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# **ADVICE**

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## **In the Matter of the Legality of the Charge against David Hicks**

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8 March 2007

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## I. EXECUTIVE SUMMARY

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David Hicks, an Australian citizen, was captured in November 2001 near Konduz, Afghanistan in the closing days of the war between the Taliban government of Afghanistan and the Northern Alliance supported by the United States. He was subsequently confined at Guantanamo Bay (GTMO) where he remains imprisoned.

The US administration has never alleged Hicks engaged in any actual acts of terrorism, nor that he killed any US or Coalition soldier while engaged in fighting at Konduz. Indeed, no specific acts of violence directed at anybody have ever been alleged.

David Hicks was not charged with any offence until 26 August 2004. He was then charged under the former military commission process with 3 offences: conspiracy, attempted murder by an unprivileged belligerent and aiding the enemy.

On 29 June 2006, in the case *Hamdan v. Rumsfeld*,<sup>1</sup> the United States Supreme Court ruled that the military commissions were illegal under United States law and the Geneva Conventions. Four justices determined that the charge of conspiracy was not a war crime. With the striking down of the military commissions, all of the 2004 charges were also rendered invalid.

A new military commission was established under the *Military Commissions Act of 2006* (the MCA), a federal statute which was signed into US law by President Bush on 17 October 2006.

On 3 February 2007, the Prosecutor under the new military commission announced that his office had prepared, but not yet laid, new charges against David Hicks. The drafted charges were attempted murder and providing material support for terrorism, both said to be offences under the MCA.

On 1 March 2007, the Convening Authority to the military commission announced that the draft charge of attempted murder would not be proceeded with. The offence of Attempted Murder in Violation of the Law of War as set out in the draft charge was clearly flawed because it went beyond what was permitted in the MCA and attempted to define a war crime that did not exist. In addition, the facts alleged in support of the charge did not identify anything in the nature of an attempt under the law.

However, David Hicks was formally charged with Providing Material Support for Terrorism pursuant to Section 950v(25) MCA.

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<sup>1</sup> *Hamdan v Rumsfeld, Secretary of Defense* 548 U.S. (2006)

For the reasons stated, we conclude and advise that this charge does not constitute a war crime contrary to the Law of War.

Further, the offence of Providing Material Support for Terrorism is clearly retrospective in its application to David Hicks. The suggestion that the offence of Providing Material Support for Terrorism under the MCA is merely a codification of an existing Law of War or an existing domestic law of the United States, and is therefore not a retrospective criminal law, is untenable. This is a recently invented and new war crime created with the passing of the *Military Commissions Act of 2006* when President Bush signed it into law in the United States on 17 October 2006.

The US Constitution prohibits retrospective (*or ex post facto*) criminal laws. Proceeding with a trial of David Hicks on the basis of this charge is also in clear violation of international treaties to which Australia and the United States are parties and contravenes the Australian *Criminal Code*.

The attempt to apply the section 950v(25) MCA offence to Hicks plainly violates the substance of the guarantee against ex post facto laws in the US Constitution. The provision is therefore unconstitutional and invalid on its face. The only doubt relates to whether Hicks, as a non-citizen held outside the sovereign territory of the United States, has the standing to seek a remedy before the US federal courts for the violation of the principle of non-retrospectivity. Until this question has finally been determined by the US Supreme Court, in practical terms, there is no constitutional obstacle in the United States to applying a retrospective criminal law to David Hicks, although this could not happen legally to any citizen of the United States.

The reasoning which leads to these conclusions is considered in detail in the advice which follows.

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## II. DETAILED ADVICE

### PROVIDING MATERIAL SUPPORT FOR TERRORISM

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The charge against David Hicks is the Crime of Providing Material Support for Terrorism (pursuant to Section 950v(25) of the *Manual for Military Commissions*). Paragraph 22 of the charge sheet specifies the following:

CHARGE I: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.  
SECTION 950v(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM

22. SPECIFICATION I: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Australi," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood," hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from in or about December 2000 through in or about December 2001, intentionally provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such an organization that engaged, or engages, in terrorism, and, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

#### A. Material Support for Terrorism as a Violation of the Law of War?

The list of elements for the offence of Providing Material Support for Terrorism in Section 950v(25)(b) of the *Manual for Military Commissions* includes the requirement that the conduct in question ‘took place in the context of and was associated with an armed conflict’. The inclusion of this phrase raises the possibility of an inference that the offence constitutes a violation of the Law of War (why else would the conduct in question need to arise in the context of an armed conflict?).

