

**Report to the International Commission of Jurists (Victoria)
on David Hicks and Guantanamo Bay**

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(Special Rapporteur)

“The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.”

Lord Hoffmann, Belmarsh Prison case, 16 December 2004 ¹

Abstract

David Hicks, an Australian citizen, and other individuals captured during the military campaign in Afghanistan have been detained indefinitely by the U.S. military in Guantanamo Bay, Cuba in the context of the “war on terror”. A number of these individuals, David Hicks included, are now subject to criminal charges and trial by a specially constituted Military Commission. The Military Commission has no application to American citizens. This report concludes that, notwithstanding contrary positions expounded by the United States, the protections of either international humanitarian law, or international human rights law, or both remain applicable to these individuals and that the United States by its conduct has breached international law. Also examined is the question whether Australia, in relation to its citizen David Hicks, has been complicit in this conduct and has failed to comply with its obligations or alternatively fulfill its responsibilities under international law. The conclusion is that it has failed on both counts.

Background

Immediately in the wake of the September 11 attacks in 2001, the U.S. Congress adopted a resolution authorizing the President to use all necessary and appropriate force against limited targets for specified purposes.² It was under this authorization that the armed conflict in Afghanistan was initiated. However the authorization made no mention of detention of enemy participants in the conflict or of military commissions to try them.

¹ *A v. Secretary of State for the Home Department* (HL(E)) [2005] 2 AC 68, per Lord Hoffman at p.132 (para. 97)

² Public Law 107-40, 115 Stat. 224 (2001) (AUMF)

Subsequently, on 13 November 2001, President Bush pronounced a Presidential Order³ whereby persons nominated by the President were to be imprisoned for an unspecified period of time “*at an appropriate location designated by the Secretary of Defense outside or within the United States*”. The Presidential Order also created a facility for the trial of those persons by a specially appointed Military Commission. The Presidential Order did not have any express basis in legislation or Congressional authorization.

David Hicks, an Australian citizen, was captured in November 2001 near Konduz, Afghanistan in the closing days of the war between the Taliban government of Afghanistan and the Northern Alliance supported by the United States. He was subsequently confined at Guantanamo Bay on the southeast corner of Cuba where he remains imprisoned.

The United States has occupied Guantanamo Bay for more than a century. It is used as a U.S. naval base. The occupation was formalized in 1903 with the grant of a lease to the United States by the Republic of Cuba which survives to this day. It was pursuant to the Presidential Order that the now notorious detention centre was established at Guantanamo Bay.

The Position of the United States

The United States claims that neither international humanitarian law (the law of armed conflict)⁴ nor international human rights law⁵ applies to David Hicks and the other Guantanamo Bay detainees. Nor does it recognize that this body of international law applies to the Military Commission system it has established to try them. It takes this

³ Executive Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 13 Nov., 2001 66 Fed. Reg. 57, 833 (16 November 2001). The full Presidential Order may be found at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>; the last date observed: 16 May 2006. The use of presidential military orders has been sporadic in US history. See Lacey, ‘Military Commissions: A Historical Survey,’ *Military Lawyer* (March 2002) 41 at 45; Laska and Smith, ‘Hell and the Devil: Andersonville and the Trial of Captain Henry Wirz, CSA, 1865,’ 68 *Military Law Review* (1975) 77; Mudd v Caldera, 134 F Supp 2d 138 (DDC 2001), appeal dismissed, 309F 3d 819 (DC Cir. 2002); In Re Yamashita, 327 US 1 (1946); Homma v Patterson, 327 US 759 (1946). In precedential terms the case most relied on is, Ex Parte Quirin, 317 US 1 (1942).

⁴ International humanitarian law (the law of armed conflict) is a body of international law established by treaty or custom, which is specifically intended to govern humanitarian issues arising from international or non-international armed conflicts. It protects persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice. The main treaty sources applicable in international armed conflict are the four Geneva Conventions of 1949 and the Additional Protocol I of 1977. The main treaty sources applicable in non – international armed conflict are Article 3 common to the Geneva Conventions and the Additional Protocol II of 1977.

⁵ International human rights law is a body of international law, established by treaty or custom, pursuant to which individuals and groups can expect and/or claim certain defined conduct and protections from governments. The main treaty sources relevant to this paper are the International Covenant on Civil and Political Rights 1966 (the “Civil and Political Covenant”), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the “Convention Against Torture”).

position in the face of having become a signatory to, and ratified, all of the relevant treaties and being bound by them.

