MILITARY COMMISSIONS[1]
Should Australia have some?

H G Fryberg[2]

I INTRODUCTION: J L KELLY

Maj Gen the Hon Jack Lawrence Kelly CBE RFD was a distinguished soldier and judge. The attendance tonight in the middle of the winter recess is evidence of the esteem in which he was held. The Reserve Forces Day Committee for South Queensland deserve congratulations and gratitude for establishing the Jack Lawrence Kelly Memorial Lecture in his name. It is a great honour to have been invited to deliver the inaugural lecture.

Jack Kelly was born in Sydney on 25 September 1920.[3] His secondary education was at the Brisbane Grammar School.

---

1 Edited version of the inaugural Jack Lawrence Kelly Memorial Lecture delivered in the Banco Court, Supreme Court of Queensland, on 30 June 2008 as an event for Reserve Forces Day. The author acknowledges with gratitude the research assistance provided by Ms Mabel Tsui and by the staff of the Supreme Court Library.

2 Maj (retired); judge of the Supreme Court of Queensland.

3 The biographical material embodied in this lecture has been provided by the staff of the Supreme Court Library. I am also indebted to Brig R I Harrison for some personal recollections.

He won an open scholarship to the University of Queensland from which he graduated with the degree of Bachelor of Arts in 1940. In the meantime he had enlisted in the militia, joining the University Detachment in 1938. From 1941 to 1945 he saw war service with 9 Battalion at Milne Bay where he was adjutant and with HQ 7 Brigade on Bougainville.

While attending an Army Cooperation Course run by the RAAF in Canberra he met Mavis O'Brien, and they were married in January 1944. Their wedding photograph shows Jack with his head slightly cocked to one side and his characteristic mischievous grin.

In 1947 Jack returned to the University as a full-time law student. The following year with the rank of captain he was appointed Officer Commanding the newly-created Queensland University Regiment (which then consisted of one company). A year later he graduated and was admitted to the bar. He spent the next three years as private secretary to Sir Arthur Fadden, Treasurer and Deputy Prime Minister in the Menzies government, transferring to the reserve of officers for the duration. He commenced practice at the bar in 1953.

His careers prospered. He became the Commanding Officer of 9 Battalion in 1957, an appointment which ended in 1960 after the unit was granted the freedom of the City of Brisbane.

It was later said that during this period he would startle the residents of Albion by running at night with a pack loaded with bricks, just to get fit for the annual camp.[4] In the 1960s he concentrated on his legal career, while serving as chairman of the Queensland Licensing Commission. He took silk in 1964 and from 1965 to 1970 served on all the right committees. He transferred to the Legal Corps in which he held an appointment at Victoria Barracks with the rank of colonel; in that capacity he spent some time in South Vietnam as judge advocate at a court martial. He was Vice-President of the Bar Association of Queensland and destined for the presidency when in May 1970 he returned to New Guinea as a judge of the Supreme Court of Papua and New Guinea.

He resigned from that position in November 1972 when he was appointed an acting judge of the Supreme Court of Queensland, based in Rockhampton, an appointment made permanent in September 1973 when he became the Central Judge. The following month he was welcomed to Rockhampton by the resident District Court judge, Pat Shanahan, who had enlisted in Queensland University Regiment under him

---

[4] R Gotterson, President of the Bar Association of Queensland, at the valediction at the Supreme Court, 7 May 1999.

in the year it was formed. Representing the local bar, Mr Maguire referred to his period as an acting judge:

> "[Y]our judgments have been distinguished by a robust commonsense and a broad humanity of approach. I am happy to say that in my experience you have not held yourself aloof from the ordinary activities, thoughts, feelings and aspirations of the man in the street."

He remained as Central Judge for over five years, until the end of 1978. Mavis became his associate. Farewelling him, with the public spirited concern characteristic of the law, the leader of the local bar remarked upon the financial benefit derived by the profession from the expeditious determination of actions resulting from Jack's efficient management of the lists, while the President of the Central Queensland Law Society, with less circumlocution, congratulated him on achieving the air-conditioning of the court.

The move to Rockhampton did not detach Jack from the army; far from it. In 1976 he was promoted to the temporary rank of Major General (confirmed on his retirement in 1982) and appointed Judge Advocate General. The appointment was only made possible by the passage of *The Hon Jack Lawrence Kelly Enabling Act 1976* (Qld), which authorised him to accept the office in addition to holding his commission as a judge for as long as he did not accept any remuneration or emolument as Judge Advocate General.[5] In that role he oversaw the drafting of the *Defence Force Discipline Act* 1982 (Cth), a piece of legislation described by one observer as

> "a long overdue and far reaching reform of Australian military law that for the first time brought coherence to what had hitherto been a Byzantine morass of Imperial and single service statutes and regulations".[6]

In recognition of his military service he was appointed a Commander in the Order of the British Empire (Military Division) in 1982.

The last 12 years of his judicial service were mostly in Brisbane, although from 1982 to 1984 he was also a judge of the Court of Appeal of the Solomon Islands.

From 1985 he held the office of Senior Puisne Judge in Queensland. Mavis retired as his associate when they left Rockhampton, probably because of ill-health. She died in 1982. In 1984 he married Isobel Catherine Smith of North Queensland.

When Jack Kelly retired aged 70 in 1990, Chief Justice Macrossan described how he served "with loyal dedication, working tirelessly and efficiently, and steady under fire". He said:

> "In life some people's virtues or strong points seem almost aggressively obvious and in their expression positively demand attention. Others

---

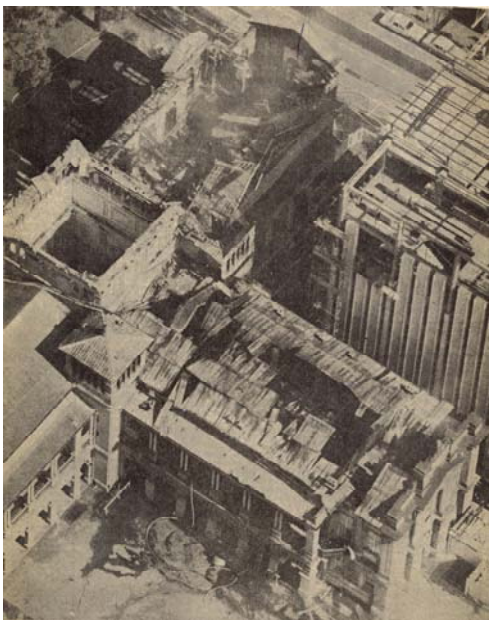
5 He was allowed to receive reasonable travelling and accommodation expenses.