Notwithstanding this inference, the offence as charged is wholly unknown in the Law of War. Despite decades of attempts to progress an agreed definition of the international crime of terrorism, there is no agreed definition to date.<sup>2</sup> Even if there were such agreement, it is unlikely that such agreement would be reached in the context of the Law of War. Instead, it is more likely that any international agreement on the crime would be reached without limitation as to the precise context in which the agreed prohibited conduct occurred. In any case, there is no agreed definition of the international crime of terrorism in the Law of War as it currently stands and so there can be no crime of ‘providing material support for terrorism’ in the Law of War either.

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<sup>2</sup> See, eg, Jean-Marc Sorel, ‘Some Questions About the Definition of Terrorism and the Fight Against its Financing’ (2003) 14 *European Journal of International Law* 365; Ben Golder and George Williams, ‘What is Terrorism?’ Problems of Legal Definition’ (2004) 27 *University of New South Wales Law Journal* 270.

Accordingly, the offence of ‘material support for terrorism’ included in the *Military Commissions Act of 2006* (MCA) is not a codification of any existing Law of War. It is derived solely from the domestic law of the United States. It is a new domestic law, although it appears to be founded upon two pre-existing federal offences found in the US Criminal Code. However, in the opinion of the authors of this advice, the offence contained in the MCA is clearly a retrospective (*ex post facto*) criminal law.

## **B. Rationale for Prohibition on Retrospective (*Ex Post Facto*) Criminal Laws**

The rationale behind the prohibition of retrospective criminal laws is that people should not be convicted and sentenced for actions that were not illegal when they were taken without fair warning that the conduct was criminal. A retrospective law is unjust because it deprives people of the knowledge of what behavior will or will not be punished and makes breaches of the criminal law a lottery at the whim of those in power.

As was said by Dicey, the basic tenet of penal jurisprudence is that every citizen is "ruled by the law, and by the law alone". The citizen "may with us be punished for a breach of law, but he can be punished for nothing else".<sup>3</sup>

Blackstone referred to Caligula’s methods of prescribing laws by writing them in very small characters and hanging them up on high pillars in order to catch the unwary and said that<sup>4</sup>

There is still a more unreasonable method than this, which is called the making of laws *ex post facto*: when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement; which is implied in the term 'prescribed'.

As Deane J. put it in *Polyukhovich v The Commonwealth*<sup>5</sup>

...it is basic to our penal jurisprudence that a person who has disobeyed no relevant law is not guilty of a crime. Of its nature, a crime "is an act committed, or omitted, in violation of a public law, either forbidding or commanding it" (Blackstone, Commentaries, (1830), vol.IV, p 5). It necessarily involves a contravention of a prohibition contained in an existing applicable valid law.

And further:

..the whole focus of a criminal trial is the ascertainment of whether it is established that the accused in fact committed a past act which constituted a criminal contravention of

<sup>3</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, (1959, 10<sup>th</sup> ed.) p 202, cited by Deane J. in *Polyukhovich v The Commonwealth* (1991) 172 CLR 50, at para. 27 of his judgment.

<sup>4</sup> Commentaries, (1830), vol.I, pp 45-46, cited by Deane J. in *Polyukhovich v The Commonwealth* (1991) 172 CLR 50, at para. 27 of his judgment.

<sup>5</sup> *Polyukhovich v The Commonwealth* (1991) 172 CLR 50, per Deane J. at para. 27 of his judgment.

the requirements of a valid law which was applicable to the act at the time the act was done. It is the determination of that question which lies at the heart of the exclusively judicial function of the adjudgment of criminal guilt.

And as Dawson J said in the same case: “In legislation, judicial decisions and statements of principles, both of municipal and international law, there has emerged a general abhorrence of retroactive criminal law.” And further:

All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.

And further:

Prohibition against retroactive laws protects a particular accused against potentially capricious state action. But the principle also represents a protection of a public interest. This is so, first, in the sense that every individual is, by the principle, assured that no future retribution by society can occur except by reference to rules presently known; and secondly, it serves to promote a just society by encouraging a climate of security and humanity.<sup>6</sup>

### C. Constitutional Position in Australia

Retrospective laws, at least at the federal level, are not in general prohibited in Australia. While the courts will, as a matter of statutory construction, normally interpret laws not to have a retrospective effect,<sup>7</sup> if retrospectivity is clearly intended by the legislature, the courts are bound to enforce it.