The legal black hole⁶ it has created for David Hicks and the other detainees is not filled by resort to the constitutional rights provided for in the U.S. Constitution, a cherished birthright of American citizens, or any of the complementary domestic law of the United States. On the contrary, excavation of the hole is complete with a denial of those rights on the basis that the prisoners held at Guantanamo Bay are “non-resident aliens, with no constitutional rights”.⁷

The United States has sought to fill the legal void with Executive Orders, principally emanating from the Presidential Order of President Bush of 13 November 2001 supplemented by Department of Defense Military Commission Order No. 1 issued by his Secretary of Defense, Donald Rumsfeld on 31 August 2005. None of the relevant Executive Orders have been passed or adopted by Congress. The system of Military Commissions established by this means to try David Hicks and the Guantanamo detainees falls well short of international law standards and the constitutional protections which Americans and citizens of civilized nations are entitled to expect.

Regardless of whether and to what extent the arguments of the United States may be sound as a matter of U.S. domestic law, it is indisputable that, as a matter of international law, they are fundamentally flawed. The position that, by keeping individuals detained during the “war on terror” outside the national territory of the State, State authorities can bypass some or all of the protections and limits on State action enshrined in international humanitarian law or in international human rights law or both is not justified.⁸

The concept of the “war on terror” may be useful as a political and rhetorical tool, however it has no legal standing in international law.⁹ The concept appears to extend

⁶ The principal motivation for transferring prisoners to Guantánamo Bay appears to be that it was “the legal equivalent of outer space”: see J. Barry, M. Hirsh and M. Isiko., “The Roots of Torture”, *Newsweek*, 24 May 2004 (quoting an administration official). An internal memorandum dated 28 December 2001 from the Office of the Legal Counsel of the Justice Department expressed the view that the US domestic courts had no jurisdiction to review the legality of detention of prisoners held at Guantánamo Bay, or to hear complaints relating to their ill-treatment.

⁷ *United States of America v David M. Hicks*, Prosecution Response To Defense Motion To Dismiss For Lack of Jurisdiction – Challenging the President’s Military Order on the grounds that it violates the U. S. Constitution’s Equal Protection Clause, 18 October 2004.

⁸ “Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”, Dr. Silvia Borelli, *International Review of the Red Cross*, Vol. 87 No. 857 March 2005.

⁹ The question of the legal character of the “war on terror” (i.e. an armed conflict waged against a loosely organized transnational terrorist network) has been the object of much debate in the academic community: see e.g. J. Fitzpatrick, “Jurisdiction of Military Commissions and the Ambiguous War on Terrorism”, *American Journal of International Law*, Vol. 96, 2002, p. 345, in particular pp. 346- 350; C. D. Greenwood, “International Law and the ‘War against Terrorism’”, *International Affairs*, Vol. 78, 2002, p. 301; G. Abi-Saab, “Introduction: The proper role of international law in combating terrorism” in A. Bianchi (ed.), *Enforcing International Law Norms Against International Terrorism* (Hart Publishing, Oxford, 2004), p. xiii. Fitzpatrick also suggests a number of possible meanings for the umbrella term,

beyond the conflicts in Afghanistan and Iraq to include any armed conflict waged against any loosely organized transnational terrorist network encompassing all anti-terror operations conducted subsequent to the events of September 11. However, it may be accepted that the conflict in Afghanistan, although being regarded as part of the “war on terror”, is an international armed conflict within the purview of established international law, with the result that the rules of international humanitarian law regulating international armed conflict were and remain applicable in full. Further, the rules of international human rights law were and remain applicable to individuals captured in that context.

The main Coalition States involved in the conflict in Afghanistan have adopted very different positions on the applicability of international humanitarian law. The United Kingdom did not dispute the applicability of the Geneva Conventions to the conflict. However, the United States has adopted a remarkable position, arguing that the military operations in Afghanistan were carried out in two different “wars”.

The “first war” is said to have been between the Coalition forces, including the forces of the United States, and the Taliban forces. Although the United States did not initially dispute that the Geneva Conventions were applicable to this conflict, the U.S. subsequently adopted a contrary stance with regard to persons apprehended during that conflict. On 7 February 2002, President Bush declared that, although in principle the Geneva Conventions applied to members of the Taliban, Taliban soldiers taken prisoner in Afghanistan could not be considered Prisoners of War under the Third Geneva Convention, because “unlawful combatants” did not satisfy the requirements of Article 4 of the Convention.¹⁰

The other “war” fought in Afghanistan is said to have been the war with al Qaeda. In relation to this “war” the U.S. administration’s position is that “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva,”¹¹ consequently, members of al Qaeda could not qualify as Prisoners of War.¹²

Thus, according to the US administration, all persons captured during the conflict in Afghanistan were “unlawful combatants” who do not have any rights under the Geneva Convention.