6 Logan, J: "Queensland Barristers in World War II", *Bar News*, December 2005, p 41.

> with egos not as restless and more at ease work in quieter fashion. Mr Justice Kelly has clearly felt no need for headlines, but yet he has given very great service to this Court."

The Attorney General thanked him for the role he had played in the administration of justice in Queensland and, probably uniquely at the retirement of a Supreme Court judge, conveyed the thanks of the Minister for Defence and the Commonwealth government. The President of the Bar described him as a quiet achiever. In his reply the judge referred to his enjoyment of his time as a member of the Court. He described how things had improved during his tenure, though with characteristic modesty without claiming any credit for the improvement:

> "I leave the Court under somewhat different and more organised circumstances than those of my arrival. When I came down from Port Moresby I went to see the then Chief Justice to arrange for my being sworn in as an acting judge and naturally I asked him where my chambers would be. To which he replied, 'Oh, Jack, you'd better go and look around and find some and when you are set up let me know where you are.' So I set off with my Associate. The Supreme Court was then in what is now the District Court building. That was full, but I found some chambers in what was left of the old Supreme Court building after the fire and took over what had been the Registrar's chambers for myself and the Deputy Registrar's for my Associate, got hold of some furniture, had telephones installed, even found myself a court - some of you may remember the old number three court which was in the old building - so I had a court all to myself, and duly went and reported to the Chief Justice that I was set up and he said, 'Oh, good'."



To the end he retained his sense of humour and fulfilled his aim to remain, as he put it at his swearing-in, "in touch with the ordinary man".

Jack Kelly died on 20 April 1999. In a valediction in the Banco Court, the Chief Justice confirmed a number of characteristics described at his funeral: his humility in spite of formidable achievement, his simplicity and lack of pretence, that he kept his own counsel, his dry sense of humour, and that "he disliked fuss, and especially long speeches."[7] The irony of being memorialised by a lecture would have appealed to him.

II MILITARY COMMISSIONS: BACKGROUND

"Military commission" is not a term of art in international law. Generically it might be applied to any military tribunal with criminal jurisdiction which is not a court martial. Nor, it seems, is it a term of art under any national law except that of the United States[8]. That exception is a large one. Military commissions are and have been used by the United States for a wider range of purposes than by any other country. They have gained notoriety since 2001 because the President of the United States has established military commissions at Guantanamo Bay to exercise jurisdiction over non-US citizens. Not surprisingly they have attracted a good deal of international attention, not least in this country. The focus of these remarks is military commissions in this wider American sense.

The question proposed is: should Australia in the early 21st century have (or at least create a framework for) military commissions in this sense? In considering that question the issue whether such commissions could validly be constituted under the Australian Constitution will not be considered.[9]

Brief history

Ancestors of the military commission can be traced back to the American revolution.[10] The first use of a commission as such was in 1847 when the commander of occupied Mexican territory, General Winfield Scott, ordered the establishment of military commissions to try ordinary crimes committed in the occupied territory and what he called a council of war to try offences against the law of war.[11] They were needed to deal with the exigencies of particular situations: "The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity".[12]

---

7 At his swearing-in on 25 September 1973 he described himself as "basically a man of few words". He also referred to one thing as essential: "to ensure that as a judge one does not lose touch with the ordinary man and so fail to understand his problems and his point of view."

8 The Central Military Commission of the People's Republic of China is not a tribunal.

9 Consider *Re Aird; ex parte Alpert* (2004) 220 CLR 308, [2004] HCA 44; *Thomas v Mowbray* [2007] HCA 33, (2007) 81 ALJR 1414.

10 A Briton, Major John André, "was captured out of uniform while trying to make contact with the traitorous General Benedict Arnold. His trial took place before a distinguished panel of thirteen US generals, chaired by Nathaniel Green and including Lafayette and von Steuben" - Vagts, D F: "Military Commissions: a Concise History", (2007) 101 *Am J Int'l L* 35 at p 37.

11 *Hamdan v Rumsfeld* 548 US 557 (2006).

12 *Ibid* at p 582.

Their widespread (more than 4,200 cases) and regular use began in the American civil war.[13] Military authorities found them an attractive alternative to the ordinary courts for cases not within the jurisdiction of courts martial[14], particularly cases with political overtones. Their proliferation was curtailed when the Supreme Court held that they could not exercise the judicial power of the United States when the ordinary courts were available for the purpose and where martial law had not been imposed.[15] Barely a year earlier those accused of having assisted John Wilkes Booth in the assassination of President Lincoln had been brought before a military commission at a time when "in practical terms, the war was over and Washington was no longer threatened"[16]. A ruling on the validity of that commission was avoided when President Johnson pardoned Dr Samuel Mudd before the latter's petition for habeas corpus was heard, but that did not assist the four[17] who had been executed.

After the collapse of the Confederacy, the rebel states were governed under military occupation. Union generals acted as military governors, displacing state and local officials. During this period of the Reconstruction some hundreds of military commissions were established in various forms and dealt with those who opposed the regime. These commissions were covered by legislation. Their validity was never tested in the Supreme Court and their use concluded when the Reconstruction ended.

---

13 No comprehensive history of military commissions has yet been written: see generally Vagts, *loc cit*; Prescott, J and Eldridge, J: "Military commissions, past and present", *Military Review* Apr-May 2003. The primary text of the law of military commissions is Winthrop, W.: *Military Law and Precedents*, 2d ed (1920), pp 831-846.

14 "Generally … the need for military commissions during this period—as during the Mexican War—was driven largely by the then very limited jurisdiction of courts-martial" - *Hamdan v Rumsfeld* at p 583.

