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NEWS RELEASE

ICJ says US Court decision should halt the trial of David Hicks at Guantanamo Bay

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“Yesterday’s US Federal District Court decision in the Hamdan case¹ should result in a halt to the trial of Australian, David Hicks, in the Guantanamo Bay military commissions,” said The Hon. John Dowd AO QC, President of the Australian Section of the International Commission of Jurists (ASICJ). “The decision potentially affects all Guantanamo prisoners captured in Afghanistan, because it undermines the purported jurisdiction, structure, and procedures of the military commissions themselves.”

“The ASICJ rejects Attorney-General Ruddock’s comments that the decision has no application to David Hicks. The Australian government’s failure to protect one of its citizens who is innocent of all crimes until proven guilty is a disgrace. The US government looks after its own citizens charged overseas”, said Mr Dowd.

Mr Dowd said, “The US federal Court decision confirms what we have been saying all along. David Hicks is entitled to be treated as a POW under the *Geneva Convention relative to the Treatment of Prisoners of War* (the Third Geneva Convention), and any criminal trial against him should comply with the international laws and customs of war. He is entitled to trial in a properly constituted court-marshal, which accords procedural fairness and other basic standards of justice within a framework that is subject to the rule of law.”

Mr Dowd also said, “Even if, for the sake of argument, Hicks is not a POW, international law² requires that he be given a *‘fair and public hearing by a competent, independent and impartial tribunal established by law’* and that he is entitled to minimum guarantees such as the right *‘to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, ... to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf’*. Further, if he is *‘convicted of a crime (he) shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law’*. The Hamdan decision found that no such guarantees exist in the Guantanamo Bay military commissions.”

¹ *Hamdan v. Rumsfeld*; (D.D.C. No. 04-1519) (8 November 2004) <http://www.dcd.uscourts.gov/04-1519.pdf>

² Article 14, International Covenant on Civil and Political Rights

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“The trial process of David Hicks in the Guantanamo Bay military commissions must be halted. His POW status must be determined by a competent tribunal established under the rule of law. The commission structures, procedures and appeals process must be amended to comply with minimum standards of justice under international law before any more trials go ahead. This aberration of justice at Guantanamo Bay whereby the US military arrests, detains, interrogates, charges, tries, convicts, sentences, and if ordained, executes prisoners, cannot be allowed to continue,” said Mr Dowd. “The ASICJ urges Attorney-General Philip Ruddock to join his British counterpart to condemn this inherently unfair process targeting our fellow Australian citizens”, said Mr Dowd

For further comment and information, please contact The Hon. John Dowd AO QC , President, International Commission of Jurists (Australian Section) on 9266 0950; Mr Steve Mark, Chairman, International Commission of Jurists (Australian Section) on 9377 1801; or Nicholas McNally, Treasurer, International Commission of Jurists (Australian Section) on 0419 855 002.

ANALYSIS

Hicks’ treatment as a POW

Against the weight of world legal opinion, the Bush administration maintains that detainees such as David Hicks are not POWs, but rather, are ‘enemy combatants’; a classification the ASICJ says does not exist under international law. “Hicks is accused of training with Taliban forces for battle against the US Army in its invasion of Afghanistan in late 2001. Hicks is clearly a prisoner of war,” said Mr Dowd.

The Hamdan case was a legal challenge to the lawfulness of the US plan to try that man for alleged war crimes in the Guantanamo Bay military commissions, convened under special order of President Bush - the same commissions dealing with the trial of David Hicks.

Hamdan, like Hicks, was taken into US custody in Afghanistan in late 2001. The US Federal District Court found in its decision that the Third Geneva Convention, incorporated into US law, covered the hostilities in Afghanistan in late 2001.

The Court found “*if Hamdan is entitled to the protections accorded prisoners of war under the Third Geneva Convention, one need look no farther than Article 102 (of the convention) for the rule that requires his habeas petition to be granted:*

*(Article 102) A prisoner of war can be validly sentenced **only** if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.*

The Military Commission is not such a court. Its procedures are not such procedures. The government does not dispute the proposition that prisoners of war may not be tried by military tribunal.”³

The Court then approvingly cited⁴ the previous Court decision in *David Hicks v. Bush*⁵ that rejected the US government’s contention that the US campaign against al Qaeda in Afghanistan was a separate conflict to the war against the Taliban regime in that country in late 2001. The Court found that “*the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there.*”⁶

³ pages 13 & 14 of the US Federal District Court decision

⁴ at page 15

⁵ (D.D.C. No. 02-00299) (14 October 2004)

⁶ at page 16 of the US Federal District Court decision

Article 5 of the Third Geneva Convention, incorporated into US law, provides that if any doubt exists as to a prisoner’s classification as a POW, such person “*shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*” The Court in Hamdan noted “*the Army’s regulations provide that whenever a detainee makes such a claim, his status is ‘in doubt.’*”⁷ The Court then confirmed “*until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.*”⁸ The same applies to David Hicks.

The US Federal District Court further found that the ad hoc Combatant Status Review Tribunal at Guantanamo Bay was not a competent tribunal, because it “*was not established to address detainees’ status under the Geneva Conventions.*”⁹

Fairness of the Guantanamo Bay Military Commissions

The Court in the Hamdan case then examined whether, in substance and practice, the Guantanamo Bay military commissions provide the fundamental standards of justice required for courts-martial in the US Uniform Code of Military Justice. The Court found the “*Military Commission is remarkably different from a court-martial ... in two important respects.*”¹⁰

Firstly, there is no right of appeal to civil courts, instead only allowing appeals to President Bush and Secretary of Defence Rumsfeld personally. The ASICJ says that on no credible assessment could that be regarded as a fair and impartial system of review. Secondly, the rules of the commission allow “*the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him.*”¹¹ Such matters, in the view of the ASICJ, strike at the heart of a fair system of justice, and there is no chance of a fair trial under the present military commissions process. The ASICJ says that no-one could credibly stand behind any criminal conviction obtained through such a system. As the US Federal District Court said, “*the rules of the Military Commission are fatally contrary to or inconsistent with the statutory requirements for courts-martial convened under the Uniform Code of Military Justice, and (are) thus unlawful.*”¹²

Mr Dowd said, “Even if the Third Geneva Convention and the US Uniform Code of Military Justice do not apply to Hicks (if he is found by a competent tribunal not to be a POW), the fundamental flaws in the military commissions process, recognised by the Court in Hamdan, result in their failure to meet basic requirements under general international law including the *International Covenant on Civil and Political Rights*. Either way you look at it, to proceed against Hicks in these commissions would be unlawful and untenable.”

Conclusion

The US Federal District Court ordered in Hamdan that “*unless and until a competent tribunal determines that (the) petitioner is not entitled to the protections afforded prisoners-of-war under ... the (Third) Geneva Convention ... he may not be tried by Military Commission...*” Further, it ordered that “*unless and until the rules for Military Commissions ... are amended so that they are consistent with and not contrary to Uniform Code of Military Justice ... (the) petitioner may not be tried by Military Commission...*”. ICJ says that David Hicks should also be provided the same outcomes.

⁷ at page 17

⁸ at pages 18 & 19

⁹ at page 18

¹⁰ at page 28

¹¹ at page 28

¹² at page 33