



**ACSJC**

**AUSTRALIAN " CATHOLIC " SOCIAL " JUSTICE " COUNCIL**

19 MACKENZIE STREET NORTH SYDNEY NSW 2060

Tel: +61 (0) 2 9956 5811 Fax: +61 (0) 2 9954 0056

Email: [admin@acsjc.org.au](mailto:admin@acsjc.org.au) Website: [www.socialjustice.catholic.org.au](http://www.socialjustice.catholic.org.au)

## **ACSJC BRIEFING AND POSITION PAPER**

### **The Detention of Australian Citizens at Guantanamo Bay**

#### **INTRODUCTION**

Two Australian citizens, David Hicks and Mamdouh Habib are currently being held by the government of the United States of America at "Camp Delta" at the US military base at Guantanamo Bay in Cuba. Both Hicks and Habib have been placed in indefinite detention in that facility without charge for almost two years, contrary to the provisions of the Third Geneva Convention, and Articles 9 and 14 of the International Covenant on Civil and Political Rights, to which both Australia and the United States are parties. Hicks and Habib have been held indefinitely – as "unlawful combatants" in the so-called "war on terrorism" without charge and without access to consular assistance, their lawyers, or their families.

David Hicks was captured by the US military in Afghanistan in November 2001. Mamdouh Habib was detained in Pakistan in early October 2001, before being moved to Egypt and then held in Afghanistan before being transferred to Guantanamo Bay. Both men have now been detained without charge for up to two years.

In early July 2003, the US Government announced the establishment of a military commission that will determine whether those charged and brought before it have committed criminal offences. David Hicks was one of six foreign nationals named as being eligible to stand trial before the commission on charges relating to the "war on terrorism" – charges which have yet to be laid. The Australian Catholic Social Justice Council holds that the indefinite detention has denied these two citizens natural justice and that the proposed military trial of detainees will not afford an adequate standard of justice.

While the atrocious terrorist attacks in the US of 11 September 2001 and in Bali on 12 October 2002 must be condemned in the strongest terms, a distinction must be made between those terrible acts and the treatment of those alleged to have been involved in terrorism.

Grant Niemann has rightly written:

*The right to procedural fairness is incorporated into law at both the national and international level. It has taken centuries to develop procedural fairness guarantees. We should be very slow to abandon them, notwithstanding the horrific consequences of terrorism. If we throw them away when under pressure, (arguably the most important time for them to be applied) we risk descending to the same level of the terrorists themselves. It is relatively easy to identify our enemy as... not worthy of the same standards of justice that we would apply to ourselves. Unfortunately when we take this*

*course, it is possible that we will ourselves become embroiled in the same injustices, that we have reserved for our enemy.*<sup>1</sup>

- **The Case of David Hicks**

David Hicks, a 28 year-old from Adelaide, South Australia, was captured by US military in Afghanistan in November 2001, during the United States-led operation in that country. According to his captors, Hicks was with Taliban forces when captured in a conflict situation. He was captured by the Northern Alliance Forces and handed over to US military custody. Neither David Hicks' family nor his lawyer claim to have any information about what David was doing at the time of his capture. They said that as far as they were aware, he was in Afghanistan with the Taliban, but is not a member of Al Qaeda, and had nothing to do with the terrorist attacks of September 11 2001.

On Tuesday 8<sup>th</sup> July, Prime Minister Howard claimed that David Hicks had received training from Al Qaeda and further claimed that this allegation was supported by admissions made by Hicks since his capture.<sup>2</sup> On Tuesday 22<sup>nd</sup> July – after the US authorities had announced the establishment of a military commission and during Australian-US talks in Washington over the fate of Hicks and Habib – Foreign Minister Alexander Downer repeated the Prime Minister's allegation and expressed the Australian Government's concern, adding the claim that Hicks received training from Al Qaeda over a number of months during 2000 and 2001, including weapons and surveillance training.<sup>3</sup>

Because the family and lawyers of David Hicks have not had access to him, they have no way of confirming the truth about this alleged involvement with Al Qaeda or the nature and level of any such involvement. Concerns have been raised by Hick's lawyers, and by other legal and human rights groups such as Amnesty International that any interrogation following his detention – the source of this information – has been conducted in the absence of legal advice and that this evidence, taken in violation of international humanitarian law, may be used before the military trial.<sup>4</sup>

- **The Case of Mamdouh Habib**

According to available reports, Mr Mamdouh Habib was arrested in Pakistan by the authorities in that country. Apparently, the Pakistani authorities handed him over to those of Egypt, who passed him on in turn to the US. According to statements in the media by Habib's Sydney-based lawyer, Stephen Hopper, Australian security forces have taken an active interest in Mr Habib since at least 1991 when he attended a demonstration while visiting New York. As detailed on ABC Radio's *The Law Report* in September 2002, one of those also at the NY demonstration – Habib's old schoolfriend – was subsequently found to have been involved in the first attack on the World Trade Centre in 1993<sup>5</sup>. Habib was also said to be involved in fundraising for diabetes medication for a Muslim cleric who was later tried for conspiracy to bomb several New York landmarks.