15 *Ex parte Milligan* 71 US (4 Wall) 2 (1866).

16 Vagts, *loc cit*, p 39.

17 They included Mary Surratt, the first woman executed by the government of the United States.

Some military commissions were used in dealing with the insurrection in the Philippines which arose after the Spanish American war, and some were used in occupied parts of Germany after the First World War; but the next major use of the commissions grew out of the Second World War. They were used to try Japanese and Germans for war crimes (at levels below the international tribunals), local civilians for offences against the occupation and US and allied civilians for offences committed in the occupied territory. In the latter part of the occupation they were sometimes not called military commissions and were sometimes staffed by civilian personnel.

Military commissions were not used in connection with either the Korean or the Vietnam wars and have not to date been used in Iraq.

III TYPES OF MILITARY COMMISSIONS

Although they try people for offences, military commissions do not exercise the judicial power of the United States.[18] Whether the President has power as commander-in-chief to establish military commissions without congressional authority remains an open question under American law.[19] The power of Congress to legislate for the creation of the commissions derives from what in Australia would be called the defence power.

In *Hamdan v Rumsfeld* the plurality wrote (citations generally omitted):

> "The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists. Commissions historically have been used in three situations. … First, they have substituted for civilian courts at times and in places where martial law has been declared. Their use in these circumstances has raised constitutional questions … but is well recognized. … Second, commissions have been established to try civilians 'as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.' … Illustrative of this second kind of commission is the one that was established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II. …
>
> The third type of commission, convened as an 'incident to the conduct of war' when there is a need 'to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war,' … has been described as 'utterly different' from the other two. … Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a fact finding one—to determine, typically on the battlefield itself, whether the defendant has violated the law of war. …
>
> *Quirin* is the model the Government invokes most frequently to defend the commission convened to try Hamdan. That is both appropriate and unsurprising. Since Guantanamo Bay is neither enemy-

---

18 *Ex parte Quirin* 317 US 1 (1942) at p 28.

19 *Hamdan v Rumsfeld* at p 585.

occupied territory nor under martial law, the law-of-war commission is the only model available."[20]

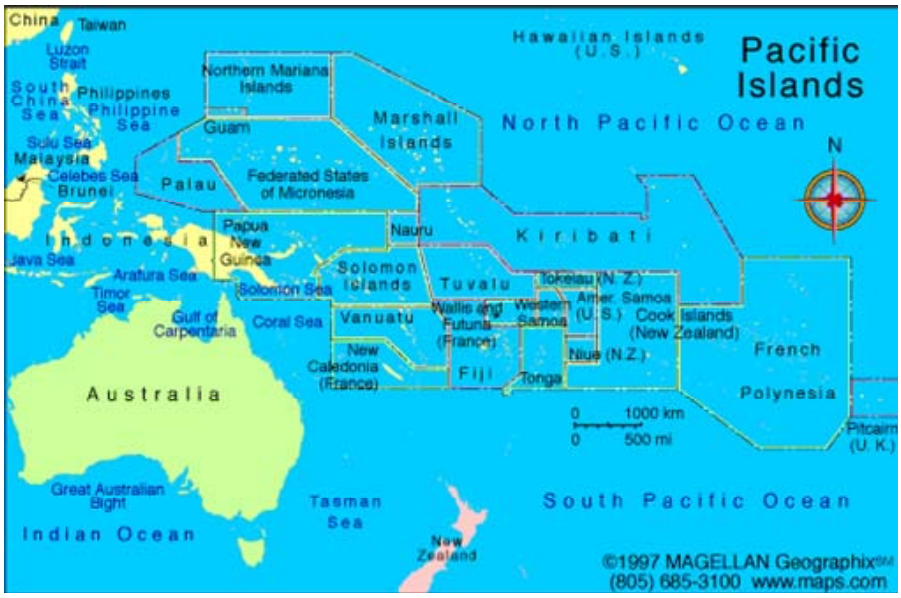
IV MILITARY COMMISSIONS FOR AUSTRALIA?

Martial law commissions

Of the first type it is unnecessary to say much. The prospect of a declaration of martial law in Australia is so remote and the consequences of such a declaration so extravagant as to make preparations for a military commission of this type plainly ridiculous.

Occupied territory commissions

Should Australia contemplate establishing military commissions of the second type, that is to provide for the exercise of a type of judicial power as part of a temporary military government over occupied or recaptured territory? It is unnecessary to consider the case of recaptured territory. Australia does not face any direct threat to its territory[21], the prospect of losing territory in which there is an established judicial system is remote and the task of re-establishing a system in Australian territory would in any event be no more difficult than the task of establishing a military commission. But what of occupied territories? The oceans around Australia contain a number of island states not all of which have proved particularly stable. Should Australia prepare for the contingency of (an Australian) military government, including military commissions, in some such state?



To date Australia has certainly not done so. Nothing in defence policy statements or recent Australian history suggests any likelihood that it will do so.

---

20 *Ibid* at pp 616-617.

21 Department of Defence: *Australia's National Security: Defence Update 2007*, p 17.

Current policy certainly recognises the possibility of Australian involvement in stabilisation missions of one sort or another. However it explicitly envisages that as much as possible "we will do this by engaging local communities in affected countries and working with our security partners"[22]. It also envisages that Australian responses will be whole-of-government responses, not simply military responses. Policing is recognized as a non-Defence responsibility.[23] Provision of a system of tribunals is not contemplated as a possible military task. In the forthcoming Defence White Paper, that is unlikely to change.[24]

Have Australian military deployments to East Timor and the Solomon Islands revealed any need for military commissions? The first point to be made is that in neither case were Australian troops part of an occupation force, nor was Australia undertaking military government of those territories. Australian troops were initially deployed to East Timor as part of a United Nations force (INTERFET) established pursuant to a resolution of the Security Council following agreement with Indonesia, the de facto governing power, whose sovereignty Australia recognised.[25] Those in the Solomons were there with others to provide assistance (RAMSI) at the invitation of the government.[26]

For the foreseeable future it is difficult to envisage a scenario in which Australian troops would be involved in a hostile occupation of foreign territory. For

---

22 *Ibid*, pp 31-32.

