mori and Major Lippert.

55. The prosecutor then outlined the nature of the charges which were not required to be read. He described them as conspiracy, attempted murder and aiding the enemy.

Voir Dire

56. The next and most time consuming step in the proceeding was the voir dire in relation to the members of the commission. The purpose is to permit questioning of all members of the commission, including the Presiding Officer, to establish that there are reasons why they should not participate as members of the commission. This process is similar to challenging jurors for cause in the civilian criminal justice process except that, as in the US, questioning to establish cause is permitted. This meant all commission members including the Presiding Officer were questioned, not on oath, on matters relevant to their capacity and impartiality. Each member, including the Presiding Officer, had completed a written questionnaire which had been distributed to counsel.

57. The standard for challenge to members of the commission remains to be determined. In the view of the Presiding Officer, the test is whether there is good cause to show that a member cannot impartially and expeditiously deal with the trial. Major Mori, on behalf of the defense does not agree that that is the proper standard but he has not yet articulated the alternative.

Presiding Officer

58. The first voir dire concerned the Presiding Officer. That voir dire was heard in the absence of the other commission members. The questioning of the Presiding Officer was conducted by Joshua Dratel for the defense and dealt with the following matters of concern:

    (a) The Presiding Officer proposes to advise the non-legally qualified members of the commission on the law but they are not bound to follow his advice. Thus, under this process non-lawyers will have to make their own findings on the law and the manner in which it applies to this case. One of the issues raised about this was whether the Presiding Officer realised that given his position and experience, whatever advice he offered on the law would almost inevitably be accepted by the other members. He noted that they did not have to accept his comments.

    (b) The Presiding Officer has a significant relationship with the Appointing Authority, Major General Altenburg[22]. It appears that they knew each other in 1992 and had a close personal relationship between 1992 and 1996. Altenburg presided over the retirement function for the Presiding Officer and was the primary speaker. That was repaid by the Presiding Officer when Altenburg retired. The Presiding Officer attended the wedding of Altenburg's son and when Altenburg was appointed as the Appointing Authority for the military commissions, the Presiding Officer contacted him to congratulate him. Asked whether a reasonable person might be concerned about the possibility of

[22] Major General Altenburg was selected by the Department of Defense as the Appointing Authority and his role appears to be (according to the Department of Defense) to oversee the military commissions including the approval of charges, the appointment of members and approving plea agreements (Department of Defense biography).

bias given that relationship, the Presiding Officer referred to his record. His record is impressive with combat experience in Vietnam winning five bronze stars and a subsequently impressive military career as a military judge. However that does not seem to adequately deal with the issue raised by defense counsel.

(c) It appears that the Presiding Officer has his own legal counsel – a Mr. Hodges. Mr. Hodges has no formalised or identified role. According to the Presiding Officer, Mr. Hodges will provide advice on the "adjudicative function", whatever that means. The Presiding Officer conceded that he did not know what that meant and asserted that, to date, Hodges had not provided advice. The Presiding Officer said in answer to questions from Dratel that he would inquire of Major-General Altenburg as to what the true nature of Hodges' role is. In one sense, a more important complaint about Hodges is that he is an employee of the Department of Homeland Security and thus affiliated with an enforcement function against terrorism. The Presiding Officer expressed the opinion that a reasonable person would not be concerned about that.

(d) Joshua Dratel produced a list of nominees for the position of Presiding Officer which was marked as an exhibit to demonstrate that there were other candidates equally well qualified and more independent than Colonel Brownback.

59. The challenge to the Presiding Officer was then articulated by Dratel as being based on

(a) His relationship with the Appointing Authority, Major-General Altenburg;

(b) His proposal to give non-binding legal advice to the rest of the commission which would be inevitably accepted by them;
(c) The lack of definition of Hodges role;
(d) Comments made by the Presiding Officer made before proceedings began which apparently questioned the right of the accused to a speedy trial.

60. The Presiding Officer then indicated that the transcript of the voir dire and motion which was yet to be filed by Major Mori would be transmitted to the Appointing Authority and that Major-General Altenburg would be asked to clarify the role of Mr. Hodges.

