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Dear Mr O'Brien

LEGAL OPINION ON WHETHER DAVID HICKS CAN BE TRIED IN AUSTRALIA

1. You have asked us to advise on whether David Hicks can be tried in Australia under Australian law. Our conclusion is that he can be charged and tried in Australia in regard to the majority of the charges brought against him by the United States Military Commission. To the extent that charges could not be brought under Australian law, legislation could be enacted with retrospective effect to enable this to occur.
2. We have had regard to Australian law as it existed at the time of the alleged offences, namely, 'from on or about January 1, 2001 to on or about December 2001'. We do not examine the evidence against Mr Hicks, and so reach no conclusion on whether there is sufficient evidence to justify charges being laid or whether he might be found guilty of such crimes.

THE CHARGES AGAINST MR HICKS

3. On 10 June 2004, the United States Department of Defense announced its approval of three charges against Mr Hicks:
 1. Conspiracy to commit war crimes (specifically, attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent and terrorism);
 2. Attempted murder by an unprivileged belligerent; and
 3. Aiding the enemy.

FIRST AND SECOND CHARGES: WAR CRIMES

4. The first two charges are war crimes derived from the international law of armed conflict.¹ The law applicable to international armed conflicts (such as that in Afghanistan in 2001) is largely found in the four Geneva Conventions of 1949 (Geneva Conventions),² Additional Protocol I of 1977³ and customary international law. Australia implemented the Geneva Conventions and Additional Protocol I into Australian law under the *Geneva Conventions Act 1957* (Cth), which commenced operation on 1 September 1959.
5. In order to determine whether the *Geneva Conventions Act* applies in relation to the charges against Mr Hicks, it is necessary to determine four questions:
 - I Does the *Geneva Conventions Act* apply to the armed conflict in Afghanistan in which the charged offences are alleged to have been committed?
 - II Does the *Geneva Conventions Act* cover the crimes with which Mr Hicks is charged?
 - III Does a conspiracy to commit such crimes (in the case of the first charge) or attempt to commit such crimes (in the case of the second charge) constitute an offence under Australian law?
 - IV Does the *Geneva Conventions Act* vest jurisdiction in Australian courts to determine these matters?

I Application of the *Geneva Conventions Act* to the conflict in Afghanistan

6. The *Geneva Conventions Act* (as amended in 1991) implements the four Geneva Conventions and Additional Protocol I into Australian law. However, the terms of the treaties themselves restrict the scope of the armed conflicts to which they will apply. The treaties only apply to an armed conflict between states that are either parties to the treaties or accept and apply the provisions of the treaties.⁴ In determining which treaties apply to the conflict in Afghanistan, a distinction must be drawn between the Geneva Conventions and Additional Protocol I.
7. Additional Protocol I does not apply to the armed conflict in Afghanistan. While Australia ratified Additional Protocol I on 21 June 1991, neither the United States nor Afghanistan have ratified the Protocol. It should be noted that certain of the provisions of the Protocol form part of customary international law. However, in so far as the *Geneva Conventions Act* only incorporates the provisions in their treaty form, and given the state of the present

¹ Military Instruction No 2 (30 April 2003), which sets out the 'Crimes and Elements for Trials by Military Commission' states that '[t]hese crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war'.

² *Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces and Field* (1949) [1958] ATS 21 (First Geneva Convention); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* [1958] ATS 21 (Second Geneva Convention); *Geneva Convention Relative to the Treatment of Prisoners of War* [1958] ATS 21 (Third Geneva Convention); *Geneva Convention relative to the Protection of Civilian Persons in Time of War* [1958] ATS 21 (Fourth Geneva Convention).

³ *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I) (1977) [1991] ATS 29.

⁴ Article 2, common to all four Geneva Conventions.