23 *Ibid*, p 37.

24 See Department of Defence: "Key Questions for Defence in the 21st Century", *Defence Policy Discussion Paper*, 2008.

25 Resolution 1264 (1999). Although Australia had recognised Indonesia as the de jure government of East Timor, the United Nations had not.

26 See Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the operations and status of the police and armed forces and other personnel deployed to Solomon Islands to assist in the restoration of law and order and security, (Townsville, 24 July 2003) [2003] ATS 17.

example even if there were a complete breakdown of law and order in Fiji, occupation of that country by Australian troops not operating under United Nations auspices is unlikely, except perhaps to the extent required to ensure the safe evacuation of Australian and friendly citizens.

That said, it is the fact that in several respects the position of INTERFET troops was analogous to that of an occupation force.[27] It will be recalled that deployment to East Timor began on 20 September 1999, 16 days after the United Nations Mission in East Timor (UNAMET) announced the result of the ballot on, in effect, independence from Indonesia. That announcement led to an almost complete breakdown of law and order, widespread killing, looting and arson and the abandonment by administrative officials of civil administration, including the judicial and detention systems. The first two tasks assigned to INTERFET by the Security Council were to restore peace and security in East Timor and to protect and support UNAMET in carrying out its tasks. Performance of those tasks necessarily involved the capture and detention of not only those carrying out hostile acts directed at the force but also those guilty of serious offences against members of the local populace. As lead nation in INTERFET Australia consciously used the law of military occupation to provide a framework of guiding principles for such detention.[28]

The task of restoring the judicial system was given to the United Nations Transitional Authority for East Timor (UNTAET). It was established by the Security Council on 26 October 1999[29] to "exercise all legislative and executive authority including the administration of justice". It set about establishing a civil judicial system, and by 12 January 2000 enough of a system was in place for INTERFET to hand over control of all detainees to it.[30] INTERFET was therefore not concerned to establish a

---

27 See generally Ratner, S R: "Foreign Occupation and International Territorial Administration: The Challenges of Convergence" (2005) 16 *Eur J Int'l L* 695.

28 Kelly, M J *et al*: "Legal aspects of Australia's involvement in the International Force for East Timor", *International Review of the Red Cross*, #841, pp 101-139 (2001).

29 Resolution 1272. UNAMET's mandate was allowed to lapse.

30 Oswald, B M: "The INTERFET Detainee Management Unit in East Timor", *Yearbook of International Humanitarian Law 2000*, pp 360-361. The process is described in more detail in Strohmeyer, H: "Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor"

system for the trial of those whom it detained. A similar position is likely in any future case involving the Australian Defence Force operating under United Nations auspices in a territory where an existing court structure does not remain operational.[31]

In short, the chance of Australia needing to employ the second type of military commission is remote. Creating them, or even a framework for them, to cover the contingency would be a misapplication of resources. As the prolific Maj Bruce Oswald has written:

> "Holding people in detention for long periods of time or providing a functioning judicial system that is adequately resourced with judges, prosecutors, defence lawyers and court administrators are roles that are also beyond the training and resource capacities of most military forces."[32]

"Law of war" commissions

The third type of commission identified above is that concerned with violations of the law of war; in other words, war crimes. Before one can consider whether such a commission would be useful in Australia it is necessary to consider what is the law of war applicable in Australia.

The law of war in Australia

The law of war originated as a part of international law. In that sphere it consists essentially of treaties relating to war to which a country is a party and that part of customary international law which deals with the law and usages of war. Under American doctrine, customary international law is incorporated into domestic law[33], although there is some uncertainty as to the precise role it plays[34]; and authorised treaties form part of "the supreme law of the land"[35]. Both are subject to the power of Congress to define offences against the law of nations[36]. In Australia there is no doubt that treaties form no part of domestic law unless and until implemented by legislation. Whether customary international law is incorporated into the common law cannot be regarded as finally settled, but prevailing authority does not favour the incorporation theory of reception.[37] That suggests that one should look primarily if not exclusively in Australian legislation.

Not surprisingly it has not been suggested that any state legislation is relevant. Two Commonwealth acts must be considered: the *War Crimes Act* 1945 and the Commonwealth *Criminal Code*. As originally enacted, the former made provision for

---

(2001) 24 *U NSW L Jnl* 171 at pp 175-177 and Linton, S: "Rising From the Ashes: The Creation of a Viable Criminal Justice System in East Timor" (2001) 25 *Melb U L Rev* 122.

31 See *Report of the Secretary-General: "The rule of law and transitional justice in conflict and post-conflict societies"*, Security Council Document S/2004/616, 3 August 2004.

32 Oswald, B M: "Addressing the Institutional Law and Order Vacuum: Key Issues and Dilemmas for Peacekeeping Operations" (2006) 6 *NZ Armed Forces L Rev* 1 at p 15.

33 *The Paquete Habana* 175 US 677 at p 700 (1900); *First National City Bank v. Banco Para el Comercio*, 462 US 611 at p 623 (1983).

34 *Sampson v Federal Republic of Germany* 250 F 3d 1145, 1153 n4 (2001).

35 *Constitution*, art VI.

36 *Constitution*, art I § 8.

37 *Nulyarimma v Thompson* [1999] FCA 1192; (1999) 165 ALR 621.

military courts to try persons charged with a violation of the laws and usages of war or a nominated war crime committed after 2 September 1939 anywhere in the world during any war in which the Crown (presumably in right of Australia) was engaged if it was committed against any person who was resident in Australia at the time of the alleged offence. For whatever reason this was repealed in 1988 and replaced with provisions designed to enable prosecution of anyone guilty of conduct in Europe during the Second World War which, had it been done in any part of Australia at that time would have been one of a list of serious crimes; but provided it occurred in the course of hostilities or in an occupation or in the course of political, racial or religious persecution or with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such. Not surprisingly all three prosecutions brought under that act failed and it is now effectively a dead letter.