61. The significance of the role of the Pentagon approved Appointing Authority became apparent during this process.

The Voir Dire of the Remaining Members

62. With the Presiding Officer present, a similar voir dire was then conducted for each member. They were questioned in the absence of the other members. The first was Colonel Toomey. Questioned by Major Mori he was effectively asked whether he understood the following legal concepts:
    (a) That David Hicks was entitled to a full and fair trial which was transparent and open without reference to extraneous material;
    (b) That "live" witnesses were needed and that there might be an unfairness in evidence being given which was hearsay with the maker of the out-of-court statement being unavailable;
    (c) That there should be equality of access to the available evidentiary material before the trial;
    (d) That laws which have a retrospective effect are problematic;
    (e) That actions (presumably of David Hicks) speak louder than words;
    (f) Difficult to keep issues of law and fact separate.

Colonel Toomey essentially agreed with those propositions.

63. The next officer questioned was Colonel Sparks. He said he understood that the charge sheet and the Presidential order had no evidentiary value. He had some experience of being a juror, witness and convening authority in court martial proceedings under the UCMJ. Dratel raised with him whether he was willing to over-ride rulings of the Presiding Officer on evidence when he thought it was necessary and of his own motion. He said he would. Colonel Sparks expressed the somewhat ambitious opinion that the views of the Presiding Officer on the law would not carry any more weight that the submissions made by defense and prosecution counsel. He conceded that he had never previously made legal determinations of the kind he would be required to make in this case. He also said that in the course of his duties he had briefings on al Qaida and that he knew those would have to be disregarded.

64. Colonel Sparks said that two weeks after 11 September 2001 he visited the site of the World Trade Center. He denied it made him angry saying it made him sad. He agreed it was an intense scene. Asked how he would separate the emotion of that scene from the trial of David Hicks, he claimed that he saw no connection between the events of 11 September 2001 and the charges against David Hicks.

65. Colonel Bright was then questioned. Frankly, from the body of the court he was very hard to hear. However it appeared that he had some logistical involvement in Afghanistan after 11 September 2001. He was unable to describe the nature of the military contact with the Taliban at that stage. He was engaged in discussions in Afghanistan about whether the Geneva convention applied and also about the rules of engagement. An issue arose as to whether he understood that there was an argument to be resolved on

whether, at the time the American military deployment in Afghanistan the Taliban were the accepted government of the country, at least by international standards. He said he was open to that evidence.

66. Colonel Bogdan was then questioned. He has no legal experience and no court martial experience. He appeared to have some connection with Operation Enduring Freedom in Afghanistan. He said a professional acquaintance had been killed in the Word Trade Center but he understood the importance of being fair and objective. It would appear that Bogdan armed drone planes (EC 130) with Hellfire missiles during the wars in Afghanistan and Iraq. Dratel referred to a staff evaluation praising Bogdan's good results in tracking and killing Taliban. Bogdan said the report was made by a supervisor and he was not aware of individual deaths.

67. In further questioning of Colonel Bright after lunch he was questioned by Major Mori. He has no legal experience and no previous role akin to fulfilling the role of a judge. He had been deployed in Afghanistan on October 2001. He was involved with the Special Forces in Task Force Sword. They began operations in Afghanistan early October, projected and supported from bases in Pakistan. He was involved in intelligence operations and would describe them in closed session which he subsequently did and which I was not permitted to hear. He claimed to have some detailed understanding of al Qaida and the Taliban. He was asked to explain the difference between Islam and Islam fundamentalism and, in my opinion, struggled to answer. He claimed that he understood that fairness and equality were core values of the US military. The questioning then moved to an exploration in his mind of the difference between the test he might apply to analyzing military intelligence and his understanding of the standard of proof, beyond reasonable doubt. On any view he struggled with the answer and eventually was relieved of the specificity the questioner was seeking by the intervention of the Presiding Officer at a most inappropriate time. The questioning was appropriate and

went to an important question of this officer's understanding of the manner in which he would carry out his role.