In *R. v Kidman*<sup>8</sup> the High Court upheld the validity of a law deeming past conduct in defrauding the Commonwealth to be criminal and imposing penal consequences. That case concerned the validity of the Crimes Act 1915 (Cth) so far as its provisions were retrospective. Section 2 of that Act added conspiracies to defraud the Commonwealth to the conspiracies which, by s.86 of the Crimes Act 1914 (Cth), were declared to be indictable offences. Section 3 of the 1915 Act provided that the Act was deemed to have been in force from the date of commencement of the 1914 Act. The accused were indicted for conspiracy to defraud the Commonwealth under the retrospective provisions of the 1915 Act. The validity of that Act was upheld. Griffith C.J. acknowledged (at p 432) that an *ex post facto* law was forbidden by the United States Constitution but pointed out that no question of the validity of such a law could arise in the case of a legislature of plenary power. Isaacs J. observed (at pp 442-443): “There is no prohibition in the Australian Constitution against passing *ex post facto* laws, as there is in the American Constitution ...”

<sup>6</sup> Ibid, at paras. 103; 104 & 107 of the judgment of Dawson J.

<sup>7</sup> See for example: *Polyukhovich v The Commonwealth* (1991) 172 CLR 50, per Deane J. at para. 25 of his judgment.

<sup>8</sup> (1915) 20 CLR 425.

The decision in *Kidman* has frequently been cited in subsequent decisions of the High Court<sup>9</sup>, although it was criticised by Deane and Gaudron JJ. in *Polyukhovich v The Commonwealth*, where it was thought that *Kidman* should be overruled because the exclusive vesting of judicial power of the Commonwealth in Chapter III courts precludes the enactment by the Parliament of an *ex post facto* criminal law.<sup>10</sup>

As Gaudron J stated in *Polyukhovich*:

The usurpation of judicial power by a law which declares a person guilty of an offence produces the consequence that the application of that law by a court would involve it in an exercise repugnant to the judicial process. It is repugnant to the judicial process because the determination of guilt or innocence is foreclosed by the law. The only issue is whether the person concerned was a person declared guilty by the law. And all that involves is the determination, as a matter of fact, whether some person is the person, or answers the description (whatever form it takes) of the persons, declared guilty by the Act. It does not involve, and indeed negates, that which is the essence of judicial power in a criminal proceeding, namely, the determination of guilt or innocence by the application of the law to the facts as found. Accordingly, such a law is invalid as infringing s.71 because it involves the exercise by Parliament of a power which can be exercised only by the courts named or indicated in s.71 and because its application by a court would involve it in exercising a power repugnant to the judicial process.

In *Polyukhovich*, Dawson J.<sup>11</sup> on the other hand confirmed the traditional view in *Kidman* that “There is ample authority for the proposition that the Commonwealth Parliament may in the exercise of its legislative powers create retrospective laws, including criminal laws with an *ex post facto* operation.” The decision of McHugh J was to like effect,<sup>12</sup> particularly where he held that:

In my opinion, the enactment of laws having a retrospective operation does not infringe the constitutional guarantee that the judicial power of the Commonwealth can be exercised only by courts established and judges appointed in accordance with Ch III of the Constitution, and by such other courts as are invested with federal jurisdiction.<sup>13</sup>

Further, the High Court more recently confirmed in the course of argument in the case of *Baker v The Queen*<sup>14</sup> that Federal Parliament does in fact have the power to pass retrospective criminal laws without trespassing on the judicial power referred to in Chapter III of the Commonwealth Constitution.

Thus the position in Australia is that, at least at the federal level and in all States other than Victoria, and with one possible exception, there is no constitutional protection

<sup>9</sup> See *R. v Snow* (1917) 23 CLR 256, at p 265; *Ex parte Walsh and Johnson*; *Re Yates* (1925) 37 CLR 36, at pp 86, 124-125; *Millner v Raith* (1942) 66 CLR 1, at p 9; *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1, at p 172; *University of Wollongong v Metwally* (1984) 158 CLR 447, at pp 461, 484; and *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

<sup>10</sup> *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, per Deane J. at para. 45 of his judgment and Gaudron J. at para. 41 of her judgment.

<sup>11</sup> *Ibid*, Dawson J at paras. 20-22.

<sup>12</sup> *Ibid*, McHugh J at para. 21-22.

<sup>13</sup> *Ibid*, per McHugh J. at para. 25.

<sup>14</sup> [2004] HCA 45 (1 October 2004).

against retrospective legislation, whether criminal or otherwise. The possible exception arises by operation of the judicial power in the Constitution of Australia through Chapter III which vests the judicial power of the Commonwealth exclusively in the Section 71 appointed courts, although practical instances of Parliament usurping judicial power to the necessary degree by passing legislation which in effect involves the exercise of a judicial, rather than a legislative function (for example legislation which punishes specifically designated persons or groups or which determines facts) are likely to be relatively rare.