Mamdouh Habib's lawyer insists that he had and has no involvement in Al Qaeda. According to him, Habib made a decision towards the end of 2001 to move his family to Pakistan, and at the time of his arrest in that country, was there in order "to check out schools and business opportunities."<sup>6</sup> Hopper says authorities have produced no evidence to support the claim that Habib was ever in Afghanistan.

---

<sup>1</sup> Grant Niemann, 2002, "Terrorism and the Rule of Law", *Law Society of South Australia Bulletin*, December 2002. Grant Niemann is Lecturer at Law, Flinders University, School of Law. Formerly Senior Trial Attorney with the Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, The Hague.

<sup>2</sup> See transcript of 8/7/03, "Hicks trained with al-Qaeda: PM", *news.com.au*, <http://www.news.com.au/common/printpage/0.6093.6720803.00.html>

<sup>3</sup> ABC report 22/7/03, 'Hicks "trained in weapons, surveillance', *ABC News Online*, <http://www.abc.net.au/news/newsitems/s907228.htm>

<sup>4</sup> Media Statement 23/01/03, 'Amnesty International requests access to Guantanamo base', <http://www.amnesty.org.au/airesources/press-02-01-23.html> <http://www.abc.net.au/news/newsitems/s907228.htm>

<sup>5</sup> ABC Radio National interview, 'Closure through the Courts; Australians in Guantanamo Bay', *The Law Report*, 10/09/02, <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s670568.htm>

<sup>6</sup> Ibid

In fact, he says, the pattern of telephone communication between Habib and his wife suggests the opposite.

Mr Habib continues to languish in Camp Delta. Unlike Mr Hicks, he has not been named as being eligible to appear before the military commission. His detention remains indefinite.

## DETENTION WITHOUT TRIAL

David Hicks and Mamdouh Habib were detained by the US military under an executive order signed by President George W. Bush relating to the detention of non-US citizens involved in the conflict in Afghanistan. Although Mr Hicks may appear before a military commission in the future, neither US Government nor military authorities have thus far charged either Australian with any offence, or indeed provided any evidence that they have committed any illegal act.

Lawyers acting for Hicks and Habib – along with those representing the two British citizens and 12 Kuwaitis similarly detained at Guantanamo Bay – issued a writ of *habeas corpus* on their behalf in the Federal Court in the District of Washington in February 2002, alleging they had been wrongfully detained. In addition to these people, there are about 600 detainees from around 40 countries being held at Guantanamo Bay. Many were captured in Afghanistan or Pakistan by US forces who were pursuing Taliban or those suspected of links with suspected members of Al Qaeda. Others were turned over to the United States by nations or forces on the suspicion of links to terrorist activities.

The argument advanced by the lawyers and families of David Hicks and Mamdouh Habib is that if they have committed an offence, then the rule of law should be applied to them. They should be charged – or, alternatively if they are prisoners of war, they should be dealt with according to the provisions of the Third Geneva Convention – or they should be released. The US chose instead to detain them indefinitely, neither charging them nor extending them the rights and protections due to prisoners of war under the terms of the Geneva Convention.

In response to the writ of *habeas corpus*, the US Government asked the US Federal Court to strike out the application on behalf of the detainees, arguing that Camp Delta and the US naval base at Guantanamo in Cuba are beyond the jurisdiction of the US courts.

The US Government argued that under the terms of the original treaty with Cuba – which was signed in 1903 by the Government of the United States of America and the then Government of Cuba – the sovereignty of the naval base remains with Cuba, even though the US has complete control over the base, and there is no Cuban presence in or effective jurisdiction over the 117.6 square kilometres of territory covered by the base.

The full bench of the US Federal Court ruled on 12 March 2003 that jurisdiction does not extend to the Guantanamo Base, and that the applicants therefore have no recourse to American courts.<sup>7</sup> This means that non-US citizens detained at Camp Delta (including the citizens of ally nations to the US in its “war on terror”) cannot access a criminal trial with all of the associated legal rights that were afforded to John Walker Lindh – a US citizen captured fighting with the Taliban in Afghanistan.