Australian authority,⁵ it is likely that an Australian court would refuse to recognise even those provisions of the Protocol that form part of customary international law as applicable under Australian law. Australian courts would at most be likely to have regard to Additional Protocol I as a helpful aid in the interpretation of the relevant provisions of the Geneva Conventions.⁶

8. The situation in relation to the Geneva Conventions is different. All relevant states that were parties to the conflict in Afghanistan were parties to the Geneva Conventions at the relevant time. The Geneva Conventions were ratified by the United States on 2 August 1955, by Afghanistan on 26 September 1956 and by Australia on 14 October 1958. It might be thought that the Geneva Conventions do not apply to the Afghan conflict because the Taliban government was not at the time recognised by certain parties to the conflict as the legitimate government of Afghanistan. This is contradicted by the Geneva Conventions. The protections in the Conventions expressly apply in relation to '[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power'.⁷ The Pictet Commentaries to the Geneva Conventions also support the interpretation that the Conventions are intended to apply regardless of the legitimacy of the enemy government.⁸
9. The only party to the conflict that was not a party to the Geneva Conventions is Al Qa'ida. However, regardless of Al Qa'ida's involvement, the Conventions will continue to apply to the conflict between the Taliban and the allied forces. In circumstances where a non-party is involved in the conflict, common Art 2 of the Geneva Conventions provides: 'Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.'
10. In any event, the position of Al Qa'ida would only be relevant if Mr Hicks was found to be acting independently of the Taliban and exclusively on behalf of Al Qa'ida. This is not the position set out in the Charge Sheet, which alleges '[o]n or about October 2001, after Coalition bombing operations commenced, Hicks joined an armed group outside the airport, where they guarded a Taliban tank'. It is also alleged that he 'intentionally aided the enemy, to wit: al Qaida and the Taliban'.⁹
11. The Geneva Conventions, and therefore the *Geneva Conventions Act*, applies to the armed conflict in Afghanistan in which the offences are alleged to have been committed.

⁵ In *Nulyarimma v Thompson* (1999) 96 FCR 153 two of the three Federal Court judges held that the crime of genocide under customary international law could not be recognised as a crime under Australian law in the absence of legislative incorporation.

⁶ Article 31 of the *Vienna Convention on the Law of Treaties* [1974] ATS 2; 1155 UNTS 331 provides that a treaty shall be interpreted taking into account 'any subsequent practice in the application of the treaty' and 'any relevant rules of international law applicable in the relations between the parties'.

⁷ First Geneva Convention, Art 13(3); Second Geneva Convention, Art 13(3); Third Geneva Convention, Art 4A(3).

⁸ Pictet J S, 'Commentary to Article 2', *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* 19-20.

⁹ Charge Sheet, *United States v David Matthew Hicks* (10 June 2004), <http://www.dod.gov/news/Jun2004/d20040610cs.pdf>, 5.

II Application of *Geneva Conventions Act* to the charged offences

12. It must next be considered whether the *Geneva Conventions Act* implements into Australian law the specific crimes making up the first and second charges, namely attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent and terrorism. In order to bring the charge of conspiracy contained in the first charge, or the charge of attempted commission in the second charge, it is necessary first to determine that the crimes to which the conspiracy or attempted commission related formed part of Australian law at the relevant time.

(i) *Attacking civilians or civilian objects*

13. In so far as the crimes charged relate to attacks on civilians or civilian objects, the crimes charged are clearly offences under Australian law. Attacks on civilians or civilian objects are prohibited by Arts 27,¹⁰ 32¹¹ and 33¹² of the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*¹³ (Fourth Geneva Convention).

14. Art 147 of the Fourth Geneva Convention sets out those provisions of the Convention the breach of which are considered ‘grave breaches’, and which will therefore constitute war crimes:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment ... wilfully causing great suffering or serious injury to body or health ... and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

15. Grave breaches will therefore include wilful killing, inhuman treatment or causing serious injury to civilians and extensive destruction and appropriation of civilian property.

16. These crimes are implemented into Australian law under section 7 of Part II of the *Geneva Conventions Act*, which provided at the relevant time:

- 7(1) A person who, in Australia or elsewhere, commits a grave breach of any of the Conventions or of Protocol I is guilty of an indictable offence.
- (2) For the purposes of this section: ...
 - (d) a grave breach of the Fourth Convention is a breach of that Convention involving an act referred to in Article 147 of that Convention committed against persons or property protected by that Convention.

¹⁰ Article 27 of the *Geneva Convention relative to the Protection of Civilian Persons in Time of War* [1958] ATS 21 (Fourth Geneva Convention) provides: ‘Protected persons ... shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof.’