68. Colonel Cooper (the alternate member) was questioned by Joshua Dratel and was immediately questioned about his strong emotional feelings about the events of 11 September 2001. He said he did not know how he would overcome those emotions, although asserting that he would do so. He said he understood there were difficulties with questions which involved a mixture of fact and law. He emphasised that he believed in justice and that such a belief was one of the foundations of his life. Despite the difficulties of hearing multiple cases he believed he had the ability to compartmentalize as required. He also said he was prepared to exercise his right to question the Presiding Officer's ruling on evidence if necessary and would not wait for others to do it.

69. Asked how he would deal with the advice he would be given by the Presiding Officer, he said he would use that assistance. Perhaps more significant was that Colonel Cooper said he felt a "real and present apprehension" that sitting as a member of the commission in this case could result in reprisals from terrorists. He also admitted that he had said the inmates at Guantanamo Bay were all terrorists and that was a view he adopted during a conversation with others. He claimed that he did not hold that opinion any longer and recognised that it was a wrong opinion to hold because the term was not "fair" and there had not been "due process". He was then asked to define what he meant by "due process" and said it meant "justice under the law". Dratel then attempted to ask him whether if a witness was permitted to give evidence of what he had been told by someone else when the latter person would never be able to be called to give evidence was fair. The witness struggled until rescued by the Presiding Officer who suggested that he might not want to answer the question until he knew more about the facts. The interference by the Presiding Officer was again, in my view, inappropriate and occurred at a

point where the officer was about to demonstrate a lack of understanding of the significance of the problem of hearsay evidence.

70. The hearing was then closed while a hearing occurred in relation to security information. It should be noted that David Hicks was not permitted to be present during that hearing.

Consequential Challenges

71. At the conclusion of the voir dire, and after the closed hearing, the defense announced the consequential challenges which were:
    - To Colonel Bright based on both the open and closed evidence based on his knowledge of the operations in Afghanistan and his potential to be a victim.
    - To Colonel Toomey also based on his knowledge of the Afghanistan operations and the potential for him to have been a victim. He was also challenged on the basis that he had a role in the nature of an investigator.
    - To Lt. Colonel Cooper (the alternate member) on the basis of his emotional involvement and that he was not correctly anticipating what is required of him.
    - To the entire panel on the basis that they lack the qualifications to perform the role required of them.
    - To the entire panel on the basis that they should hear only one case.

72. Argument followed concerning those challenges with submissions by both the prosecution and defense. It became clear from the comments of the Presiding Officer that these matters were all to be determined not by him but by the Appointing Authority. The best result the defense could expect would be an indication from the Presiding Officer that he would be inclined to uphold

the motion but the matter would still be referred to the Appointing Authority. Directions were then given that motions in relation to these matters are to be filed by 7 September 2004 with a prosecution response two weeks later. The Presiding Officer ruled that he would not hold the proceedings in abeyance while these matters were dealt with.

Directions to the members of the commission

73. The Presiding Officer then gave what sounded very similar to jury directions to the non legally qualified members of the panel. Those matters covered:
    - Their entitlement to ignore his comments on matters of law;
    - Only discussion between the members would be closed conference;
    - Each member had an equal voice in the deliberations;
    - No outside influence on members would be tolerated;
    - Each case is to be dealt with separately;
    - Colonel Cooper was a non-voting member and would not vote unless his status changed.

Defense Motions

74. Major Mori then anounced the 19 defense motions. They were announced very quickly and I am not confident that I have them all but they included motions to dismiss the charges against David Hicks on the basis of:
    - The military commission not being authorised to conduct the trial;
    - The military commission lacking jurisdiction at Guantanamo Bay;
    - The charges against David Hicks are not triable under the laws of war;
    - The charges and procedures violate the principle of equal protection under the US Constitution;
    - The military commission is not independent;
    - The consequence of pre-trial punishment;
    - David Hicks correct status was as a prisoner of war;

- The intention of the Presiding Officer to give inappropriate legal advice to the other members of the commission ;
- Improper control of the Department of Defense over member selection.

75. In addition a further motion for a bill of particulars (effectively a request for further and better particulars) was foreshadowed. I have requested the detail of all 19 defense motions from Stephen Kenny and he has said he will supply copies of them. Those documents can be the subject of analysis with a view to the motions hearing and the trial itself.

76. Near the conclusion of the proceedings, David Hicks was formerly arraigned by the Presiding Officer and pleaded "not guilty" to each of the three charges.