Following the Federal Court ruling, the lawyers representing the two Australians and two Brits detained at Guantanamo Bay lodged an appeal application with the US Supreme Court on 2 September 2003 seeking a ruling on the legality of their clients’ detention. At the same time, seven separate *amici curiae* (or “friends-of-the- court) briefs were filed with the US Supreme Court supporting this appeal application. These amici briefs have been filed by groups representing former US Diplomats, Federal Judges, Lawyers, former American POWs, and a former internee who was

---

<sup>7</sup> Commentary 23/3/03, ‘US Courts abandon Guantanamo Detainees’, *Human Rights Watch*, <http://www.hrw.org/editorials/2003/us032103.htm>; Washington File 2/8/02, ‘Judge rules detainees have no legal right in US Courts’, *US Department of State*, <http://usinfo.state.gov/topical/rights/law/02080201.htm>

detained under a WWII Executive Order authorising the internment of 120,000 individuals of Japanese descent.<sup>8</sup>

In November 2003, the US Supreme Court agreed to hear the case which could determine if the Australian, British and 12 Kuwaiti nationals detained at the naval base in Cuba are being held illegally. The decision of the Supreme Court will effectively determine whether detainees have a right to challenge the legality of their detention in a US court. A decision is due by the end of June next year.<sup>9</sup>

In relation to arguments that the detainees should be treated as prisoners of war under the terms of the Geneva Convention, the American authorities have offered their own interpretation, namely that these belligerents belong to a *sui generis* (or 'one of a kind') category known as "enemy combatants" and that as such "they are not covered by the Geneva Convention and are not entitled to prisoner-of-war (POW) status under treaty."<sup>10</sup>

With regard to the conditions endured by the two Australians at Camp Delta and the indefinite delay in the determination of their legal status, Australian governmental authorities have admitted little responsibility for protecting their rights. The Australian Government's position, enunciated by the then Attorney-General Daryl Williams, MP, and the Minister for Defence, Senator Robert Hill, has been that Messrs Hicks and Habib are in the custody of the US military, and the question of their legal status is a matter for the US.<sup>11</sup> Further, the Australian Government has indicated to the American Government that they regard it as appropriate that they continue to be detained in military custody while the hostilities continue.<sup>12</sup>

The Australian Government sent a team of ASIO, Australian Federal Police and foreign affairs officials to visit Guantanamo Bay in May 2002. Another visit has occurred as recently as November 2003. Despite subsequent assurances that Habib and Hicks were in good health, the Australian government has refused to accept that the detainees should either be charged with a recognised criminal offence, or voluntarily repatriated as prisoners of war.

Following a recent agreement reached between the Australian Government and US authorities, the Attorney-General Philip Ruddock and Minister for Foreign Affairs Alexander Downer repeated the Australian Government's position:

*The Government has been advised that Mr Hicks or Mr Habib could not be prosecuted successfully in Australia in relation to their activities in Afghanistan or Pakistan under Australian laws that applied at the time. The Government has been advised that both men trained with Al Qaeda.*

*Australians who breach the laws of foreign countries while overseas, have no automatic right to be repatriated to Australia for trial.*

---

<sup>8</sup> BBC news report, "'Justice denied' at Guantanamo", *BBC News Online*, <http://news.bbc.co.uk/2/hi/americas/3179014.stm>; also see: [http://www.nofear.org/Archives/2003/10/09/guantanamo\\_bay.html](http://www.nofear.org/Archives/2003/10/09/guantanamo_bay.html); <http://www.davidhenderson.com/gitmo/summary.htm>

<sup>9</sup> *ABC News Online* report: 11/11/03, 'US Supreme Court to rule on Guantanamo case', <http://www.abc.net.au/news/newsitems/s986330.htm>

<sup>10</sup> Statement made by the United States Press Secretary on 2 February 2002.

<sup>11</sup> See Joint News Release, Attorney-General Daryl Williams, and Minister for Defence Senator Robert Hill, 17 December 2001; Attorney-General Daryl Williams, transcript of doorstep interview, Perth, Western Australia, 17 January 2002; Transcript of Attorney-General's doorstep London interview, 8 May, 2002; Transcript of Attorney-General's doorstep interview, Perth, 24 May 2002: See <http://nationalsecurity.ag.gov.au/>

<sup>12</sup> Attorney-General Daryl Williams, transcript of doorstep interview, Perth, Western Australia, 17 January 2002.

