

Detainee 002: The Case of David Hicks

Leigh Sales

Reviewed by Neil James

Few controversies in Australia in recent years have excited as much argument as the case of David Hicks. But it was not always so. As late as 2004, for example, one editor rejected an ADA opinion article on the unprecedented legal complexities of the Hicks case because 'no-one is interested in David Hicks'. In *Detainee 002* Leigh Sales, the national security correspondent of the ABC since 2006, ably explores why Hicks eventually became such a cause celebre in Australia after such initial public indifference, and even hostility, concerning his fate.

Detainee 002 covers many but not all aspects of a complex story. It overwhelmingly focuses on the human aspects, his potential and then actual trial by a US military tribunal, and whether this was fair or indeed legal. As with most of the public argument about Hicks, on either side, the book tends to obscure or ignore that his detention was an entirely separate legal and practical issue. As a combatant captured in a war Hicks was detained under the laws of armed conflict (LOAC), based on the Hague and Geneva conventions, and was never 'held pending trial' or 'imprisoned without trial'.

Serving and former members of the defence force generally express considerable puzzlement as to why some fellow Australians think that David Hicks should have been treated differently to numerous prisoners-of-war in previous conflicts or, indeed, ADF personnel who might be captured in our current wars. This aspect too is largely uncovered.

Detainee 002 misses that public confusion on this issue largely stemmed from the fact that of the dozen or so Australian lawyers with a good understanding of LOAC, all but two or three wore an ADF uniform (as regulars or reservists) and were largely absent from public debate. Into this vacuum rushed a torrent of well-meaning but usually uninformed civilian human rights lawyers and activists. Almost all had little or no knowledge of, and too often contempt for, the body of specialist international law actually applying to Hicks' detention. They naturally fixated on the unfairness of any separate criminal trial because this was their comfort zone.

Hicks also became an emotional rallying point, especially for those ideologically opposed to the Bush administration and Australia's participation in the Iraq war. Uncomfortable facts were just ignored if they contradicted what people wanted to believe. *Detainee 002* is quite deft at treading around these prejudices and biases, so deft in fact that some commentators unfairly criticised Leigh Sales for being 'too even-handed' in her account. One particularly uncomfortable aspect for some was her telling of the consistent pressure the Howard Government had apparently applied to the Americans to sort the Hicks matter out. Her coverage of American policy

confusion and its bungled execution is also informative and balanced.

But *Detainee 002* occasionally misses or skates over key points. Sales' discussion of the seminal Hamdan judgement by the US Supreme Court in June 2006 is a good example. In a single, throwaway, introductory line she accurately records that the Court found that the US was engaged in a war and could detain those captured in that war, but that Common Article 3 of the Geneva Conventions consequently applied to them. But the bulk of her discussion then dwells on the Court striking down the original military commissions as unlawful and the results of this, without discussing why it occurred and the full implications really involved. The commissions were principally struck down because they contravened the detainee's protections under the Geneva Conventions. This completely invalidated the common but mistaken cry that those captured were 'illegally detained' and should be freed because this was somehow a type of habeas corpus matter under international civil law.

Detainee 002 was apparently written under some marked handicaps, especially the absence of much input from the Hicks camp. This probably resulted from fears that a detailed and objective story risked undermining their public relations campaign to depict Hicks merely as an innocent naif. Commercial motives regarding future book sales also no doubt played a part. While Sales appears to have spoken to Hicks' first civilian lawyer, Stephen Kenny, there is also little or no first-hand input from his successor, David McLeod, and Hicks' US military lawyer, Major Dan Mori.

Somewhat oddly, there is also no mention at all of the minor role played by the ADA. After Mori first advised that he thought the analysis of the Hicks case on the ADA website was the most substantial public comment he had seen in Australia – although he did not necessarily agree with aspects of it – the Association emphasised that he needed to broaden his client's popular support base outside the traditional Left, including in the legal profession. Others seem to have conveyed the same advice. Kenny was replaced by McLeod (a RAAF reservist) and this helped to take much of the politics out of the legal issues. A well-publicised article in the Summer 2006/07 *Defender*, advocating the release of Hicks on captured combatant parole before the war in Afghanistan ended, also helped neutralise the issue in public debate, as well as helping clear some perceived and actual logjams at political and bureaucratic levels.

Detainee 002 is essential reading for anyone who professes to hold an informed opinion on the case of David Hicks. It is a particularly good account of the human dilemmas involved and the flawed principles and processes applying to his criminal trial by a US military commission. But it is not a definitive stand-alone reference that covers all the legal, political, strategic and moral dilemmas of Hicks' predicament. Its limited understanding and sparse discussion of the separate international law actually applying to Hicks' detention as a captured combatant is particularly disappointing. ♦

Leigh Sales, *'Detainee 002: The Case of David Hicks'*, Melbourne University Press, Melbourne, 2007, Softback, 322pp., RRP \$A32.95.