This may be contrasted with the position in a number of other countries. In Indonesia, for example, the Indonesian Constitutional Court recently ruled to strike down anti-terrorism laws introduced shortly after the Bali bombings of 12 October 2002. This resulted in the conviction of one terror suspect being overturned and a further decision to withdraw charges against another alleged terrorist. In spite of these outcomes being greeted with dismay and even outrage in some quarters in Australia, there is little doubt that the outcome was consistent with the proper application of the Indonesian Constitution and the rule of law. Under the amended Indonesian anti-terrorism legislation, committing or assisting terrorist acts was punishable by death and Section 46 of the law authorised its retrospective application. Article 28I of the Indonesian Constitution, however, prohibited prosecution for a retrospective offence. The Constitution describes this as a "basic human right that may not be diminished under any circumstances at all". In Indonesia the Constitution is the supreme law and a law that conflicts with it is not valid. Retrospective laws are therefore constitutionally invalid under Article 281 and the Indonesian Constitutional Court ruled accordingly.

An example of the operation of the 'supremacy' of Federal Parliament in relation to retrospective laws in Australia is provided by the Commonwealth's "bottom of the harbour" tax legislation of the 1980's.<sup>15</sup> In 1982 the Commonwealth Parliament passed a number of related Acts, including the *Taxation (Unpaid Company Tax) Assessment Act* which aimed to recover tax evaded under the "bottom of the harbour schemes" which had been declared illegal. This Act expressly provided for retrospective operation enabling the recovery of tax previously avoided at a time when the schemes had not been declared illegal. In his second reading speech on the 1982 Bill, the then Federal Treasurer, John Howard, acknowledged the retrospective nature of the new legislation but justified this aspect as follows:

Our normal and general reluctance to introduce legislation having any retrospective element has, on this occasion, been tempered by the competing consideration of overall perceptions as to the equity and fairness of our taxation system and the distribution of the tax burden.<sup>16</sup>

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<sup>15</sup> See: A. Freiberg, 'Ripples from the Bottom of the Harbour: Some Social Ramifications of Taxation Fraud' (1988) 12 *Criminal Law Journal* 136 at 159.

<sup>16</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 1982, Vol. HR129, p. 1866 (John Howard, Federal Treasurer).

In Victoria The Charter of Human Rights and Responsibilities Act 2006 came into operation on 1 January 2007. The Charter is a set of human rights which receives recognition and defined protection by law.

Government departments and public bodies are required to act compatibly with human rights as defined in the Charter, and to consider human rights in making decisions, unless to so act would be inconsistent with another statute.

New laws in Victoria are now required to be checked against the Charter. All new laws in Victoria require a Statement of Compatibility to advise Parliament whether a law is compatible with human rights including whether, if it limits human rights, that limitation is reasonable and proportionate. Where limits on the human rights are reasonable and proportionate, the law will be found to be compatible with human rights. In circumstances where a law is not compatible with human rights, the Government is expected to explain how and why. In exceptional circumstances Parliament may provide that an Act has effect despite being incompatible with human rights. From 1 January 2008, the Supreme Court will be empowered to issue a Declaration of Incompatibility requiring the reconsideration of legislation but it does not have the power to strike down legislation. Thus Parliament retains the final authority as to the passing of legislation in Victoria.

Section 27 of the Victorian Charter of The Charter of Human Rights and Responsibilities Act 2006 contains a prohibition against retrospective criminal laws in the following sub-Sections:

- (1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.
- (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
- (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.
- (4) Nothing in this Section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

However, section 27 must be read in conjunction with section 7 which allows for limitations on the rights provided for by the Charter (including section 27) where those limits are reasonable and proportionate.

### D. International Law Binding on Australia

The legal principle against retrospective criminal laws has been incorporated into international law in treaties to which Australia is a party.

Emphasizing its importance in the community of nations, the principle is found in Article 11 of the United Nations Universal Declaration of Human Rights.<sup>17</sup>

Central to the modern international law framework of human rights is the International Covenant on Civil and Political Rights 1966 (the “ICCPR”).<sup>18</sup> This treaty gives binding force to the fundamental civil and political rights contained in the Universal Declaration of Human Rights. With 160 States Parties, the Civil and Political Covenant is widely accepted. The United States ratified the ICCPR in 1992 and is therefore bound by its terms.<sup>19</sup> Australia is also bound by the Covenant, having ratified the treaty in 1980.<sup>20</sup>

The principle against retrospective criminal offences is re-stated in Article 15 of the ICCPR 1966, where the following is provided:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Article 99 of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (GC3) which also binds Australia and the United States under international law, contains a similar provision:

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by International Law, in force at the time the said act was committed.