*In these circumstances, we accept Mr Hicks and Mr Habib could be tried by the US, provided that their trials are fair and transparent while protecting security interests.*<sup>13</sup>

Despite Mr Hick's consideration for trial before a military commission, and assurances that the US is expediting consideration of Mr Habib's case, both Australian citizens continue to be held in a legal vacuum without charge and without recourse to the provisions of the Third Geneva Convention or the International Covenant on Civil and Political Rights.

## **VIOLATION OF HUMAN RIGHTS**

The human rights of these two persons, both citizens of Australia, have been violated and continue to be violated by the United States of America. This is contrary to the provisions of the Third Geneva Convention (in relation to the treatment of prisoners of war), and articles 9 and 14 of the International Covenant on Civil and Political Rights, to which both Australia and the US are parties.

- ***Third Geneva Convention (Art. 5, para. 2; Arts. 105, 106)***

The US executive government has asserted that these two persons – along with nationals of other countries held at Camp Delta – are “unlawful combatants” who are not entitled to prisoner-of-war status, or to the protections afforded by the Third Geneva Convention. By not allowing their status to be tested in a competent court or tribunal, as required under the Convention, the US is acting contrary to article 5, paragraph 2, of the Third Geneva Convention, which states that:

***“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any other category [of prisoners of war] enumerated in article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal” [of the detaining power].***

To the extent that they should enjoy the full protection of the Convention until such time as their status is definitively determined, David Hicks and Mamdouh Habib have the right to have the lawfulness of their detention reviewed, and the right to a fair trial provided under articles 105 (including: notification of charges; qualified assistance of counsel; interpretation etc.) and 106 (the right of appeal) of the same Convention. The Australian Catholic Social Justice Council contends that the failure to recognise these rights and to offer these protections renders the detention of the prisoners arbitrary.

Related rights concerning judicial proceedings which are outlined in this section of the Convention demand of the Detaining Power that there be: no moral or physical coercion to induce admissions; the prompt conduct of investigations leading to a trial; and no confinement while awaiting trial exceeding three months. It appears from all available evidence that these rights have not been afforded to the inmates of Camp Delta.

- ***International Covenant on Civil and Political Rights (Arts. 9 and 14)***

The indeterminate detention of Hicks and Habib, without charges being laid against them, or trial before a court or “competent tribunal,” violates the provisions of Article 9 of the International Covenant on Civil and Political Rights, which guarantees that everyone has the right to liberty and security of person, and shall not be subjected to arbitrary arrest or detention. Messrs Hicks and Habib are entitled to be informed of any criminal charge, and to be brought before the proper judicial power, or

---

<sup>13</sup> Joint News Release, Attorney-General Philip Ruddock, and Minister for Foreign Affairs Alexander Downer, 25 November 2003:  
<http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Web+Pages/C8E45854478FB7E0CA256DE90018ED4D?OpenDocument>

to be released without delay. However, over the course of their detention, they have been denied the opportunity to test the lawfulness of their detention.

They are also entitled to equal treatment before the courts and tribunals provided in Article 14 of the Covenant, including the minimum guarantees set out in Article 14, paragraph 3 (a) –(g).

**3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:**

**(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;**

**(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;**

**(c) To be tried without undue delay;**

**(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;**

**(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;**

**(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;**

**(g) Not to be compelled to testify against himself or to confess guilt.**

Responding to other cases brought on behalf of detainees at Camp Delta, the Inter-American Court of Human Rights, on 12 March 2002, requested the US to take urgent measures to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.<sup>14</sup> Similarly, the United Nations Working Group on Arbitrary Detention considered the general question of the “deprivation of liberty of persons detained at Guantanamo Bay” in its report to the 59<sup>th</sup> Session of the UN Commission on Human Rights.

The Working Group considered that, should a competent tribunal issue a ruling on the legal status of detainees, it would either rule in favour of a prisoner of war status which would afford detainees the rights of the Geneva Conventions or it would invalidate this status in which case the rights of the Covenant on Civil and Political Rights would take over. The Working Group stated that until such time as a ruling was made, those detained in Guantanamo Bay were entitled to the guarantees of articles 105 and 106 of the Third Geneva Convention.<sup>15</sup>

## **CONDITIONS AT CAMP DELTA**

Already, despite the US Government’s establishment of a military commission before which David Hicks may appear, the fundamental rights ascribed to the two Australians and other detainees have been violated. The damage has already been done both in terms of the denial of rights prescribed

---

<sup>14</sup> Report of the Working group on Arbitrary Detention, UN Commission on Human rights 59<sup>th</sup> Session, 16 December 2002, (E/CN.4/2003/8) p. 21

<sup>15</sup> E/CN.4/2003/8, pp. 19-21

under articles 105 and 106 of the Third Geneva Convention and in terms of the reported conditions endured at Camp Delta.