With regard to the status of individuals captured in Afghanistan, the distinction that the United States seeks to draw between the “war” against the Taliban and that against al

‘war against terrorism’: see J Fitzpatrick, ‘Speaking Law to Power: the Law Against terrorism and Human Rights’ EJIL (2003) Vol 14 No 2, 241 at 249.

¹⁰ George W. Bush, Memorandum on ‘Humane Treatment of Taliban and al-Qaeda detainees’, 7 February 2002, para. 2

¹¹ *Ibid.*

¹² *Ibid.*

Qaeda was firmly rejected recently by a judge of the District Court for the District of Columbia. In *Hamdan v. Rumsfeld*¹³ Robertson J held that:

“The government’s attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with.”

Robertson J further held that detainees could only be denied Prisoner of War status and treatment following a determination by a competent tribunal, and that the Presidential determination and the “combatant status review tribunals” were not sufficient for these purposes. As a result, it was held that the trial of the applicant before a military commission could not proceed until such a determination had taken place. The determination of Robertson J is consistent with conventional international law analysis and is clearly correct.

The position adopted by the United States administration has given rise to a groundswell of strident criticism, both domestically and abroad. For example, it prompted the Archbishop of York, the Most Revd and Rt Hon John Sentamu¹⁴ to say in February 2006: “In Uganda President Amin¹⁵ did something similar: he did not imprison suspects because he knew that in prison the law would apply to them, so he created special places to keep them. If the Guantanamo Bay detainees were on American soil, the law would apply. This is a breach of international law and a blight on the conscience of America.”¹⁶

The Presidential Order

By means of the Presidential Order, the President of the United States has claimed the unilateral authority to try persons nominated by him as suspected terrorists in a system which is wholly outside the traditional civilian and military judicial systems, for crimes defined by the President alone, under procedures lacking basic protections, before persons who are his chosen subordinates. The President has further asserted the power to disregard international treaty obligations that have been entered into by both the

¹³ *Hamdan v. Rumsfeld*, 8 November 2004 (Memorandum Opinion) (D.Ct., D.C.) (available at www.findlaw.com last observed 25 April 2006), the case concerned a habeas petition presented on behalf of a man accused of being Osama bin Laden’s driver and bodyguard, and who was standing trial before a military commission set up under the Presidential Order of 13 November 2001.

¹⁴ Dr. John Sentamu, Archbishop of York (appt. 17 June 2005) and formerly a High Court judge in Uganda, fled in 1974 during the regime of Idi Amin. “*The Guardian*” 17 June 2005

¹⁵ Idi Amin was the President of Uganda 1971 – 1979. President Amin conferred upon himself the formal title: *His Excellency President for Life, Field Marshal Al Hadji Doctor Idi Amin, VC, DSO, MC, Lord of All the Beasts of the Earth and Fishes of the Sea, and Conqueror of the British Empire in Africa in General and Uganda in Particular*”

¹⁶ 23 February 2006 <http://www.thinkinganglicans.org.uk/archives/001555.html> last observed 30 April 2006. See too: “The Americans are breaking international law... it is a society heading towards Animal Farm” - Archbishop Sentamu on Guantanamo by Ian Herbert and Ben Russell, *The Independent* 18 February 2006

United States and Australia – obligations that are in place to protect not only the Guantanamo detainees but also American and Australian service-members.

The Military Commission established by the President is the first of its kind since the coming into force of the new regime of post-World War II humanitarian international law and human rights law based on the U N Universal Declaration of Human Rights 1948¹⁷, an instrument which was drafted, promoted and internationalized predominantly by the influence of the United States.

Section 2 of the Presidential Order purports to vest total power in the President to make persons subject to the Order, and therefore subject to an indeterminate period of imprisonment and possible trial by Military Commission. Citizens of the United States are expressly exempt from the Order. It is couched in expansive terms:

*“The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that: .. there is reason to believe that such individual has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.....and it is in the interest of the United States that such individual be subject to this order.”*¹⁸

In section 7(b) the Presidential Order seeks to confer exclusive jurisdiction on the Military Commissions for trials referred to them and purports to oust the jurisdiction of all established courts over persons made the subject of the Order, including all courts of the United States, all courts of foreign nations and any international tribunal.

