COMBATANT STATUS AND THE 'WAR ON TERROR'

Lessons from the Hicks case

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David Hicks is now back in Australia. The media attention that accompanied his detention at Guantanamo Bay has largely dissipated. However, it would be unfortunate if we forgot about Hicks. The legal issues surrounding his detention and aborted prosecution by US authorities carry enduring implications for the conduct of the international 'war on terror'.

In this short article, I focus on two issues arising from the Hicks case. The first concerns the level of protection to which Hicks was entitled under international law. The public debate and government statements surrounding this issue focused heavily on the applicability of prisoner of war status — while largely ignoring other legal protections afforded to captured combatants.

The second point relates to the attempt by US military prosecutors to charge Hicks with attempted murder. The inclusion of this charge on the draft indictment reflected a serious confusion in the legislation governing the military commissions about the status of so-called 'unlawful combatants' under international law. Although the charge was ultimately dropped, there is little sign that the underlying misconception has been remedied.

POW status is not the only game in town

What exactly was Hicks' status under international law? This issue was the subject of much debate and confusion over the five years of Hicks' incarceration. Most discussions of the topic focused on the question of whether Hicks was entitled to prisoner of war status.

In order to answer this question, it is necessary to examine the international law of armed conflict. This area of law centres on the four Geneva Conventions of 1949, which enjoy near universal adherence within the international community, and their two Additional Protocols of 1977.

The Third Geneva Convention relates to prisoners of war — that is, certain types of combatants captured by opposing forces. Article Four sets out the classes of people who are entitled to prisoner of war status. The main category is members of the regular armed forces of a party to the conflict. (The so-called global 'war on terror' is not itself an armed conflict under international law; in Hicks' case, the relevant conflict was the war in Afghanistan.)

Members of organised militias are also entitled to prisoner of war status, provided that they bear arms openly and carry a distinctive sign. A similar (although slightly wider) definition appears in the First Additional Protocol to the Geneva Conventions (to which the US is not a party).

It is doubtful whether Hicks fulfilled this definition. He was not a member of the regular armed forces. The available facts suggest that he was a member of a loosely organised militia group providing support to the Taliban and associated with al Qaeda. Although Hicks was part of a group with some kind of organisational structure, he does not seem to have carried arms openly or distinguished himself from the civilian population.

On this basis, it seems likely that Hicks was not protected by the Third Geneva Convention. This is fortunate for his US captors. The provisions of the Third Convention are extensive and detailed; they were almost certainly not met by conditions at Guantanamo Bay.

What, then, was Hicks' legal status? Assuming he did not fulfil the definition set out above, the Third Geneva Convention did not apply. However, this does not mean that he was entirely unprotected. Protection under the law of armed conflict is not an all-or-nothing proposition. Rather, there are layers of protection; if you do not qualify for one layer, you may fall within the next.

There are at least two additional layers of protection available to captured fighters who do not benefit from the Third Convention. The first is the Fourth Geneva Convention, which protects people who fall into the hands of a party to a conflict of which they are not nationals.

However, the Fourth Convention did not extend to Hicks, since he is an Australian national and Australia and the US are allied nations. In any event, it is possible to override some aspects of the Fourth Convention on security grounds. This might have been argued to apply in Hicks' case.

The second additional layer of protection is contained in Common Article Three of the Geneva Conventions. This article appears identically in each convention; it sets out the basic rights guaranteed to all persons not actively engaged in combat, including captured and wounded fighters.

Although Common Article Three is directed at non-international armed conflicts, it is widely viewed as setting out the minimum rights applicable in all forms of warfare.[1] Among other things, the article prohibits the passing of sentences without judgment by 'a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilised peoples'.

REFERENCES

1. This interpretation was endorsed by the International Court of Justice in *Nicaragua v United States (Merits)*, ICJ Reports 1986, para 218 and confirmed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Delalic*, Case No IT-96-21-A, Judgment of 20 February 2001, para 150.

A more extensive list of fundamental rights applicable in international armed conflicts is contained in Article 75 of the First Additional Protocol. Although the US is not a party to this treaty, it is likely that at least some of these protections are enshrined in customary international law.[2] Together, these provisions represent the minimum level of protection to which *everyone* is entitled in times of armed conflict. This is the minimum set of safeguards that Hicks should have been afforded.