Serious concerns have been raised by the families and lawyers of these two men about the treatment of detainees. Amnesty International have issued reports which highlight fears for the entire population of detainees at Guantanamo Bay and other US-controlled detention facilities. Because Amnesty International and other human rights groups have been denied access to detainees, it has been difficult to verify reports that torture may have occurred in this facility.

Earlier reports suggested Detainees were confined for 24 hours a day in small cells in sweltering heat. According to David Hicks' lawyer, Hicks was confined to a cage measuring roughly 2 metres by 2.5 metres for his first 170 days. After that, he was reportedly held in solitary confinement in a concrete cell, smaller than the first, under lights for 24 hours a day, with only two 15-minute exercise periods each week.<sup>16</sup>

Amnesty says that interviews with previous detainees suggest minimal direct physical ill treatment but that practices of hooding, blindfolding, handcuffing, shackling and sleep deprivation had occurred<sup>17</sup>. Concerns have also been raised about the use of interrogation techniques including "stress and duress" methods sometimes characterised as "torture lite".<sup>18</sup> As reported in July 2003, the commander of Camp Delta stated that three-quarters of detainees had confessed some involvement with terrorism and that many had turned on former friends and colleagues. Major-General Geoffrey Miller revealed a system of "incentive-based interrogations" was operating which offered rewards including more recreation time, extra food rations to keep in their cell cages, or being moved to the prison's medium security area.<sup>19</sup>

On more than one occasion, the International Red Cross has made known its concern over the "worrying deterioration in the psychological health" of a large number of detainees denied due legal process and subject to a "seemingly open-ended system of internment".<sup>20</sup>

Some of the conditions reported at Camp Delta are in direct violation of international minimum standards for the humane treatment of prisoners. The apparent further exploitation of these conditions under the incentive-based system to elicit verbal statements that could be used as evidence before the military commission would seem to amount to coercion to induce admissions.

Clearly, the previous treatment of detainees may undermine the ability of assigned military lawyers to ensure adequate representation before a military commission. In October, the US military lawyer for David Hicks, Colonel William Gunn admitted it would be difficult for military defence teams to win the trust of detainees appearing before the commission. Colonel Gunn expressed some concern that the detainees may be extremely distrustful of military defence teams: "They may well look at us as the enemy and be very suspicious of our services," he said.<sup>21</sup>

---

<sup>16</sup> Steven Kenny, speaking on ABC radio *The Law Report*, 10/9/02

<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s670568.htm>

<sup>17</sup> Media Statement 8/10/03, 'Claims of torture at Guantanamo Bay', *Amnesty International Australia*,

<http://www.amnesty.org.au/airesources/press-03-10-09.html>

<sup>18</sup> Media report 25/1/03, 'US interrogators turn to "torture lite"', *The Guardian*,

<http://www.guardian.co.uk/usa/story/0,12271,882002,00.html>

<sup>19</sup> Media Reports: 26-27/7/03, 'Camp Delta detainees cave in', *Weekend Australian*, p.12; 25/7/03, 'Detainees sprout pre-trial intel tips', *Herald Sun* [http://heraldsun.news.com.au/common/story\\_page/0,5478,6808197%255E401,00.html](http://heraldsun.news.com.au/common/story_page/0,5478,6808197%255E401,00.html)

<sup>20</sup> Operational Update 25/8/2003, 'Guantanamo Bay: Overview of the ICRC's work for internees', *International Red Cross*, [www.icrc.org/web/eng/siteeng0.nsf/html/5ORC5V?OpenDocument](http://www.icrc.org/web/eng/siteeng0.nsf/html/5ORC5V?OpenDocument); Media Report 10/10/03, 'Red Cross blasts U.S. over detainees', MSNBC News, <http://www.msnbc.com/news/977037.asp?cp1=1>

<sup>21</sup> *ABC News Online* reports: 30/10/03, 'Hicks' US military lawyer admits difficulties', <http://www.abc.net.au/news/newsitems/s978198.htm>

## THE MILITARY COMMISSION

Under the November 2001 Military Order of President Bush, concerning the “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism”<sup>22</sup>, individuals made subject to the order will be tried by a military commission. Under this Order, the President designates individuals suspected of terrorism as being eligible for trial before a commission. The US authorities must then decide if those named should be charged. The time between detainees being named as eligible for trial and charges actually being laid is indeterminate. In July 2003, Australia’s Justice Minister Senator Chris Ellison announced the prosecution was ready to proceed.<sup>23</sup> Despite the November 2003 announcement that the Australian Government has finalised procedures which would apply to possible military commission trials, no date has yet been set for the trial of David Hicks and Mamdouh Habib has not been named as being eligible to appear before such a commission. Neither have they been charged with any offence.