Pursuant to the Presidential Order, the Secretary of Defense on 31 August 2005 promulgated Military Commission Order No. 1 (the “Military Commission Order”) governing the appointment of military commissions and setting forth various rules governing the appointment, jurisdiction, trial and review of military commission proceedings.¹⁹

The Military Commission

In July 2003, David Hicks became one of the first six Guantanamo Bay detainees to be determined by President Bush to be eligible for trial by Military Commission. Some two and a half years after his capture, David Hicks was charged on 10 June 2004 with:

¹⁷ On 10 December, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights.

¹⁸ Presidential Order, 13 November 2001, Section 2(a).

¹⁹ See: Department of Defense Military Commission Order No 1 dated 31 August 2005, last observed on 16 May 2006 <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>

- (1) conspiracy to
 - a. commit murder,
 - b. attack civilians and civilian objects, and
 - c. terrorism,
- (2) attempted murder and
- (3) aiding the enemy.

He has pleaded not guilty to all charges.

Pursuant to the Military Commission Order (sub-sections 4A.(2 - 4)) the Military Commission appointed to hear David Hicks' case will consist of a Presiding Officer and at least three other military officers. The senior Commission member ('the Presiding Officer') is a judge advocate, but the three other members are not required to have legal training. The Presiding Officer is not a member of the independent judiciary. Only the Presiding Officer can make rulings on matters of law, however he cannot make a determination to dismiss a charge in response to a submission of defence counsel – that function is left to the Secretary of Defense or his designee. Findings of fact and determinations as to sentence are made by the three appointed members of the Commission who have no legal qualifications. The members are appointed by the Appointing Authority, which consists of the Secretary of Defense or his designee (section 2). The Appointing Authority also approves the charges prepared by the Prosecution (sub-section 6 A. 1)

Under the Commission rules provided for in Section 4(c)(3) of the Presidential Order (and sub-section 6 D. 1 of the Military Commission Order), evidence can be admitted if, in the opinion of the Presiding Officer, (or in certain circumstances by a majority of the Commission), it would have 'probative value to a reasonable person.' Thus the relatively strict rules of evidence familiar in Australian (and US) criminal trials do not apply.

The Military Commission Order provides (by sub-section 5B and C) that the accused is presumed innocent until proven guilty and the standard of proof is beyond reasonable doubt on the admitted evidence. However, the concurrence of only a two-thirds majority vote by Commission members under section 4(c) (6) and (7) of the Presidential Order will be sufficient for a conviction and the imposition of the sentence, which may include life imprisonment. The Military Commission Order provides (by sub-section 6 F) that unanimous affirmative vote of Commission members is required to pass a sentence of death. The Presiding Officer is not permitted to participate in, or be present during, the deliberations or voting on findings or sentence by the other members of the Commission.

Following completion of the trial before the Military Commission, the procedure provides that the cases will be reviewed 'for material errors of law' by a four-member Review Panel. At least one member of each Review Panel shall have experience as a judge who is commissioned as a military officer for the purpose of the Commission proceedings. Should the Panel find that a material error of law occurred, the case is to be returned to the Commission.

Further and notably section 4(c)(8) of the Presidential Order and sub-section 6H(2) of the Military Commission Order provide that, once the trial finding and sentencing has passed through the Review Panel stage, either the President of the United States or the Secretary of Defense (if delegated by the President) makes the final decision whether to approve the finding. Under this procedure an authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty, however there is no express facility for a finding of Guilty to be reversed to a finding of Not Guilty.

The Australian Law Council has appointed Lex Lasry QC as the Australian independent legal observer to the trial. In his initial report following attendance at a preliminary hearing, Lex Lasry concluded that there is an ‘unacceptably high risk that there will be a miscarriage of justice’ in Hicks’ trial.²⁰ It is submitted that the findings in the report are well founded.

International Law

In *Hamdan v. Rumsfeld* the Presidential Order is now the subject of direct challenge before the Supreme Court of the United States. The trial of David Hicks before the Military Commission has been adjourned pending resolution of this case.

