



PRESS RELEASE

12 November 2006

Urging or Supporting Unfair Trial of David Hicks may Constitute a War Crime

David Hicks – US Military Commissions Act of 2006 – Compliance with the Geneva Conventions and the War Crimes provisions of Australian Law

A group of eminent Australian lawyers have prepared an Opinion about the continued detention of David Hicks in Guantanamo Bay and his proposed trial by a Military Commission. The Opinion has potentially alarming implications for the Federal Government and its Ministers.

In essence, the lawyers have concluded:

- that the US proposal to try David Hicks before a freshly constituted Military Commission contravenes Article 3 of the Geneva Conventions in that such a trial is not capable of being regarded as a fair trial at international law;
- that the conduct of such a trial by the Military Commission is also inconsistent with the recent decision of the US Supreme Court in *Hamdan*, which declared a previous such Commission unlawful;
- that such a trial would be in contravention of the *Australian Criminal Code*;
- that government ministers are subject to the *Australian Criminal Code*; and
- that to knowingly counsel or urge that such a trial be conducted before a Military Commission constituted under the relevant US legislation would constitute a war crime under the *Australian Criminal Code*.

In substance, the lawyers say that such a trial is in breach of the Geneva Conventions because:

- The Military Commission is not an independent and impartial tribunal. It will be composed of officers appointed by the President through his delegate, the US Secretary of Defense, and will be serving under the command of and at the pleasure of those individuals. The Secretary of Defense controls the manner in which trial counsel and military defense counsel are appointed and also administers the prosecuting authority.
- The US Secretary of Defense can control issues such as the law to be applied and the type of evidence that will be admitted. Further, evidence may be admitted even where it was obtained by moral or physical 'coercion'.

- The accused may never be made aware of the evidence that has been admitted against him as it may be withheld for security reasons and may include hearsay evidence.
- The US Secretary of Defence, as part of the Executive, also controls the detention of prisoners being tried.
- The procedures deny an accused person any adequate opportunity to present his defence.

In addition, the lawyers say that such a trial has been excessively delayed and violates David Hicks' right to a trial without unreasonable delay and that his continued detention also violates international law.

The Opinion has been signed by **the Hon Alastair Nicholson** AO RFD QC (Former Judge Advocate General of the ADF, Honorary Professorial Fellow, Department of Criminology, University of Melbourne); **Peter Vickery** QC (Special Rapporteur, International Commission of Jurists, Victoria); **Professor Hilary Charlesworth** (Professor of International Law and Human Rights, ANU); **Professor Andrew Byrnes** (Professor of International Law, Faculty of Law, UNSW); **Gavan Griffith** AO QC (Solicitor-General of Australia 1984 – 97); and **Professor Tim McCormack** (Australian Red Cross Professor of International Humanitarian Law, University of Melbourne).

The opinion has been delivered to the Human Rights Law Resource Centre Ltd ('HRLRC') and to the Law Council of Australia. The Law Council of Australia has supplied the Opinion to the Federal Attorney-General, the Hon Philip Ruddock MP.

The HRLRC is now undertaking a factual investigation and analysis of material to form a view as to whether, in fact, the conduct of any person or persons in relation to David Hicks may amount to a war crime. Contravening conduct could lead to prosecution in Australian courts under the *Australian Criminal Code* or before the International Criminal Court under the Rome Statute.

The Opinion is available for download from www.hrlrc.org.au or by emailing hrlrc@vicbar.com.au

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