The military commission will be comprised of three to seven military officers in addition to an Office of the Chief Prosecutor and an officer of the Chief Defence Counsel<sup>24</sup>. Under the originally proposed procedures, the six named detainees appearing before the commission would be guaranteed:

- a presumption of innocence;
- a protection from compulsory testimony;
- a standard of proof beyond reasonable doubt;
- access to witness documents to be used in defence;
- ability to cross-examine prosecution witnesses; and
- representation by defence counsel.

When convicting and sentencing, two-thirds of the commission would need to be in agreement. However, a unanimous vote would be required in handing down a death sentence.

Many Australians were rightly outraged that the death penalty could be applied to a fellow citizen. There were additional concerns that the military commission would not offer a fair trial as many of the rights and protections provided by a non-military court would not be afforded.

In July 2003, a Government delegation from the United Kingdom, followed by an Australian one, were successful in negotiating a number of concessions for their citizens. The concessions gained for Mr Hicks include:

- protection from the death penalty;
- communication between the accused and the defence counsel free of monitoring;
- no reliance on evidence that would require the exclusion of the accused from proceedings;
- allowing the defence counsel to retain an appropriately qualified Australian lawyer as a ‘consultant’, subject to security restrictions; and
- agreement between Australia and the US towards the establishment of arrangements for Mr Hicks to serve any term of imprisonment in Australia.<sup>25</sup>

---

<sup>22</sup> November 2001 Military Order of the President of the USA,  
<http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>

<sup>23</sup> Justice Minister Sen. Chris Ellison, transcript of doorstep interview, 23/7/03  
<http://www.law.gov.au/www/justiceministerHome.nsf/Web+Pages/578636B3A15594EECA256D6D000426B0?OpenDocument>

<sup>24</sup> Refer: Justice Mark Weinberg, *Guantanamo Bay, Detention and Trial by Military Commission*, Eighth International Criminal Law Congress, <http://www.crimbarvic.org.au/weinberg.html>

<sup>25</sup> Justice Minister Sen. Chris Ellison, transcript of doorstep interview, Washington, 23/7/03,  
<http://nationalsecurity.ag.gov.au/www/justiceministerHome.nsf/Web+Pages/578636B3A15594EECA256D6D000426B0?OpenDocument>

Since this time, the Australian Government has further negotiated for:

- an Australian Government delegation to the trials to be able to make submissions to a review panel of the commission;
- the right of the two Australians to have face-to-face communications with a security cleared Australian lawyer of their choice;
- telephone communication with family members once they are listed as eligible for trial and two family members would be able to attend each man's trial; and
- the presence of an independent legal observer sanctioned by the Australian Government.<sup>26</sup>

Importantly, the Australian Government has won the extension of key concessions gained for Mr Hicks for Mr Habib, should he be listed as eligible for trial.

Despite the welcomed concessions gained from US authorities by the Australian Government, the Australian Catholic Social Justice Council continues to share the concerns of many community leaders, civil liberties and other groups that the two Australians and any other detainees appearing before a military commission are unlikely to receive the standard of trial that would be guaranteed in a criminal court of the US or Australia. Following are some of these concerns:

- ***The death penalty***

The guarantee that the death penalty will not be applied in a sentence against the Australians is a source of great relief for all concerned with the wellbeing of these men and for those who also oppose the death penalty. However, the same guarantee has not been extended to non-Australian and UK detainees who are eligible to appear before the military commission or to the rest of the detainees at Guantanamo Bay.

Australia opposes the death penalty. It has made this clear to the US authorities in the case of Mr Hicks. It should argue forcefully against such a penalty being applied to any detainee at Camp Delta. The Australian Catholic Social Justice Council repeats the words of Pope John Paul II in a homily given in St Louis in 1999 in which he urged against the death penalty.