The *Hamdan* case involves a complex analysis of the domestic law of the United States surrounding the critical question of the allocation of power between Congress, the President and the federal courts in the ongoing war on terror. The case may also deal with the issue as to whether the Geneva Convention is applicable to the petitioner Mr. Hamdan.

This report however analyses the question as to whether, and to what extent, the Military Commission process complies with the standards set by international law.

International law is derived from treaties and customary international law. Both the United States and Australia are parties to several human rights treaties which are now well entrenched in international law. The most important treaties relevant to the detainees at Guantanamo Bay are the Third Geneva Convention Relative to the Treatment of Prisoners of War (the “Geneva Convention”), the International Covenant on Civil and Political Rights (the “ICCPR”), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Convention Against Torture”).

²⁰ The Report is available at <http://www.lawcouncil.asn.au/read/2004/2403092446> last observed 25 April 2006. However, a case for military commissions can be found in Anderson, ‘What to do with Bin Laden and Al Qaeda Terrorists? : A Qualified defence of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base,’ 25 Harvard Journal of Law and Public Policy (2002) 591. See also, Crona and Richardson, ‘Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism,’ 21 Oklahoma City University Law Review (1996) 349.

The Geneva Convention

Both the United States and Australia are parties to the Geneva Conventions of 1949.²¹ Of the four Geneva Conventions the Third Geneva Convention Relative to the Treatment of Prisoners of War is applicable to David Hicks (the “Geneva Convention”).²² Protocol I, adopted in 1977, is an addition to the Geneva Conventions of 1949 and expands its operation. The United States is not a party to Protocol I, nor is Afghanistan.²³

The first Article of the Geneva Convention requires signatories to do all within their power to respect and to ensure respect for the present Convention in all circumstances. Article 1 is couched in simple and direct terms: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”

In accordance with the intention proclaimed by Article 1, the Convention should be generously and faithfully interpreted by both the United States and Australia to effect the spirit of its terms and ensure its application wherever possible. Attempts to circumvent the operation of the Convention by exploitation of what are perceived to be legal loop holes should be avoided.

This is reinforced by the terms of the Vienna Convention on the Law of Treaties which binds Australia as a signatory.²⁴ Some 105 States have ratified the Vienna Convention. However, even those States that have not ratified the Convention, which includes the United States, are required to recognize it as binding upon them in as much as it is a restatement of customary international law.

Pursuant to Article 26 of the Vienna Convention: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Further, Pursuant to Article 31

²¹ The Geneva Conventions of 1949 together consist of four instruments, each covering different subject matter. The First Convention covers sick and wounded in the field; the Second Convention covers sick and wounded at sea; the Third Convention covers Prisoners of War and the Fourth Convention covers civilians in time of war.

²² The [Third] Geneva Convention Relative to the Treatment of Prisoners of War was ratified by the United States in 1955. The Convention has been in force in Australia following ratification of the 1929 Geneva Convention by Australia on 23 June 1931 (Australian Treaty Series [1931] ATS 7), which was subsequently replaced as between the parties by [Third] Geneva Convention of 12 August 1949. The Third Geneva Convention is included as Schedule 3 to the Geneva Conventions Act 1957 (Commonwealth of Australia).

²³ It was adopted on 8 June 1977 by the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*. Australia has ratified Protocol I although it has not been adopted by several nations, including the United States, Afghanistan and Iraq.

²⁴ The Vienna Convention on the Law of Treaties was signed in Vienna on 23 May 1969 and entered into force on 27 January 1980. It is in force for Australia following its Accession on 13 June 1974 (Australian Treaty Series [1974] ATS 2) but has not been adopted by the United States. The Vienna Convention is the authoritative treaty on the international law of treaties, establishing the procedures by which treaties are adopted, interpreted, and invalidated. It is considered for the most part to reflect already existing and binding customary law on treaties, and thus apart from some necessary gap-filling and clarification, it is not viewed as a change in existing international law. This means that the Vienna Convention is arguably binding on non-parties, such as the United States.

States are required to interpret treaties “in good faith.” and “in the light of its object and purpose”. These provisions may be accepted as re-statements of customary international law and therefore arguably binding on the United States.

By Article 27 of the Vienna Convention: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Again, this may be accepted as a re-statement of customary international law. As such it puts to rest the contention of the United States²⁵ that: “the Accused’s [Hicks’] motion should be denied because the President has declared that the GPW [Geneva Convention] does not apply to al Qaeda” [and Taliban detainees], relying upon a Memorandum from the President to his Vice President and others of 7 February, 2002.²⁶ The Memorandum signed by President Bush concludes:

“I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.”