Since 2002 Australian law relating to war crimes has been located in subdivisions D to H of division 268 of chapter 8 of the *Criminal Code*. These five subdivisions deal with war crimes committed under different circumstances. They cover:

- grave breaches of the Geneva Conventions and Protocol I thereto
- other serious war crimes committed during an international armed conflict
- serious violations of common article 3 during a non-international armed conflict
- serious violations of the laws and customs applicable to a non-international armed conflict and
- grave breaches of Protocol I.

Each subdivision specifies with particularity the conduct constituting the offences and the relevant mental element if it is not covered by the general provisions of the Code. A limited defence of superior orders is available. The provisions apply to conduct anywhere in the world whether or not it has a consequence in Australia.

The definition of these offences is based substantially on the text *Elements of Crimes* adopted by the parties to the Rome treaty constituting the International Criminal Court. Federal jurisdiction to hear charges of these offences is conferred on State and Territory courts by s 68 of the *Judiciary Act* 1903 (Cth). No special procedures are mandated and the provisions do not operate retrospectively. The Code abolishes all common law offences as offences against the law of the Commonwealth.[38]

Australia is a party to the Rome treaty. If it is unable or unwilling to exercise jurisdiction in a particular case, the ICC has jurisdiction to do so. The United States is not a party to that treaty and has successfully demanded that Australia and many other parties to it enter into bilateral agreements guaranteeing that no American citizen will be referred to the ICC.

The nature of "law of war" military commissions

What are the qualities of an American military commission of this type? Under US common law some requirements attached to such a commission:

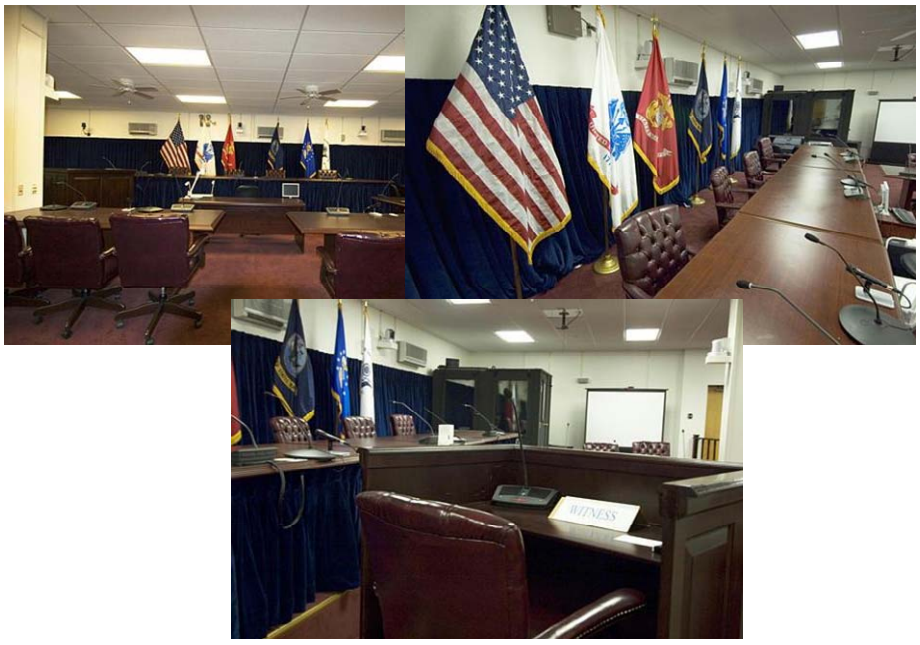
> "The classic treatise penned by Colonel William Winthrop, whom we have called 'the 'Blackstone of Military Law,' … describes at least four preconditions for exercise of jurisdiction by a tribunal of [this] type

[38] Section 1.1.

> ... First, '[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander.' … The 'field of command' in these circumstances means the 'theatre of war.' … Second, the offense charged 'must have been committed within the period of the war.' … No jurisdiction exists to try offenses 'committed either before or after the war.' ... Third, a military commission … may try only '[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war' and members of one's own army 'who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.' ... Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'
>
> All parties agree that Colonel Winthrop's treatise accurately describes the common law governing military commissions … ."[39]

Those preconditions were described as "designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal".

However that was written before the enactment of the *Military Commissions Act of 2006*. That act changed the nature of this type of military commission quite significantly, both jurisdictionally and procedurally. It also modified the content of the law of war applied as the domestic law of the United States to the extent that it applies to persons subject to the act.



39 *Hamdan v Rumsfeld* at pp 590-591.

The jurisdiction of the statutory commissions

To summarise the jurisdiction conferred by the act:

- the commissions are given jurisdiction over offences whenever committed
- the jurisdiction of the commissions is limited to trying alien unlawful enemy combatants. Lawful enemy combatants must be tried by court martial; unlawful combatants who are US citizens are left to the civil courts
- however the definition of *lawful* enemy combatant is very narrowly drawn[40]
- unlawful enemy combatant is defined to include a person who was part of the Taliban, al Qaeda or associated forces, regardless of whether he engaged in combat
- the term also includes a person who, not being a lawful combatant, has engaged in hostilities or purposefully and materially supported hostilities against a co-belligerent of the United States - for example someone who opposed the ragtag warlord armies (not belonging to any nation state) with whom America fought in Afghanistan[41]
- the term includes persons who merely support hostilities rather than participate in them

- the jurisdiction of courts martial over cases covered by the act is excluded.

The United States makes no secret of the reason for these changes. They are designed to enable the commissions to be used as a tool in the so-called war on terror.

---

40 It is restricted to members of regular forces engaged in hostilities against the US and militias or such like "belonging to a State party engaged in such hostilities, which are under recognizable command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war": § 948a.

41 To date no court or commission has ruled on whether or when a single criminal act of terrorism can amount to "hostilities".

However politically useful that name may be, it is not legally accurate: too few of the characteristics which define war are present.[42] The same opinion informs some of the jurisdictional provisions already described.