*The dignity of human life must never be taken away, even in the case of someone who has done great evil. Modern society has the means of protecting itself without definitely denying criminals the chance to reform. I renew the appeal for a consensus to end the death penalty, which is both cruel and unnecessary.*<sup>27</sup>

These words referring to the use of the sentence in criminal courts in the US and around the world can be applied to the circumstances of non-US citizens being held unlawfully at Guantanamo Bay.

- ***Rules of evidence do not apply***

Lawyers for the accused and other legal representatives have warned that the right to a fair trial will be undermined because the military commission will not operate under the standard rules of evidence – permitting hearsay and statements made under interrogation. This concern seems well founded given that interrogations have been conducted in the absence of legal advice and it now appears that some admissions may have been induced under coercion.

---

<sup>26</sup> Joint News Release, Attorney-General Philip Ruddock, and Minister for Foreign Affairs Alexander Downer, 25 November 2003:

<http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Web+Pages/C8E45854478FB7E0CA256DE90018ED4D?OpenDocument>

<sup>27</sup> Michael Costigan, 2000, *The Death Penalty: Why Catholics should oppose it*, Catholic Social Justice Series No.40, ACSJC, p.9

Another of David Hick's lawyers, Mr Franco Camatta, and Shadow Attorney-General Robert McClelland fear that statements made by senior politicians in Australia, regarded by them as prejudicial allegations of guilt, could be admitted as evidence before the military tribunal. Given his belief that any prospect of a fair trial is likely to be damaged by these sorts of statements, Camatta has called for Hicks to be tried before an ordinary court.<sup>28</sup>

- ***Lack of judicial review or appeal rights***

Those charged and brought before a military tribunal will have no right to challenge the jurisdiction of the court to hear a case. Serious questions have been raised about the independence of the military commission and the right of the accused to appeal decisions. US legal advisors acting for detainees at Guantanamo Bay say the absence of independent judicial review of the military commissions by US courts is a fundamental flaw of this system.<sup>29</sup> There is no separation of this tribunal from the executive branch of government and this may make its hearings irrelevant given that Section 4(c)(8) of President Bush's Military Order states:

*Submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of State if so designated by me for that purpose.*

Lawyer Steven Kenny has argued that this provision leaves the final decision on the continued detention, conviction or sentencing of a prisoner to the personal decision of the President of the United States.<sup>30</sup>

The Law Council of Australia and the Law Society of New South Wales believe that the establishment of military commissions will undermine the rule of law and "effectively form a parallel system for trying people when the criminal justice system has determined that there may be no criminal act on which to base a prosecution"<sup>31</sup>. They regard the lack of judicial review or appeal rights for the accused as unacceptable.

- ***Possibility of further detention as "enemy combatant"***

Following the announcement of a military commission, American-based lawyer Joseph Marguilles stated on Wednesday 9<sup>th</sup> July that even if the commission exonerated David Hicks, he could still be held indefinitely at Guantanamo Bay as an "enemy combatant".<sup>32</sup> Two days later, Prime Minister Howard said he expected Mr Hicks to be released if found not guilty:

*I think if he's found not guilty I think most people would expect him to be released... I think most people looking at the thing from a commonsense fair go point of view, would take the view that if he's found not guilty, well that should be the end of it.*<sup>33</sup>

However, Pentagon official Major John Smith informed *The Age* (12<sup>th</sup> July 2003) that if the accused were found not guilty of a criminal offence, "that doesn't necessarily mean they are still not an enemy combatant who is a threat to the US". He said the US would still have the right to keep men such as

---

<sup>28</sup> ABC News Online reports: 22/7/03, 'Hicks "trained in weapons, surveillance', <http://www.abc.net.au/news/newsitems/s907228.htm>, 24/7/03, 'US rules out death penalty for Hicks', <http://www.abc.net.au/news/newsitems/s908804.htm>

<sup>29</sup> *The Sydney Morning Herald*, 'Hicks spared death but will not get Australian lawyer', 25/07/03 p.4

<sup>30</sup> Refer: Mr Steven Kenny, *Justice Delayed*, Eighth International Criminal Law Congress, <http://www.crimbarvic.org.au/kennyb.html>

<sup>31</sup> Media Statement 23/7/03, 'Hicks tribunal unacceptable', *Law Society of New South Wales*, <http://www.lawsociety.com.au/page.asp?PartID=7413>

<sup>32</sup> Media Report 9/7/03, 'Hicks may "never escape"', *news.com.au*, <http://www.fairgofordavid.org/htmlfiles/media/news9july03.htm>

<sup>33</sup> ABC News Online reports: 22/7/03, 'PM expecting Hicks to be released if not guilty', <http://www.abc.net.au/news/justin/nat/newsnat-11jul2003-36.htm>

Hicks “removed from the battlefield”.<sup>34</sup> Continued detention until the cessation of hostilities against an allusive enemy in this so-called “war on terror” would simply worsen the inhumanity of this indefinite detention. It is hoped that the Prime Minister’s view will prevail and that the Australian Government will act to see that it does.