As Brennan J said in *Polyukhovich*<sup>21</sup> “In legislation, judicial decisions and statements of principles, both of municipal and international law, there has emerged a general abhorrence of retroactive criminal law.”

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<sup>17</sup> GA Res 217A, 3 U.N. GAOR, U.N. Doc. A/810 (“Universal Declaration”), agreed at the United Nations General Assembly on 10 December 1948.

<sup>18</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

<sup>19</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 with entry into force 23 March 1976. The ICCPR was ratified by the United States on 8 September 1992.

<sup>20</sup> *The ICCPR was ratified by Australia on 13 August 1980 (Australian Treaty Series [1980] ATS 23).*

<sup>21</sup> *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, Brennan J at para. 48.

The principle is also enshrined in several national constitutions, and a number of international instruments, as for example in Article 28I of the Indonesian Constitution and in the European Convention on Human Rights 1950.<sup>22</sup>

### E. The Australian Criminal Code

The Rome Statute of the International Criminal Court (the Rome Statute) entered into force on 1 July 2002. It established the International Criminal Court (ICC) and defined war crimes within the jurisdiction of the ICC. Australia signed the treaty in 1998 and ratified it on 1 July 2002 and the treaty entered into force for Australia on 1 September 2002. There are now 104 countries that are bound by the Rome Statute and subject to the jurisdiction of the ICC.

The Australian government then implemented its obligations under the Rome Statute by incorporating those obligations into domestic law.<sup>23</sup> In describing the importance of the introduction of the Rome Statute into Australian law the former Attorney-General Daryl Williams said in July 2002<sup>24</sup> “*It was clear after Australia's signature of the Rome Statute in 1998 that ratifying the International Criminal Court Statute was an issue of importance to many members of the community. This is why the Government took such a considered approach to ratification of the ICC Statute and to the development of the domestic legislation implementing Australia's obligations under the Statute in Australian law.*”

Following ratification, the Australian Parliament also introduced Division 268 into the Australian *Criminal Code* thereby incorporating the war crime provisions of the Rome Statute into Australian law and making those war crimes offences under Commonwealth law.<sup>25</sup> Division 268 of the *Criminal Code* creates offences of denying a fair trial to persons protected by the Geneva Conventions. The offences are found in Section 268.31 (a trial of a protected person arising out of an international armed conflict) and Section 268.76 (a trial of a protected person arising out of a conflict which is not of an international character).

David Hicks is clearly a protected person, whether his precise status is that of a presumed prisoner of war under Article 5 of the Third Geneva Convention (GC3) or, consistently with the findings of the US Supreme Court in *Hamdan v Rumsfeld*,<sup>26</sup> he is otherwise a protected person under Common Article 3 of the Four Geneva Conventions (GC 1-4).

War crimes in the *Criminal Code* include offences which strike at conducting unfair and irregular trials arising out of an armed conflict. The offences include prohibitions against

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<sup>22</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), was adopted under the auspices of the Council of Europe in 1950. The Convention also established the European Court of Human Rights, which has its seat in Strasbourg.

<sup>23</sup> International Criminal Court Act 2002

<sup>24</sup> Australian Red Cross, International Humanitarian Law Lecture Series, “Future Directions in International Humanitarian Law”, Mallesons Stephen Jaques, July 2002

<sup>25</sup> International Criminal Court (Consequential Amendments) Act 2002

<sup>26</sup> above

prosecuting charges in criminal trials against protected persons based on retrospective offences by the specific incorporation of Article 99 of GC3 (section 268.31) and Article 15 of the ICCPR (section 268.76).

## F. Prohibition in Constitution of the United States of America

Since 1789 in the United States, the passing of retrospective (or in the US, “*ex post facto*” or “retroactive”) laws are prohibited by Article I Section 9 (applying to federal law) and Section 10 (applying to state law) of the Constitution of the United States of America. These clauses of the Constitution limit Congress and state legislatures when enacting criminal or penal laws that have a retrospective effect.

At the time the Constitution was adopted, many persons understood the term *ex post facto* laws to “embrace all retrospective laws, or laws governing or controlling past transactions, whether a civil or a criminal nature”.<sup>27</sup>

However in the early 1798 case of *Calder v Bull*<sup>28</sup>, the Supreme Court determined that the phrase *ex post facto* as used in the Constitution, applied only to penal and criminal statutes.