Such a unilateral assertion, whatever may be its status in the domestic law of the United States, cannot alter the obligation to comply with the terms of a binding treaty if it is otherwise applicable.

Article 2 of the Geneva Convention relevantly provides: “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party.”

It is difficult to dispute that Hicks was captured in a conflict within the meaning of Article 2 so as to attract the operation of the Geneva Convention. Afghanistan and the United States are High Contracting Parties to the Convention. The alleged separate conflicts against al Qaeda and the Taliban were fought on the same territory, at the same time, with the same forces, and under the same Congressional resolution. The Taliban constituted the *de facto* government of Afghanistan. The attempted distinction between Northern Alliance conflict with al Qaeda and the Taliban does not conform to the structure of the Convention which calls for a decision as to whether it applies to the conflict in Afghanistan, not the precise designation of the individual actors participating in the conflict.

²⁵ *United States of America v David M. Hicks*, Prosecution Response To Defense Motion To Dismiss For Lack of Jurisdiction – Challenging the President’s Military Order on the grounds that it violates the U. S. Constitution’s Equal Protection Clause, 18 October 2004.

²⁶ The Memorandum is available at www.library.law.pace.edu/government/detainee_memos.html last observed: 25 April 2006. The policy of the US government is that the captives are not prisoners of war (POWs) whose internment is regulated by the Third Geneva Convention: see White House Fact Sheet: Status of Detainees at Guantanamo (7 February 2002) at <http://www.whitehouse.gov/news/releases/2002/02> last observed 15 May 2006.

Given that the Geneva Convention applies, a second question arises as to the status of David Hicks under it. Article 3 provides for the regime which is to apply in the event that the conflict is not “of an international character occurring in the territory of one of the High Contracting Parties.” In that event, if David Hicks is found at the time of his capture to be a person who was “taking no active part in the hostilities” (which includes the situation where he was a member of an armed force who had laid down his arms or he was placed *hors de combat* by detention) the following conduct is prohibited by Article 3(1)(d): “[T]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

However, the Military Tribunal established by the Presidential Order is not a “regularly constituted court” and does not afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.” A violation of Article 3 will therefore have occurred as the result of the passing of a sentence on David Hicks.

In the alternative, provided David Hicks falls within the broad categories of armed forces militias or volunteer corps defined in Article 4, he will have assumed the status of a Prisoner of War under the Convention, which carries significant protections with it in the present context.

Article 5 – Deemed P O W Status

However, the most obvious status conferred on David Hicks is that of a “deemed” Prisoner of War pursuant to Article 5. This Article relevantly provides: “The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.” Further:

“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

At the very least, there is doubt as to whether David Hicks belongs to any of the categories set out in Article 4.

No Article 5 Determination

Further, it is beyond dispute that his Prisoner of War status has not been determined by any tribunal, whether “competent” or not.

Article 5 requires not only that the status of a combatant who falls into the hands of the enemy be determined by a competent tribunal, but also that it be assessed on a case-by-case basis. Generalized determinations relating to the status of a group of detainees or of a whole category of enemy combatants do not comply with the requirement of Article 5.

In this case, in contravention of Article 5, the treatment of the detainees is determined by executive discretion and not by legal norms, because the administrative action with respect to them lacks judicial oversight.

In the case of David Hicks and the other Guantanamo detainees, if there has been any determination as to their POW status, it was at best a non-compliant generalized class determination and one made not by any “competent tribunal” but by the executive.²⁷

The contention that any individual can be denied Prisoner of War status under the Convention by Presidential fiat, is irreconcilable with text of Article 5, defeats its purpose, and departs from and undermines respect for the present Convention contrary to the exhortation in Article 1. It also compromises the ability of the U.S. and Australia to insist on faithful observance of the Convention when and if our personnel fall into enemy hands in similar conflicts, such as that presently occurring in Iraq.

The Combatant Status Review Tribunal

By order made on July 7, 2004 the US Department of Defense established the Combatant Status Review Tribunal (CSRT) for detainees held at Guantanamo Bay, Cuba. This tribunal was designed to serve as a forum for detainees to contest their status as “enemy combatants”.²⁸

CSRT tribunals are comprised of three neutral officers, none of whom were involved with the detainee. One of the tribunal members is a judge advocate and the senior ranking officer serves as the president of the tribunal. Each detainee, in turn, is assigned a military officer as a personal representative. The assigned officer is appointed to assist the detainee in preparing for a tribunal hearing. Detainees are to have the right to testify before the tribunal, call witnesses and introduce any other evidence. Following the hearing of testimony and other evidence, the tribunal will determine in a closed-door session whether the detainee is properly held as an “enemy combatant.”