- Because one cannot say when the war started nor how one will know when it ends, the jurisdiction is unlimited by time; at common law it was limited to offences committed during the war
- Because of the difficulty if not the impossibility of distinguishing between opponents who are combatants and those who are not, the jurisdiction is extended from combatants to supporters. As one commentator has pointed out, under the law of war "combatants are people who directly participate in hostilities. People who merely support hostilities - such as cafeteria workers at a military base - are considered civilians"[43]
- Because very few American ground troops were deployed in Afghanistan, the jurisdiction extends to those engaged in hostilities against US co-belligerents (a term wide enough to cover rebel warlord armies not belonging to a nation state)
- To ease the burden of proof, any alien who was part of the Taliban, al Qaeda or associated forces is subject to the jurisdiction regardless of whether he was a combatant.
- To create a military necessity which justifies the use of the commissions, the existing jurisdiction of courts martial is excluded.

The law applied in the statutory commissions: the question of retrospectivity

A military commission has jurisdiction to try "any offense made punishable by this chapter or the law of war", whenever committed.[44] Identifying the precise content of the law of war can be difficult. The act seeks to avoid that problem by creating 28 offences[45] which are made "punishable by this chapter", only three of which require

---

42 See generally Schwarzenberger, G: *International Law: The Law of Armed Conflict (vol II)*, London, 1968; Wittes, B: *Law and the Long War*, New York, 2008.

43 Mariner, J: "The Military Commissions Act of 2006: a Short Primer", 9 October 2006, http://writ.lp.findlaw.com/mariner/20061009.html.

44 § 948d(a).

45 § 950v.

proof of violation of the law of war[46]. Military commissions are given jurisdiction over such offences in addition to their jurisdiction over offences against the law of war.[47] It is likely that in practice all charges will be laid under one or more of the 28 provisions.

Considerable controversy has surrounded the question whether those charged under the act are being charged retrospectively with new offences. To the extent that they are charged with an offence against the (customary) law of war (which does not appear to have happened to date) or with one of the three statutory offences of which a breach of the law of war is an element, the complaint of retrospectivity has no substance. As stated above, the United States incorporates customary international law, including the law of war, as domestic law, albeit subject to modification by legislation. On the other hand, to the extent that the terms of the remaining 25 statutory offences were not part of the law of war nor prohibited by statute prior to the coming into force of the act, they do operate retrospectively.

It is beyond the scope of this lecture to undertake a detailed analysis and comparison of each of the 25 offences, the law of war and the United States Code. Two examples suffice.

First, the offences of terrorism[48] and providing material support for terrorism[49] are not as such offences against customary international law. Much of the conduct commonly associated with terrorists would be prohibited in the context of armed conflict by the 1949 Geneva Conventions and the two 1977 Protocols. However they do not address terrorism directly, and in any event the United States has neither ratified nor acceded to the Protocols. Terrorist bombing was addressed in a treaty in 1997[50], but no treaty addressed terrorism and the support of terrorism in terms similar to those used in the act. Provisions dealing with terrorism and its support were introduced into the US Code during the 1990s. However their ambit was considerably narrower than the provisions now in the *Military Commissions Act*, particularly in terms of extraterritorial operation.[51]

In short, to the extent that these offences have a novel operation, it is a retrospective operation. The conviction of David Hicks was based on such retrospective operation.

The second example is the offence of conspiracy to commit one of the other offences in the act[52]. Seventeen of the 20 persons so far charged under the act have been charged with this offence and two of the remaining three with a terrorism offence. This offence was included in the act to counter the finding by a plurality of four judges of the Supreme Court of that the offence of conspiracy is not a war crime. Inevitably, at least to the extent that it operates extraterritorially, it operates retrospectively.

---

46 Those three are, by paragraph number, (13) intentionally causing serious bodily injury; (15) murder in violation of the law of war; and (16) destruction of property in violation of the law of war.

47 For an interesting analysis of the domestic validity of this grant of jurisdiction, see Colangelo,A J: "Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law", (2007) 48 *Harv Int L Jnl* 121.

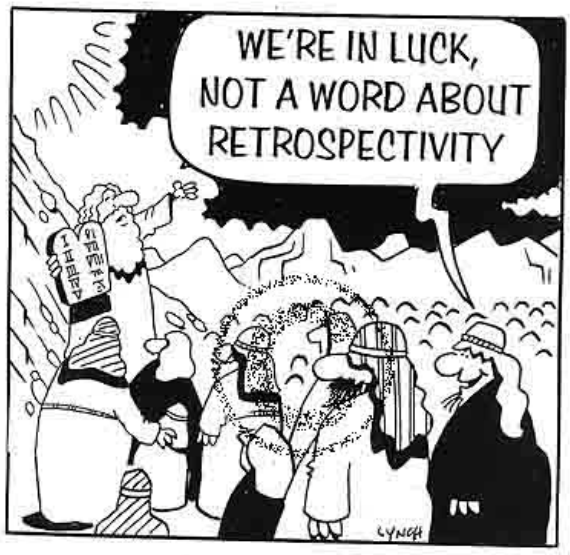
48 § 950v(b)(24).

49 § 950v(b)(25).

50 *International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997).*

51 See Fryberg, H G: "Why We Fight Wars – Revisited", 19 *RUSI(Qld) Quarterly* 21 (Winter 2007).

52 § 950v(b)(28).



Those who drafted the *Military Commissions Act* foresaw the difficulties which these retrospective provisions might generate and attempted to pre-empt them:

> "**§ 950p. Statement of substantive offenses**
>
> (a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.
>
> (b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter."

That section represents a stunning piece of legislative double talk. If these recitals were true, they would be unnecessary. Courts and lawyers are quite adept at identifying existing offences. Indeed if they were true, it would not be necessary to restate the offences at all, though it might be convenient to re-enact or incorporate them by reference to the acts in which they appear. But the recitals are necessary, because they are not true; or at the least, are not true in every case.

To propound such a provision required deep cynicism. The US government had recognized its inability to try the "vast majority" of the individuals in Guantanamo under any other American criminal law: "because" as a spokesman put it, "as of September 11, 2001, they had not broken laws that we had on our books that had extra-territorial application"[53].