When deciding *ex post facto* cases, the United States Supreme Court has referred repeatedly to its seminal ruling in *Calder v Bull*. Justice Chase established four categories of unconstitutional *ex post facto* laws. In this case the Calders claimed that a Connecticut law relating to testamentary dispositions of property under a will was void. The sole issue in the case was whether the law of Connecticut was an *ex post facto* law and therefore void within the prohibition of the Federal Constitution because it violated Article I, Section 10.

Justice Chase said in his judgment:

The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.

In defining the categories of *ex post facto* legislation that are prohibited by the US Constitution, Justice Chase said further:

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<sup>27</sup> 3 J. Storey, Commentaries on the Constitution of the United States (Boston: 1833), 1339 cited in Killian and Costello (eds) *The Constitution of the United States of America, Analysis and Interpretation, annotation of cases decided by the Supreme Court of the United States to June 29, 1992* p. 350.

<sup>28</sup> 3 Dall. (3 U.S.) 386 (1798).

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Cases in the Supreme Court of the United States on *ex post facto* laws have tended to focus on issues which are not relevant to the present case of Hicks. An issue which often arises when a law is challenged under an *ex post facto* clause is whether the legislature has actually imposed a penalty for past conduct. For example, in *Flemming v Nestor*<sup>29</sup> the issue was whether a deported alien's loss of Social Security benefits was punitive or non-punitive in character and therefore valid. The issue sometimes arises as to whether the effect of the legislation is to actually increase a penalty previously imposed. For example, in *Lynce v Mathis*<sup>30</sup> the question was whether the cancellation of certain penal "credits" for released prisoners violated the *ex post facto* clause because objective factors demonstrated that the prisoner's sentence had increased. To similar effect is the case of *Weaver v Graham*.<sup>31</sup> A mere change in the type of penalty will not violate the provisions. If for example a State had imposed a death penalty on an individual, altering the form of capital punishment from death by hanging to death by electrocution would not violate the constitutional prohibition on *ex post facto* laws.<sup>32</sup> Laws that alter rules of criminal procedure but do not affect substantive rights of an accused do not violate the *ex post facto* clauses, even though the legislative change is made during the trial process.<sup>33</sup>

The Supreme Court in the modern era has generally used a three pronged analysis, which has its foundation in *Calder v Bull*, when determining whether the particular application of a law to a defendant violates one of the *ex post facto* clauses.<sup>34</sup> An *ex post facto* violation involves both a change to substantive laws and the application of the changed law to a particular defendant. The three types of *ex post facto* violations recognized and regularly applied by the US Supreme Court are:

- First, the application of a statute to a defendant that would impose a criminal punishment on him for the doing of an act that was not punishable under the criminal law (first ground);
- Second, applying to a defendant's case a law that removed a defence to the crime that was available under the substantive law at the time that the defendant committed the relevant act (second ground); and

<sup>29</sup> 363 U.S. 603, 614-17, 80 S.Ct. 1367, 1374 -76, 4 L.Ed. 2d 1435 (1960)).

<sup>30</sup> 519 U.S. 433, 117 S.Ct.891, 137 L.Ed. 2d 63 (1997).

<sup>31</sup> 450 U.S. 24, 101 S.Ct. 960, 67 L. Ed. 2d 17 (1981).

<sup>32</sup> *Malloy v South Carilina* 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915).

<sup>33</sup> See: *Duncan v Missouri*, 152 U.S. 377, 14 S.Ct. 5700, 38 L.Ed. 485 (1894).

<sup>34</sup> Rotunda and Nowak, *2 Treatise on Constitutional Law, Substance and Procedure* (3<sup>rd</sup> ed, 1999) 679.

- Third, application to a defendant of a statute that increased the punishment for the crime the defendant committed from the punishment that existed under the law applicable to the defendant's conduct at the time he committed the relevant act (third ground).

The charge against Hicks founded upon Section 950v(25) of the MCA is a clear and straightforward case. Any one of the three tests used by the US Supreme Court to determine an *ex post facto* violation would, if satisfied, be sufficient to have the section struck down. In this case, all three have been satisfied.<sup>35</sup>

### **G. The Hicks' Charge of 'Providing Material Support for Terrorism'**

After its passage through Congress, the *Military Commissions Act of 2006* was signed into law in the United States by President Bush on 17 October 2006. The specification for the charge of Providing Material Support for Terrorism is set out above.