Motion for Continuance

77. On 20 August 2004 a defense request for continuance was filed. It seeks the continuance of the proceedings until the agreement between the US and UK governments regarding the trial of British citizens before the military commissions are completed. This arises because it is a part of the agreement between Australia and the US that any favourable condition created by the agreement between the US and the UK would be incorporated into the agreement between the US and Australia. Thus, the argument is that a trial of David Hicks before these matters are finalised may deprive him of the benefit of any favourable conditions provided to British detainees.

The Motions Hearing

78. As set out above, there are some 19 motions filed by the defense. In relation to most of those the Presiding Officer gave directions which require that the written motions be filed by 1 October 2004. In turn the prosecution reply was to be filed 15 October 2004. A response from the defense is to be filed by 22

October 2004. The hearing is then scheduled for 3 November 2004. There will then be oral argument.

79. In deciding whether the LCA should send an observer for that hearing as well as the trial in January 2005, it needs to be borne in mind that although the argument will occur on 3 November 2004 based on the motions and responses filed, there cannot be any final outcome. If the commission were to be sympathetic to the defense motions, which appears to me to be unlikely, the most that can happen is that the commission will refer the motions to the Appointing Authority for final decision.

80. The proceedings can, of course, be followed on the internet and the motions themselves can be obtained. All of those documents can be analysed without the need to travel to Guantanamo Bay. Assuming the resources of the Law Council are not unlimited and given the need to attend the trial in January, I do not regard it as crucial to have an observer present for this hearing.

81. However important matters are raised in these applications and if the Law Council is anxious to have me present for those proceedings, I will endeavour to accommodate that. I would be grateful to be informed of that as soon as possible.

The Proposed Trial Date – 10 January 2005

82. As appears above, the commission set a trial date of 10 January 2005. The factor most likely to affect that date is one of the motions filed by the defense for a continuance dated 20 August 2004 referred to above.

Conversations with various participants

83. I had several conversations with interested participants. Initially, I spoke with Marc Hess – a representative of the Australian Attorney-General's Department. He travelled with me for some part of the journey and stayed in the same accommodation. His role is also to report to his department and we had several conversations during the trip to the US.

84. In Washington DC I attended a meeting with Peter Baxter, the Deputy Head of Mission at the Australian embassy. That discussion was essentially administrative. I have notes of the discussion but I do not think they bear on the issues the LCA must consider.

85. I travelled to Guantanamo Bay with consular staff from the Australian Embassy and spent considerable time with them while I was there. Again, apart from observing Mr Francis stating the official policy of the Australian government, nothing else was significant. I should say that the efforts of those officials, particularly Mr Derek Tucker, in facilitating the arrangements for Mr and Mrs Hicks to see their son were outstanding. Their sympathy and professionalism was clearly visible.

86. At Guantanamo Bay we were escorted and supervised by Lt. Colonel Sherer of the US Air Force and Major Bill Morris of the US Army. These officers were extremely helpful and professional in their approach to us. The more they came to understand the potential for criticism of their government and this process, the more helpful and professional they were. I am very grateful for their good will and assistance.

87. I spoke with consular staff on a regular basis while at Guantanamo Bay. I met with Major Dan Mori on several occasions and also with Joshua Dratel and, of course, Stephen Kenny. Many of these conversations were concerned with the welfare of David Hicks and the various logistical arrangements. I met briefly with Mr Neil Sonnet who is the Observer for the American Bar Association. He is participating in that role in all the cases and has a very clear and thorough understanding of how the military commission process functions. He also chaired the ABA's Task Force on Treatment of Enemy Combatants. That Task Force completed a report and recommendations with particular reference to the role of Civilian Defense Counsel in August 2003.

Proposed Federal Habeas Corpus Proceedings

88. On 28 June 2004 in *Rasul v Bush,* the United States Supreme Court, by a 5-4 majority, held that US courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals at Guantanamo Bay. Thus they held that the District Court is conferred with jurisdiction to hear the petitioner's challenges to their detention. David Hicks was one of a number of petitioners in that case.