Pursuant to the Detainee Treatment Act of 2005, the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.²⁹

However, the CSRT is strictly limited in the findings it is permitted to make. It can only determine whether a detainee is an “enemy combatant” as defined in the Order establishing the tribunal. The definition is in the following form:³⁰

²⁷ Pursuant to the Presidential Order *op cit.* Note 3.

²⁸ The Order establishing the CSRT was pronounced by US Deputy Secretary of Defense Paul Wolfowitz on 7 July 2004 (the CSRT Order)

²⁹ Amendment to Section 2241 of title 28, United States Code

³⁰ See: Paragraph a. of the CSRT Order

“For purposes of this Order, the term “enemy combatant” shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.”

It can be readily seen that any determination as to “enemy combatant” status does not and cannot amount to a determination as to POW status under Article 4 of the Geneva Convention. Indeed, if anything a finding that a detainee is an “enemy combatant” as defined arguably raises a prima facie case that the person may also fall within the definition of a POW for the purposes of Article 4.

The purpose of the CSRT is therefore to determine, as a matter of the domestic law of the United States whether a person is an “enemy combatant” and therefore subject to continued detention at Guantanamo Bay and trial by Military Commission pursuant to the Presidential Order. The CSRT is not a “competent tribunal” within the meaning of Article 5 of the Geneva Convention.

Accordingly, the fact that David Hicks may have been determined by the CSRT to be an “enemy combatant”³¹ is not a finding which can deny David Hicks his deemed prisoner of war status under Article 5 of the Geneva Convention. Rather, the opposite is the case – the finding tends to confirm his present status as a deemed POW.

Administrative Review Board

On 14 September, 2004, the Department of Defense announced a directive to provide for administrative review procedures for enemy combatants detained by the Department of Defense at Guantanamo Bay.

The Administrative Review Boards (ARB), also known as the Annual Review Boards, are managed through the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) at Guantanamo Bay.

If a detainee is found to be an enemy combatant by the Combatant Status Review Tribunal, the detainee then goes before the ARB. The ARB determines if the detainee should still be detained at Guantanamo Bay, released to their home countries for further detention, or simply released without any conditions.

During an ARB review, detainees are allowed to present evidence and/or call witnesses. Home countries of the detainee are notified about a month before an ARB review is to take place, giving the home country time to compile evidence, if it wishes, to present to

³¹ See: See: Australian Government Attorney General’s Department – David Hicks FAQ www.ag.gov.au/agd Last observed 28 May 2006

the board in defence of the detainee. Family members of the detainee are also allowed to present statements, evidence or witnesses on behalf of the detainee. Government agencies, such as the Justice, Homeland Security, and State Department and the CIA, are also allowed to present information to the board. It is intended that these boards will conduct reviews on an annual basis.

On December 14, 2004, the Department of Defense announced that it had conducted its first Administrative Review Board (ARB) for enemy combatants detained at Guantanamo Bay and on 9 February 2006, the US Department of Defense announced the completion of the first round of Administrative Review Board (ARB) decisions. All of the hearings for this first round were conducted between 14 December 2004 and 23 December 2005. Deputy Secretary of Defense Gordon R. England, the Designated Civilian Official (DCO) for the ARB process, has made final decisions on all 463 board recommendations; these decisions consist of 14 releases (3 percent), 120 transfers (26 percent) and 329 continue to detain (71 percent).

Again, it can readily be seen that any determination made under the annual review of the ARB does not and cannot amount to a determination as to POW status under Article 4 of the Geneva Convention.

The purpose of the ARB review is to determine, as a matter of the domestic law of the United States, whether a detainee continues to represent a threat to the United States and its allies or whether the person should remain detained “for intelligence purposes”. and if so, whether the person should be subject to continued detention at Guantanamo Bay and trial by Military Commission pursuant to the Presidential Order.³²

The ARB is not a “competent tribunal” within the meaning of Article 5 of the Geneva Convention.

In any event, David Hicks has not been the subject of an ARB review, because the Order governing this procedure has no application to those charged and awaiting trial before a Military Commission.