Section 950v(25) of the *Military Commissions Act of 2006* (MCA) is the source of the offence as charged. It provides:

(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.—

(A) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

(B) MATERIAL SUPPORT OR RESOURCES DEFINED.—In this paragraph, the term 'material support or resources' has the meaning given that term in Section 2339A(b) of title 18.

### **H. Jurisdiction of the *Military Commissions Act of 2006* (MCA)**

"Any person subject to this chapter" as provided in Section 950v(25) of the MCA is a reference to all those who are subject to trial by Military Commission under the Act.

Under Section 948c of the MCA "Any alien unlawful enemy combatant is subject to trial by military commission under this chapter". Under Section 948d a finding, whether before, on, or after the date of the enactment of the MCA, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is determinative for purposes of jurisdiction for trial by military commission.

Further, a military commission established under the MCA is granted jurisdiction by Section 948d to "try any offense made punishable by this chapter or the law of war when

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<sup>35</sup> below Section I

committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”

Section 948d therefore authorizes the application of retrospective offences under the MCA to David Hicks and other GTMO detainees.

The question then becomes, does Section 950v(25) MCA create a retrospective offence ?

### **I. Pre-existing US Law and Comparisons with Section 950v(25) MCA**

Section 950v(25) MCA is derived solely from the domestic law of the United States. It is a new domestic law, although it appears to be founded upon two pre-existing federal offences under the US Criminal Code.

There are two statutes in the US Criminal Code with the title of “Providing material support”: One is 18 U.S.C. 2339A, “providing material support to terrorists”, and the other is 8 U.S.C. 2339B, “providing material support to a designated terrorist organization”.

If the MCA is not retrospective, then the MCA should be a mirror image of the US federal statute offences. But it is not. The differences between the MCA offence under Section 950v(25) and Sections 2339A/2339B are not superficial, they are substantive. The MCA offence applies to foreign nationals like David Hicks and others operating outside the territory of the United States, which the US federal offences do not. The MCA offence removes important elements found in the US federal offences and attempts to create a broader offence. Notably it also markedly increases the punishment.

- (1) First Ground (as applied by the Supreme Court in determining *ex post facto* violations)

The application of Section 950v(25) MCA to Hicks would impose a criminal punishment on him for the doing of an act that was not punishable under the criminal law at the time it is alleged to have been done.

Until 26 October 2001, an offence under Section 2339A could only be committed within the United States in order to come within the provision. Following the *Patriot Act* being signed into law in the United States on 26 October 2001, the words “within the United States” were struck from Section 2339A. However, the section was not extended to provide jurisdiction over persons who were not US citizens or who were not permanent residents of the United States.

Section 2339B throughout 2001 was confined to conduct that occurred within the United States. In 2004, Section 2339B was amended to provide for extraterritorial jurisdiction so that the section would apply to a list of defined categories of persons who were outside the territory of the United States, but in respect of conduct that occurred within the United States.

Accordingly, in 2001 the activities of Hicks (a non U.S. citizen or resident) in Afghanistan (not in US territory) were not punishable under the criminal law provided under the either Section 2339A or Section 2339B of the US Criminal Code. Even on the extended extra-territorial operation of Section 2339B as and from the commencement of the 2004 amendment, none of the categories of extended operation would have applied to Hicks' activities in Afghanistan in the period 2000 - 2001. The closest category to Hicks may be the category which extends jurisdiction to persons "brought into ...the United States". However, Guantanamo Bay is not the United States and has never been recognized as such.

Section 950v(25) MCA in combination with other sections of the MCA removed applicable limits on extraterritorial jurisdiction which would otherwise have protected Hicks under Sections 2339A and 2339B. Thus Hicks' acts, which were not unlawful under these sections of US law at the time they may have been committed (because the sections had no application to him), purportedly became unlawful for him retrospectively.

(2) Second Ground (as applied by the Supreme Court in determining *ex post facto* violations)

The application of Section 950v(25) MCA to Hicks would apply a law that removed a defence to the crime that was available under the substantive law at the time that Hicks committed the relevant act. Put another way, the MCA offence removes substantive elements that are required to be proven by the Prosecutor under either Section 2339A or Section 2339B of the US Criminal Code and thereby removes the capacity of the defendant to defend his case by challenging the proof advanced by the Prosecutor (or the lack thereof) of these essential elements.

As referred to above, the US Criminal Code offences would not have applied to Hicks and his activities in Afghanistan in 2001. However, Section 950v(25) MCA in combination with other sections of the MCA removed extraterritorial limits which would have applied in respect of Sections 2339A and 2339B, and potential defences to these charges, had they been pressed, were thereby removed retrospectively.