How the Supreme Court of the United States will interpret § 950p is uncertain. It may be that the section will be regarded as showing a congressional intent not to legislate retrospectively and as authorising the reading down of the various offence provisions so they do not operate that way. If that argument is accepted it is likely to

---

53 John B. Bellinger III, State Department legal adviser, Foreign Press Centre briefing, 19 October 2006: http://fpc.state.gov/fpc/74786.htm; see also his speech "Legal Issues in the War on Terrorism", (2007) 8 *German L Jn*l 735 at p 740. He restated his view that people who trained for terrorism should not go free just because "we didn't have enough laws on the books" as at 11 September 2001 on the ABC TV program *Four Corners*, 2 April 2007: http://www.abc.net.au/4corners/content/2007/s1887902.htm.

reduce the number of convictions; but it will uphold the rule of law. It is however a difficult argument, given the terms of the section.

Australia may not be "the land of the free", but at least its government refused to enact retrospective legislation as a response to terrorism.[54] It is unlikely that that position will change. There is no reason why it should. Australia is not presently holding any prisoners for war crimes. If it were to establish military commissions it would have no need to make the offences tried by them retrospective.

The procedures of the statutory commissions

Time does not permit a detailed analysis of the military commission procedures. They are discussed them in more detail elsewhere.[55] It can fairly be said that the procedures of the statutory commissions represent a marked improvement from those proposed for the invalid presidential commissions which preceded them. The right to counsel has been particularly beneficial to the accused - think Major Mori.

Despite the improvements there remain a number of serious flaws:

- the independent judgment of the chief prosecutor is vulnerable to politically inspired intervention on the part of the legal adviser to the convening authority (the legal adviser is currently Brig Gen Thomas W Hartmann) - such intervention has actually occurred[56]
- there is no restriction on or regulation of which officers the armed forces may nominate for membership of the military commissions
- hearsay evidence otherwise inadmissible may be admitted on notice to the accused unless the accused can prove that it is unreliable or lacking in probative value. There is no requirement for the maker of the statement to be called, even if he is available as a witness

- statements obtained by coercion, even statements from third parties so obtained, may be admitted into evidence[57]
- relevant information is privileged from disclosure to the accused if it is classified. A claim for such privilege is determined in camera and without disclosing the information to the accused. Information regarding where the

---

54 See Attorney-General's Department: "David Hicks: Frequently asked questions", http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_DavidHicks,JosephJackThomasandothercases.

55 See the article cited at note 51.

56 Davis, Col Morris D: "Unforgivable Behavior, Inadmissible Evidence", *New York Times*, 17 February 2008. Col Davis was the chief prosecutor until he resigned on 5 October 2007.

57 In an attempt to overcome the unreliability of coerced evidence, FBI "clean teams" have reinterviewed potential witnesses and suspects; see Shane, S and Johnston, D: "US Acts to Avert Tactic Expected in Qaeda Trial", *New York Times*, 13 February 2008.

accused was held, details of his confinement and the methods used in his interrogation is classified

- if the prosecution wishes to use classified information to prove a fact, the judge is obliged to permit the tender of a statement of that fact in lieu of the classified information[58]
- there is no appeal on any question of fact, although the statutory prohibition on applications for habeas corpus has recently been held invalid[59].

These flaws inevitably give rise to a perception that justice is not being done, and they may in fact lead to that result. The commissions are dealing with politically controversial matters and inevitably there is pressure to politicise them. The members of the commissions, all service officers, cannot be seen by the public to be impartial. The trial listing process is being manipulated in an attempt to secure a conviction of a high profile accused before the November 2008 elections. The former chief prosecutor, Col Morris D Davis, resigned rather than succumb to pressure from Gen Hartmann to use evidence obtained by coercion which he regarded as unreliable. The judge in charge of one of the high-profile cases, Col Peter E Brownback resigned suddenly on 29 May and no explanation for that resignation has been given.

That perception is fuelled by the deficiencies in the commissions' procedures. In any court or tribunal, the use of statements of fact in lieu of classified information is particularly problematic. That was demonstrated in the course of a hearing in a Combat Status Review Tribunal in the case of a man named Mustafa Ait Idr. A statement was put before the Tribunal which asserted, "While living in Bosnia, the Detainee associated with a known Al Qaida operative." In response, the following exchange occurred:

> "Detainee: Give me his name.
> President: I do not know.
> Detainee: How can I respond to this?
> President: Did you know of anybody that was a member of Al Qaida?
> Detainee: No, no.
> President: I'm sorry, what was your response?
> Detainee: No.
> President: No?
> Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.
> President: We are asking you the questions and we need you to respond to what is on the unclassified summary.'"[60]

---

58 § 949d(f)(2)(A)(iii).

59 *Boumediene v Bush*, unreported but to be 553 US ??? (2008), 12 June 2008.

60 In re Guantanamo Detainee Cases 355 F.Supp.2d 443 (2005).

That could have been written by Kafka.

One could understand the need for some relaxation of the common law hearsay rule[61], but Australian experience with war crimes trials after the Second World War demonstrates that this should be done only subject to carefully-considered conditions. Documentary evidence was permitted under the Commonwealth *War Crimes Act* 1945 as originally enacted.[62] That was recommended by Sir William Webb, then Chief Justice of Queensland, "so as to enable private diaries kept by enemy soldiers regarding atrocities and breaches of the rules of warfare to be tendered in evidence against the persons named in those diaries as the offenders"[63]. The result was not what he intended: "In the typical war crimes trial the greater part of the prosecution evidence consisted of written statements from living persons who were not produced in court."[64]

To permit prosecutors to avoid having available witnesses cross-examined is bad enough. The *Military Commissions Act* goes further. It permits the use of statements made by third parties and obtained by coercion under interrogation without the disclosure of the circumstances in which they were made. Such evidence could hardly be regarded as reliable. A trial in which it was used could hardly be regarded as a fair trial.

The commissions are also in breach of Common Article 3 of the Geneva Conventions, because they do not satisfy the requirement of that article for "a regularly

---

61 That rule has already been relaxed substantially in US federal courts and courts martial: see common r 807 of the *Federal Rules of Evidence* and of the *Military Rules of Evidence*.