## CONCLUDING REMARKS

The available information and media coverage regarding David Hicks and Mamdouh Habib – their capture, detention and possible trial before a US military commission – has given rise to strong words and emotions in our community. The disastrous impact of terrorist attacks in the lives of Australians and Americans has made the fate of these Australians the subject of much speculation and even condemnation. The public reaction against the possible activities of Hicks and Habib has increased as future military trial arrangements have become clearer. Public statements by political leaders alleging the involvement of David Hicks with Al Qaeda have been joined by often prejudicial media headlines implying guilt. For example, the front page headline of the Sunday Telegraph on 20 July 2003 said “BRING HOME THE TRAITOR”.

Despite these harsh words, the fact remains that these Australians and the other inmates of Camp Delta have thus far been arbitrarily detained without charge and without the fundamental rights afforded by the Third Geneva Convention or the International Covenant on Civil and Political Rights to which both Australia and the US are signatories.

Regardless of the guilt or innocence of David Hicks and Mamdouh Habib in relation to terrorist offences, the fact remains that they are yet to be charged or to have these claims tested in any court. Australians believe that their fellow citizens are entitled to the protection of the rule of law regardless of the nature of charges which might be laid against them. Messrs Hicks and Habib are entitled to a presumption of innocence and to a fair trial. Should they be afforded their right to be charged and have their cases heard, it is becoming clear that the fairness of the hearing they are likely to receive before a military commission will fall short of that which United States or Australian citizens would expect before a criminal court in the US or Australia.

In addition to the human rights that are owing to detainees at Guantanamo Bay, the assurance of their basic legal rights should be regarded as a vital component in the international response to terrorism. The treatment of all detainees at Camp Delta and the rights afforded to them during trial hearings will have a significant bearing on the credibility of verdicts. The President of the Law Council of Australia makes a convincing argument that justice will best be achieved for those accused of terrorism as well as the victims of terrorism under the established rule of law.<sup>35</sup> Flawed procedures such as the ones proposed for the military commission may actually undermine efforts to address terrorism and its causes by calling into question the legitimacy of any outcomes.

The Australian Catholic Social Justice Council welcomes the efforts of the Australian Government through the recent delegations to Washington to secure certain concessions for David Hicks and Mamdouh Habib - not least of which was protection from the death penalty. However, more can and should be done to promote and protect the rights of Australian citizens in Guantanamo Bay.

---

<sup>34</sup> *The Age*, ‘Why Hicks is unlikely to get a fair trial’, 12/07/03 p.4 *Insight*

<sup>35</sup> See <http://www.lawcouncil.asn.au/read/2003/2383309761>

## **A CALL ON GOVERNMENT**

The Australian Catholic Social Justice Council

- (I) Calls on the Australian Government to make every effort to end the indefinite detention of these two citizens.
- (II) Calls for the immediate access by these citizens to the ordinary process of justice through the laying of any appropriate charges to be determined by a non-military court in Australia or elsewhere.
- (III) Failing implementation of either of these calls, urges the Australian Government to continue negotiating with US authorities to have determined, as a matter of priority, by a competent tribunal (preferably a tribunal under the aegis of the UN) whether these citizens are entitled to be treated as Prisoners of War under articles 4 and 5 of the Third Geneva Convention.
- (IV) Failing any of the above, urges the Australian Government to continue negotiations with the US authorities:
  - a. to ensure further concessions with regard to a military commission addressing concerns over rules of evidence, judicial review and rights of appeal so that they conform to long-established international minimum standards and protections recognised by customary international law;
  - b. to ensure that each of these citizens have a right to appoint their own defence lawyer;
  - c. to ensure that the established position of an independent legal observer to be present at all hearings of the military commission will carry out the tasks of monitoring and reporting without any hindrance, direction or censorship by the US or Australian governments;
  - d. to ensure that in the eventuality of a not guilty verdict, Australian citizens would be freed from detention immediately; and

As signatories to international laws promoting the fundamental rights of all, the Australian Government should also consider negotiating with the US Government for the extension of similar rights to all detainees of Guantanamo Bay.

November 2003