Further, Section 2339A prohibits support in the nature of preparation for or carrying out violations of other specified US criminal statutes. There is a long list of US offences which the support must further. This is a significant element of Section 2339A. Yet, in the MCA this list of US federal offences is removed and in their place the MCA creates the offence of "terrorism". The removal of this critical element of Section 2339A and the substitution of the newly created offence of "terrorism" is retrospective. This is a substantial modification of Section 2339A.

Section 2339B prohibits support to a designated terrorist organisation. The organisation must be so designated by the US Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury. This element of Section 2339B is eliminated in the MCA offence which does not require an official designation on the part of the Secretary of State.

- (3) Third Ground (as applied by the Supreme Court in determining *ex post facto* violations)

The application of Section 950v(25) MCA to Hicks would increase the punishment for the crime he is alleged to have committed from the punishment that existed under the either Section 2339A or Section 2339B of the US Criminal Code at the time he is alleged to have committed the relevant act.

There is a significant difference in the maximum punishment authorised under the MCA compared to the US federal offences. The MCA maximum punishment is life imprisonment.

The maximum punishment for a violation of Section 2339A or Section 2339B was 10 years. However, on 26 October 2001, the maximum punishment for both was amended to 15 years. This change also permitted a maximum penalty of confinement for life if any death resulted. As Hicks is not accused of causing anyone's death, it follows that if prosecuted for the US federal offence, the maximum punishment Hicks would face is 10 or 15 years depending on when the offence occurred. Yet if successfully prosecuted under Section 950v(25) MCA Hicks faces imprisonment for life.

#### **J. Whether Hicks has Constitutional Rights in the United States**

A threshold question arises as to whether Hicks (or any other non-US citizen imprisoned at GTMO) is protected by provisions of the US Constitution, including the Constitution's *ex post facto* clause.

Although the US Constitution expressly forbids retrospective criminal laws, there is considerable dispute as to the circumstances in which non - US citizens held outside sovereign United States territory may come within the scope of constitutional protections.

The Supreme Court of the United States has not yet conclusively resolved that question, although it might do so in the next round of cases currently making their way through the litigation process. Recently the United States Court of Appeals for the District of Columbia (one rung below the Supreme Court) in the case of *Boumediene v. Bush*<sup>36</sup> decided by a 2 to 1 majority that non-US citizens at GTMO have no constitutional rights.

The question, in time, will be likely to be reviewed by the Supreme Court of the United States and may ultimately be resolved in favor of the detainees (at least insofar as the particular circumstances of prisoners held at GTMO are concerned). On the other hand, if the position in *Boumediene v. Bush* is affirmed by the Supreme Court, then in practical terms there would be no US constitutional obstacle to applying a retrospective criminal law to David Hicks, although this could not happen legally to any citizen of the United States.

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<sup>36</sup> No. 05-5062 D.C. Cir. (Feb. 20, 2007)

Accordingly, the constitutionality of Section 950v(25) of the *Military Commissions Act of 2006* as applied to David Hicks under US law is presently questionable.

### **K. Conclusion**

Accordingly, and on all three grounds consistently applied by the Supreme Court of the United States, the offence created by Section 950v(25) MCA, when applied to the activities of David Hicks in Afghanistan between December 2000 to December 2001 is a clear and straightforward case of a retrospective criminal law. As such it is a classic retrospective (*ex post facto*) offence within at least three of the *Calder v Bull* categories of unlawful criminal legislation. Consequently, it is prohibited by the Constitution of the United States of America and also violates treaties to which Australia and the United States are parties, namely Article 99 GC3 and Article 15 of the ICCPR and contravenes the Australian *Criminal Code*.

The attempt to apply the section 950v(25) MCA offence to Hicks plainly violates the substance of the guarantee against ex post facto laws in the US Constitution. The provision is therefore unconstitutional and invalid on its face. The only doubt relates to whether Hicks, as a non-citizen held outside the sovereign territory of the United States, has the standing to seek a remedy before the US federal courts for the violation of the principle of non-retrospectivity. Until this question has finally been determined by the US Supreme Court, in practical terms, there is no constitutional obstacle in the United States to applying a retrospective criminal law to David Hicks, although this could not happen legally to any citizen of the United States.

The suggestion that the offence of Providing Material Support for Terrorism under the MCA is merely a codification of an existing Law of War or an existing domestic law of the United States, and is therefore not a retrospective criminal law, is untenable. This is a recently invented and new war crime created with the passing of the *Military Commissions Act of 2006* on 17 October 2006.



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