62 Section 9(1).

63 *Report of the Third Board of Enquiry on War Crimes Committed by Enemy Subjects Against Australians and Others* (also known as the Third Webb Report), 31st of January 1946, p 5.

64 Sissons, D C S: *The Australian War Crimes Trials And Investigations (1942-1951)*, undated paper held by the War Crimes Studies Centre, University of California Berkeley, and available online at http://socrates.berkeley.edu/~warcrime/documents/Sissons%20Final%20War%20Crimes%20Text%2018-3-06.pdf; last accessed on 27 June 2008. I am indebted to Justice Logan of the Federal Court of Australia for this reference.

constituted court".[65] To avoid any adverse legal consequences from that fact, the act declares that a commission established under it "is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions"[66]. Presumably that will be effective in domestic law, but it does not change the fact. To make assurance doubly sure, the act further provides, "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights"[67].

Should Australia have "law of war" military commissions?

On the face of things there seems little benefit in establishing such commissions for Australia. They are costly; they are inefficient; they are unfair; they make trouble politically; they are in breach of the Geneva Conventions; and they risk arousing public sympathy for the alleged criminals. What could Australia gain?

It is sometimes said that war crimes cannot be tried in ordinary courts or courts martial because it is not practicable to apply the ordinary principles of law or rules of evidence in war crimes cases. If Australia tries to do that, it is said, commanders will have to go into the field with a lawyer at one hand and a public relations consultant at the other. In the heat of battle it is not possible to apply the forensic procedures of a well-trained police force. Similar arguments have been advanced by President Bush and his Attorney-General.[68] Elsewhere the author has written:

> "The asserted existence of procedural difficulties is a specious reason for the establishment of the commissions. I say that for three reasons. First, the assertion fails to explain how it is possible to try US citizens in civilian courts for similar (indeed allegedly the same) offences as are charged against the Guantanamo detainees. Second, … the assertion fails to explain why it would not be possible to try the detainees before ordinary courts-martial[69]. The government's argument that this was impractical was rejected by the Supreme Court[70]; and that argument is plainly inconsistent with the fact that jurisdiction to try *lawful* enemy combatants for offences against the law of war *is* conferred on courts-martial to the exclusion of military commissions[71]. Third, it fails to explain why the detainees should not be charged before an international tribunal such as the International Criminal Court or a special purpose tribunal such as those established for the former Yugoslavia or Rwanda. This would give the process international

---

65 See *Hamdan v Rumsfeld* at pp 619 ff.

66 § 948b(f).

67 § 948b(g).

68 Presidential Order 13/11/01: http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html; Gonzales, A R: "The Military Commissions Act of 2006", Berlin, 25 October 2006: http://www.usdoj.gov/ag/speeches/2006/ag_speech_061025.html.

69 Which had jurisdiction under UCMJ §18 "to try any person who by the law of war is subject to trial by a military tribunal". A court-martial is a military tribunal: see UCMJ §21 (as it stood before the enactment of the *Military Commissions Act of 2006*).

70 *Hamdan v Rumsfeld* at pp 610 ff..

71 § 948d(b).

> legitimacy. If an international tribunal was appropriate for Mr Milosovic, why is it not appropriate for Guantanamo detainees?"[72]

Moreover the argument overlooks the fact that a number of those charged, the alleged September 11 plotters in particular, were not captured on the battlefield but by carefully targeted arrests a long time after the events in respect of which they are charged.

If it is all so easy, why do the Americans persist with the commissions? The President answered that question at the time he signed the act into law:

> "THE PRESIDENT: Welcome to the White House on an historic day. It is a rare occasion when a President can sign a bill he knows will save American lives. I have that privilege this morning.
>
> The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror. This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives like Khalid Sheikh Mohammed, the man believed to be the mastermind of the September the 11th, 2001 attacks on our country. This program has been one of the most successful intelligence efforts in American history. It has helped prevent attacks on our country. And the bill I sign today will ensure that we can continue using this vital tool to protect the American people for years to come. The Military Commissions Act will also allow us to prosecute captured terrorists for war crimes through a full and fair trial.
>
> …
>
> When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test. It allows for the clarity our intelligence professionals need to continue questioning terrorists and

[72] See the article cited at note 51.

> saving lives. This bill provides legal protections that ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs.
>
> This bill spells out specific, recognizable offenses that would be considered crimes in the handling of detainees so that our men and women who question captured terrorists can perform their duties to the fullest extent of the law. And this bill complies with both the spirit and the letter of our international obligations. As I've said before, the United States does not torture. It's against our laws and it's against our values.
>
> By allowing the CIA program to go forward, this bill is preserving a tool that has saved American lives."

In short the purpose of the act was to enable the CIA to continue to use coercive interrogation methods.[73]

Australian law presently permits war crimes to be tried either in the ordinary courts or in the International Criminal Court. Australia does not systematically obtain the information needed for prosecutions by coercion. It does not need "law of war" military commissions for these offences.

V CONCLUSION

America's current defence strategy explicitly lists as one of the nation's vulnerabilities challenges "by those who employ a strategy of the weak using international fora, judicial processes, and terrorism"[74]. Military commissions are a logical manifestation of a strategy which views the use of judicial processes as a vulnerability, on a par with terrorism. You can judge for yourself the likelihood of the next President maintaining that strategic vision. If it is abandoned, the future of military commissions in the United States must be regarded as doubtful. Even President Bush has expressed the desire to close the Guantanamo Bay facility. It is unlikely that those charged will escape trial, whatever the fate of the commissions.

Australia's current defence strategy recognizes the changing nature of threats to this country. Those changes have been reflected through changes in the nature of the tasks assigned to its armed forces. Not every one is pleased with the changes. There are reported to have been threats by infantry officers to leave the service because of their exclusion from real fighting. It may be that today's soldiers have to learn to do more than fight; but they do not have to learn how to run courts or conduct war crimes trials. That is what judges are for. There is no reason to change the system.

---

73 For an interesting account of the methods used in interrogating Khalid Shaikh Mohammed, see Shane, S.: "Inside a 9/11 Mastermind's Interrogation", *New York Times*, 22 June 2008.

74 The National Defence Strategy of the United States of America, p 6.