¹¹ Article 32 of the Fourth Geneva Convention provides: ‘The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.’

¹² Article 33 provides: ‘Reprisals against protected persons and their property are prohibited.’

¹³ [1958] ATS 21.

(ii) Murder and destruction of property by an unprivileged belligerent

17. The act of murder by an unprivileged belligerent is a crime listed in both the first and second charge. The first charge also includes the crime of destruction of property by an unprivileged belligerent. Of all the offences charged, these are the only offences that do not clearly constitute an offence under Australian law. The focus of these offences is the alleged status of Mr Hicks as an ‘unprivileged belligerent’.
18. The offences derive from the distinction drawn in the law of armed conflict between combatants (or belligerents) and civilians. One aspect of this distinction is that, while combatants are entitled to take a direct part in hostilities (extending to the killing of other combatants, destruction of military objectives and incidental and proportionate killing of civilians and destruction of civilian objects), anyone not falling within the category of combatants (defined in Art 13 of the First and Second Geneva Conventions and Art 4A of the Third Geneva Convention) is not entitled to do so. The participation in hostilities by a non-combatant, or an ‘unprivileged belligerent’, is a violation of the laws and customs of war. In the *Hostages case*, the United States Military Tribunal at Nuremberg held that:
- [T]he rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.¹⁴
19. The offences are not expressly provided for in the Geneva Conventions. However, having regard to the principles of treaty interpretation in the *Vienna Convention on the Law of Treaties*, there is an argument in favour of the recognition of the offence under the Fourth Geneva Convention. Art 31 of the *Vienna Convention* provides that, in the interpretation of a treaty, ‘[t]here shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties’. It is a principle of customary international law that non-combatants are prohibited from direct participation in hostilities such that the killing of any protected person (including combatants) by a non-combatant becomes unlawful. In addition, Art 147 of the Fourth Geneva Convention provides that ‘wilful killing ... wilfully causing great suffering or serious injury to body or health ... and extensive destruction and appropriation of property, not justified by military necessity *and carried out unlawfully and wantonly*’ (emphasis added) will constitute a grave breach ‘if committed against persons or property protected by the present Convention’.¹⁵ Wilful killing of a civilian or combatant by an individual who does not benefit from combatant immunity under the law of armed conflict can be said to constitute ‘wilful killing’ not justified by military necessity and carried out unlawfully, and therefore constitutes a grave breach under the Fourth Geneva Convention.

¹⁴ *Hostages case*, 8 July 1947 – 19 February 1948, *Law Reports of Trials of War Criminals* (Vol XV), 111.

¹⁵ Persons protected by the Convention include ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’: Fourth Geneva Convention, Art 4. Article 4 is therefore sufficiently broad to cover all persons involved in an armed conflict, including combatants who find themselves in the hands of enemy forces, within the protection provided by the Convention.

20. Australian courts have never prosecuted an individual for either offence. There is therefore no Australian authority on the issue. If the Fourth Geneva Convention is interpreted consistently with the principles of interpretation set out in Art 31 of the *Vienna Convention on the Law of Treaties*, the Convention can be interpreted to recognise the offence, which would render it an offence under the *Geneva Conventions Act*. Australian courts are not required to favour a strict construction of criminal legislation, and this interpretation is achievable utilising general principles of statutory construction.¹⁶ However, this conclusion cannot be stated with any certainty.

(ii) Terrorism

21. The offence of terrorism, as defined in Military Commission Instruction No 2, includes as an element the requirement that '[t]he killing, harm or destruction took place in the context of and was associated with armed conflict'.¹⁷ The charged offence therefore refers to acts of terrorism committed during an armed conflict, and is reflected in the Geneva Conventions. Art 33 of the Fourth Geneva Convention provides that 'all measures of ... terrorism are prohibited'. To the extent that an act of terrorism extends to 'wilful killing ... wilfully causing great suffering or serious injury to body or health ... and extensive destruction and appropriation of property', it will constitute a grave breach under Art 147 of the Convention, and will constitute an offence under Australian law.