It has been suggested by some officials and commentators that even the most basic protections afforded by the Geneva treaties do not apply to people who provide support for terrorism.[3] However, there is no basis for this in the conventions themselves. Nor is there any real scope to argue that the treaties did not anticipate the use of terrorism as a form of warfare. Terrorism in wartime is hardly a new phenomenon. Indeed, it is explicitly mentioned and condemned in the Fourth Geneva Convention, as well as both Additional Protocols.[4]

Although Hicks' legal status in detention is now largely a moot point, the failure of commentators and government figures to acknowledge the full range of possible protections does not augur well for future cases. When it comes to determining the legal entitlements of captured combatants, we would do well to remember that POW status is not the only game in town.

Dropped charge had no basis in law

In March 2007, after five years in captivity, Hicks was finally charged with just one count — providing material support for terrorism. A second proposed charge of attempted murder was dropped at the last minute. It will be useful to look first at the purported legal basis for this charge.

Hicks was charged in accordance with the *Manual for Military Commissions* (MMC), a regulation created pursuant to the *Military Commissions Act of 2006* (MCA),[5] which was passed by the US Congress. The MCA provoked widespread debate, both in Australia and internationally. The two main criticisms of the legislation were, first, that it enacted retrospective criminal offences and, second, that it illegitimately attempted to extend US domestic jurisdiction to acts committed by foreign nationals outside its borders.

For present purposes, however, I wish to focus on the relationship between the MCA and international law. The exact nature of this relationship is somewhat ambiguous. On the one hand, the MCA explicitly attempts to preclude persons charged under the legislation from relying on the Geneva Conventions as a source of rights.[6] On the other hand, at several points the MCA relies implicitly or explicitly on international law to give content to its provisions.

One example of this is s 950v(15) of the MCA, which details the crime of 'murder in violation of the law of war'. It was this provision that formed the basis for the proposed charge against Hicks of attempted murder.

The crime defined in this provision consists of intentionally killing one or more persons 'in violation of the law of war'. This wording is repeated in the applicable part of the MMC.[7] This seems to reflect an intention to rely upon international law to provide the

2. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I (2005) 299–383.

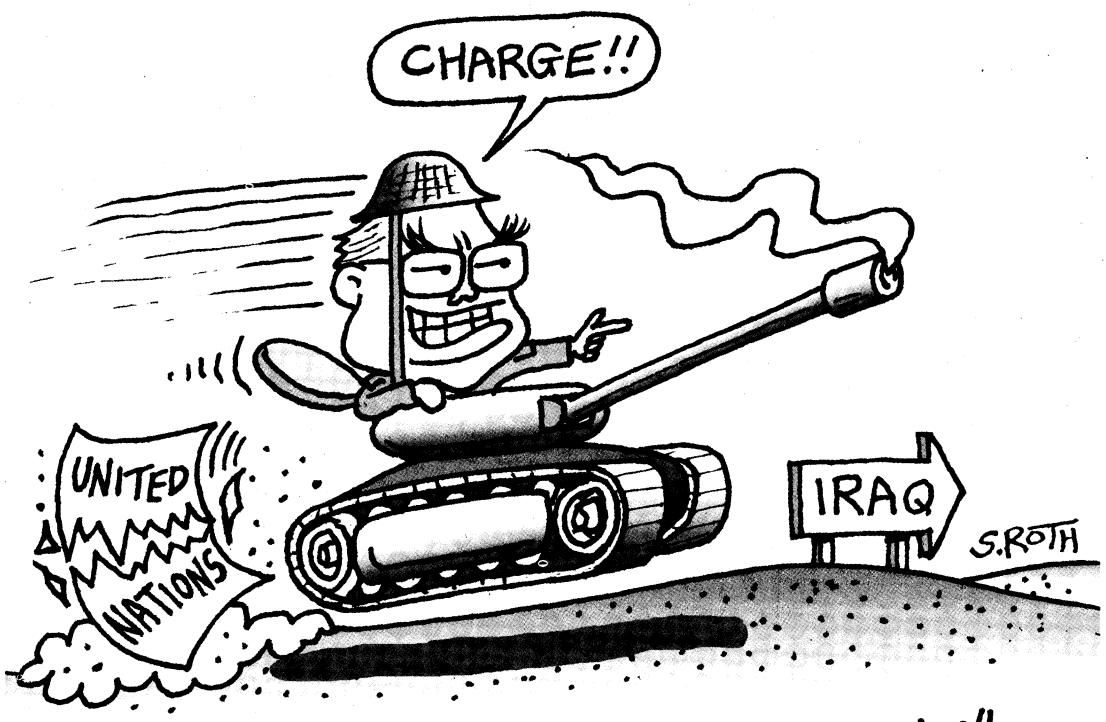
3. See, for example, John C Yoo, 'Terrorists Have No Geneva Rights', *Wall Street Journal*, 26 May 2004, A16.