89. There is what I understand to be an amended petition for habeas corpus in the US Federal Court which has been recently filed. Apparently some process in relation to that petition will occur in Washington DC in the next week or two.

Comments and recommendation

90. As I have said earlier in this report it is my view that as a matter of fundamental principle of criminal justice, these proceedings are (and will continue to be) flawed and that a fair trial of David Hicks in the military commission is virtually impossible. That is brought about both by matters of

structure in the commission process involving the role of the executive leading, in turn, to lack of independence and impartiality. There is also the question of the individual members and issues of perceived bias. There is a further genuine issue as to whether the non-legally qualified members actually have the capacity to perform the role required of them. I do not believe they do. That, of course, has already been a matter for argument, motion and finally consideration by the Appointing Authority.

91. These factors combined with the broad and all-encompassing charge of conspiracy have, in my opinion, the very strong potential to result in a substantial miscarriage of justice. I acknowledge generally the necessary differences between military criminal law and civilian criminal law. However as I understand it, the critics of this process who regularly practice in military law are of the opinion that if a person in David Hicks' position is to be dealt with militarily rather than by the civilian criminal law, a trial in the form of a court martial under the UCMJ would be the appropriate formula. That does seem to have the obvious benefits of a more independent and impartial process and a genuine appellate process leading, ultimately, to the US Supreme Court.

92. Whether in fact my assessment of the alternatives is correct, it is my view that a fair and impartial trial is the same concept in all systems dispensing criminal justice - there are particular fundamental requirements which are missing in this case. The principal test for me to apply in reporting to the LCA is whether there is a significant chance of a miscarriage justice. I think there is.

93. Thus my preliminary view is that a fair trial for David Hicks is virtually impossible for the following specific reasons:

    (a) The military commission in this case is not independent in any sense that would generate confidence in its impartiality because:

i) The commission represents a process created and exclusively controlled by the executive of the US government;

ii) There is a strong relationship between the Presiding Officer and the Appointing Authority;

iii) Several of the current members of the commission may be perceived as officers with some predisposition on the relevant issues because they were operationally involved in Operation Enduring Freedom in Afghanistan against *inter alia* the Taliban; or because they were significantly emotionally affected by the events of 11 September 2001 or because they have already formed and expressed views adverse to the interest of the detainees at Guantanamo Bay.

(b) The commission as established includes five members who are not legally qualified. Those officers are required to resolve issues of fact as a jury would and issues of law as a judge would without any experience in doing so and without being given legal directions on which they can rely. Indeed such assistance as might be given to them by the Presiding Officer is problematic because there is a genuine concern that they will abdicate their function to him because of his expertise as a military judge. It is not at all obvious to me why all the members of the commission are not officers with legal qualifications. That would be a substantial benefit to the process.

(c) This commission is intended to hear all 6 of the cases currently designated and it will presumably hear them consecutively. As was submitted to the commission, it would be extremely desirable if each case was dealt with by a separate commission rather than the present arrangements. It is simply impossible to

accept that non-legally qualified commission members can resolve issues of fact and law in four trials consecutively without making errors or misusing evidence. The fact that they say they are conscious of the problem and determined to avoid that consequence is of no comfort whatsoever.

(d) 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 acknowledging the multiplicity of risks that law had observed over the years in identification evidence then the true meaning of "beyond reasonable doubt" is removed. Such rules underpin that standard.

(e) The count of conspiracy laid against David Hicks is so broad and so easily facilitates a conviction as to arguably represent a misuse of that charge. The use of such a charge in these circumstances may also be contrary to international law.

(f) There is no viable appellate process which can impartially correct errors and remedy a miscarriage of justice.

94. In my view, the Law Council of Australia should consider expressing the view that given its previous concerns about the case of David Hicks and having, through me, seen this introductory proceeding it concurs with many other critics of the process and is of the view that in the trial of David Hicks there is an unacceptably high risk that there will be a miscarriage of justice. The Law Council should also consider calling upon the Australian Government to re-examine its position on the issue and request the United States to remove David Hicks from the military commission process and either place him before a court martial under the UCMJ, the US civilian criminal justice system or return him to Australia.

LEX LASRY QC

Latham Chambers
MELBOURNE
30th day of August 2004