III Recognition of conspiracy or attempt to commit charged offences

22. In the case of the first charge, it is necessary to establish that a conspiracy to commit such offences is a crime under Australian law. At the relevant time,¹⁸ section 86 of the *Crimes Act 1914* (Cth) provided:

A person who conspires with another person to commit an offence against a law of the Commonwealth punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

23. While the legality of a conspiracy charge is controversial under international criminal law, Australian domestic law clearly recognises the offence of conspiracy to commit an offence against the *Geneva Conventions Act*.
24. The second charge relates to the attempted commission of an offence. Section 6A of the *Geneva Conventions Act* provides that Ch 2 of the *Criminal Code Act 1995* (Cth) applies

¹⁶ *Beckwith v R* (1976) 135 CLR 569, 576 (Gibbs J): 'The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of a subject by refusing to extend the category of criminal offences ... The rule is perhaps one of last resort'.

¹⁷ United States Department of Defense, 'Military Commission Instruction No 2: Crimes and Elements for Trials by Military Commission' (30 April 2003), 13.

¹⁸ As the *Criminal Code Act 1995* (Cth) only entered into force on 15 December 2001, the *Crimes Act 1914* (Cth) is applicable to the present case.

to all offences against the Act.¹⁹ Section 11.1 of the Criminal Code (which is part of Ch 2) provides: ‘A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.’

IV Vesting of jurisdiction in Australian courts

25. At the time of the alleged conduct, section 7 of the *Geneva Conventions Act* vested jurisdiction in the High Court and State Supreme Courts to hear offences against the Act.
26. It should be noted that, in 2002, Pt II of the *Geneva Conventions Act* (which contained sections 6 and 7) was repealed by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth). The latter Act replaced Pt II of the *Geneva Conventions Act* with a new Subdiv D of Div 268 of the Commonwealth Criminal Code relating to ‘War Crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions’.
27. The repeal of sections 6 and 7 of the *Geneva Conventions Act* does not affect the jurisdiction of the relevant courts to hear offences under section 6 of the *Geneva Conventions Act* allegedly committed prior to its repeal.²⁰

THIRD CHARGE: AIDING THE ENEMY

28. The third charge of ‘aiding the enemy’ is, by its nature and with limited exceptions, an offence against the state of which one is a national. The relationship of ‘enemy’ is defined by reference to the country of which one is a national. The offence does not derive from the Geneva Conventions or Additional Protocol I. It is generally found in the military code or domestic criminal law of a particular country.
29. At the relevant time, the offence of aiding the enemy (or related offences) existed under Australian law in a number of Acts:
1. section 15 (‘aiding the enemy’) of the *Defence Force Discipline Act 1982* (Cth);
 2. sections 24 (‘treason’) and 24AA (‘treachery’) of the *Crimes Act 1914* (Cth); and
 3. sections 6 (‘hostile activity in a foreign state’) and 7(d) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).
30. The first offence stated above is inapplicable to Mr Hicks as it only applies to members of the Australian Defence Force or civilians accompanying the Defence Force.
31. The second stated offences of treason and treachery are the offences most applicable to those accused of aiding an enemy of the Commonwealth of Australia. The offence of treason makes it an indictable offence to ‘assist by any means whatever, with intent to assist, an enemy ... at war with the Commonwealth...and specified by proclamation made

¹⁹ This provision only came into force in April 2001, yet the Charge Sheet covers alleged conduct ‘from on or about January 1, 2001 to on or about December 2001’. In relation to conduct before April 2001, section 7 of the *Crimes Act 1914* (Cth) is applicable.

²⁰ *Acts Interpretation Act 1901* (Cth), section 8.

for the purpose of this paragraph to be an enemy at war with the Commonwealth'.²¹ The offence of treachery makes it an indictable offence to assist persons 'against whom ... the Defence Force ... is likely to be opposed' where those persons 'are specified ... by proclamation to be persons in respect of whom...this subsection applies'.²² Section 3A of the *Crimes Act* provides that extraterritorial offences against these provisions may be prosecuted by Australian courts. However, Mr Hicks cannot be prosecuted under either of these provisions. This is because the Australian Government did not make the proclamation of 'enemy status' required under the relevant Acts in order to attract the offence.