4. *Geneva Convention IV*, art 33; *Additional Protocol I*, art 51(2); *Additional Protocol II*, art 4(2)(d).

5. *Military Commissions Act of 2006*, 10 USC ss 948a *et seq*.

6. *Military Commissions Act of 2006*, 10 USC s 948b(g).

7. *Manual for Military Commissions*, Part IV, s 6(15).



THE REAL "UNLAWFUL COMBATANT"

So why was Hicks facing a potential criminal charge for doing exactly what soldiers are supposed to do? … [A]ccording to the MCA, Hicks was not entitled to take part in hostilities under international law. He is what the legislation describes as an 'unlawful enemy combatant'.

substance of the crime. However, a closer examination of the proposed charge against Hicks reveals a serious confusion about the relevant aspects of the international law of armed conflict.

The substance of the proposed charge against Hicks under s 950v(15) of the MCA was that Hicks attempted to shoot at anti-Taliban forces during the war in Afghanistan. It was not alleged that Hicks fired on civilians, which is a serious violation of international law. Rather, the allegation was that he attempted to kill members of opposing armed forces.

On the face of it, this seems odd. After all, attacking opposing forces is part and parcel of armed conflict. Soldiers get medals for it. There were numerous soldiers on both sides of the conflict doing exactly what Hicks was alleged to have done — with much greater success in many cases.

So why was Hicks facing a potential criminal charge for doing exactly what soldiers are supposed to do? The reason is that, according to the MCA, Hicks was not entitled to take part in hostilities under international law. He is what the legislation describes as an 'unlawful enemy combatant'.[8]

As we saw above, Hicks was arguably not entitled to the rights and privileges accorded to prisoners of war under the Third Geneva Convention. It is for this reason that he was sometimes called an 'unprivileged combatant'. The term 'unlawful combatant' was also widely applied to Hicks. However, unlike the former term, this description had no basis in international law.

It is sometimes assumed that if a combatant who is not entitled to prisoner of war status engages in armed conflict, then that person is violating international law. This seems to be the assumption behind the use of the term 'unlawful combatant' in the MCA, as well as the offence outlined in s 950v(15). However, this is a mistake. Unprivileged combatants are not protected under the Third Geneva Convention. However, this does not mean their participation in armed conflict is unlawful.

Unprivileged combatants are bound by the same legal rules as any other fighter. They cannot attack civilians or their property. They cannot mount their attacks in a disproportionate way. They cannot mistreat captured enemies. They cannot use prohibited weapons. All of the above actions could amount to war crimes. However, provided that unprivileged combatants abide by the ordinary laws of war, they are not prohibited from firing on enemy soldiers.

Firing on combatants during an armed conflict is not a war crime. That is what war *is*. Certain types of combatants may be unprivileged, but they are not entirely unprotected — and their participation in warfare is not illegal.

Learning from our mistakes

The Hicks saga now seems to have been largely concluded. However, the case highlights some important and enduring misconceptions about the legal protections afforded to captured combatants.

Captured fighters who are not entitled to prisoner of war status are still protected by the law of armed conflict, even if they are found to have supported terrorism. And there is, strictly speaking, no such thing as an 'unlawful combatant' under international law — however much the term may be bandied about by US officials. The fact that a combatant is not covered by the Third Geneva Convention does not make their involvement in warfare illegal.

There seems to be continuing confusion on these points within the Australian and US administrations. This does not bode well for other cases where combatants are captured as a result of the 'war on terror'. Those responsible for the Hicks case should reflect upon its lessons for their understanding and implementation of the international law of armed conflict.

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8. *Military Commissions Act of 2006*, 10 USC s 948a.