32. While the first two stated offences do not apply, the third does provide an avenue for the prosecution of Mr Hicks before Australian courts. Conduct alleged against Mr Hicks in the Charge Sheet predominantly relates to participation in training exercises. Section 7(d) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* provides that a person (being an Australian citizen)²³ shall not, whether within or outside Australia:

allow himself or herself to be trained or drilled, or be present at a meeting or assembly of persons with intent to allow himself or herself to be trained or drilled, in the use of arms or explosives, or the practice of military exercises, movements or evolutions, with the intention of committing an offence against section 6.

33. Sections 6(3)(aa), (b) and (d) make it an offence to 'enter a foreign State with intent to engage in a hostile activity in that foreign State', defining 'hostile activity' as inter alia 'engaging in armed hostilities in the foreign State', 'causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury' or 'unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State'.
34. Mr Hicks could be charged under section 6 in relation to alleged participation in armed hostilities in Afghanistan, or under section 7(d) (read together with section 6) for alleged participation in military exercises with intent to engage in hostile activity in Afghanistan, the United States or any other applicable state.
35. A limit on the application of the *Crimes (Foreign Incursions and Recruitment) Act 1978* is that section 6(4)(a) states that it does not apply to any act done by a person as part of the person's service in 'the armed forces of the government of a foreign State'. Therefore, the Act would not apply if the evidence showed that Mr Hicks was part of the regular armed forces of the government of Afghanistan, namely, the Taliban. The fact that Mr Hicks is charged, among other things, with being an 'unprivileged belligerent' suggests that he is not considered to have been a member of the regular armed forces. Moreover, if Mr Hicks was thought to have been part of the regular armed forces of the Taliban, he would clearly be entitled to protection as a prisoner of war, a position that has consistently been denied by the United States government.

²¹ *Crimes Act 1914* (Cth), section 24. It should be noted that this provision was repealed in 2002, and replaced by section 80.1 of the *Criminal Code Act 1995* (Cth). The repeal of this section does not affect its application to conduct engaged in prior to its repeal: *Acts Interpretation Act 1901* (Cth), section 8.

²² *Crimes Act 1914* (Cth), section 24AA.

²³ *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), section 6(2)(a)(i).

RETROSPECTIVE LEGISLATION

36. If there is uncertainty as to whether certain of the charged offences form part of Australian law at the relevant time, these offences can be created by retrospective legislation.
37. The High Court has held that the Australian Constitution does not prevent the Australian Parliament from enacting retrospective criminal legislation.²⁴ However, there is some uncertainty as to the scope of this power. The decision of the High Court in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 suggests that the Commonwealth can, at the least, enact retrospective legislation in regard to crimes that were, at the time of their commission, recognised crimes under international law or share the basis of crimes (such as murder or assault) that already form part of Australian law.

CONCLUSIONS

38. Our opinion is that the charges brought against Mr Hicks by the United States Military Commission exist under Australian law in the following form:
- Conspiracy to commit grave breaches of the Fourth Geneva Convention (specifically, attacking civilians, attacking civilian objects and terrorism) in contravention of section 6 of the *Geneva Conventions Act 1957* (Cth) (read together with section 86 of the *Crimes Act 1914* (Cth));
 - Engaging in hostile activity in a foreign state in contravention of section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth);
 - Allowing himself to be trained or drilled in the use of arms or explosives, or the practice of military exercises with the intention of engaging in a hostile activity in a foreign state in contravention of section 7(d) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).
39. It is also arguable, though not certain, that the crimes of conspiracy to murder and engage in destruction of property by an unprivileged belligerent and attempted murder by an unprivileged belligerent constitute crimes under section 6 of the *Geneva Conventions Act 1957* (Cth) (as read together with section 86 of the *Crimes Act 1914* (Cth) and section 11.1 of the *Criminal Code Act 1995* (Cth).
40. To the extent that these or any of the other charges could not be brought under Australian law, legislation incorporating crimes under international law in existence at the time of the alleged conduct might be enacted with retrospective effect to enable prosecution before Australian courts.

Yours sincerely

Professor George Williams

Devika Hovell

²⁴ *R v Kidman* (1915) 20 CLR 425.