Conclusion as to Deemed POW Status

In the case of David Hicks, it is beyond dispute that he was apprehended in a theatre of military operations. It is also the case that no Article 5 hearing has occurred. Thus David Hicks is entitled to presumptive Prisoner of War status, which is a status he retains to this day. As such he is entitled to all of the protections provided by the Convention.

One important right in the present context is the right of Prisoners of War to be tried by the same courts, according to the same procedure as in the case of members of the armed forces of the Detaining Power. As provided in Article 102:

³² See: Guantanamo Detainee Processes, updated September 8, 2005, Lt. Cmdr. Chito Pepler, www.defenselink.mil/news/Sep2005 (Last observed 28 May 2006)

“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.”

Trial by a specially constituted Military Commission, which has no application to members of the armed forces of the United States, is a clear violation of Article 102 of the Geneva Convention.

The International Covenant on Civil and Political Rights

Central to the modern international law framework of human rights is the International Covenant on Civil and Political Rights 1966 (the “ICCPR”).³³ This treaty embodies the fundamental civil and political rights contained in the Universal Declaration of Human Rights.³⁴ With over 150 States Parties, the Civil and Political Covenant is the most widely accepted human rights treaty in existence.

The United States ratified the ICCPR in 1992 and is therefore bound by its terms.³⁵ Australia is also bound by the Covenant, having ratified the treaty in 1980.³⁶ However, the United States has consistently maintained the position that the ICCPR has no application to the inmates of Guantanamo Bay. It purports to do so on the basis that:

“The Coalition, including the United States, is engaged in an armed conflict with al Qaeda and the Taliban. Accordingly, the Law of Armed Conflict applies to this war, not the Civil and Political Covenant. The Laws of Armed Conflict regulate the interactions between belligerent states and the interactions between a state and individual members of enemy forces. The Law of Armed Conflict includes such treaties as the Hague and Geneva Conventions and was negotiated with the exigencies of war in mind. In contrast, the Civil and Political Covenant is part of a body of law known as Human Rights Law, a distinctly separate body of law. Treaties under Human Rights Law were not negotiated with the requirements of wartime in mind and therefore cannot apply to the ongoing armed conflict. By placing such emphasis on the Civil and Political Covenant for relief, Defense is sidestepping the applicable body of law, the Law of Armed Conflict.”³⁷

³³ 16 Dec., 1966, 999 U.N.T.S. 171.

³⁴ 10 Dec, 1948, G.A. Res.217A, 3 U.N. GAOR, U.N. Doc. A/810 (“Universal Declaration”), agreed at the United Nations General Assembly on 10 December 1948.

³⁵ *Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 with entry into force 23 March 1976. The ICCPR was ratified by the United State on 8 September 1992.*

³⁶ The ICCPR was ratified by Australia on 13 August 1980 (Australian Treaty Series [1980] ATS 23).

³⁷ *United States of America v David M. Hicks*, Prosecution Response To Defense Motion To Dismiss For Lack of Jurisdiction – Challenging the President’s Military Order on the grounds that it violates the U. S. Constitution’s Equal Protection Clause, 18 October 2004.

Here the inherent contradiction in the position adopted by the United States becomes apparent. On the one hand it maintains that the Geneva Convention, although it is the principal component of the Law of Armed Conflict, does not apply to David Hicks and the other detainees because, as Taliban or al Qaeda detainees they are merely “unlawful combatants” and the conflict with the Taliban and al Qaeda is such that the Convention has no application. However, it is also said that the Law of Armed Conflict does apply with the consequence that the Civil and Political Covenant and international human rights law are excluded.

Notwithstanding this strained position, it is a well-established principle of contemporary international law that the applicability of international human rights law, including the ICCPR, is not confined to times of peace, and that the existence of a state of armed conflict *per se* does not justify the suspension of fundamental human rights guarantees.

This principle, affirmed by the International Court of Justice (the “ICJ”) in the *Nuclear Weapons Advisory Opinion* in 1996³⁸, has recently been restated by the ICJ in the *Palestinian Wall case*³⁹ in the following terms:

“The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”

Similarly, in a case relating to military operations conducted by US forces in Grenada, the Inter-American Commission, rejecting the US contention that “the matter was wholly and exclusively governed by the law of international armed conflict,” held that:⁴⁰

“While international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a ‘common nucleus of non-derogable rights and a common purpose of protecting human life and dignity’, and there may be a substantial overlap in the application of these bodies of law.”

³⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996(I)*, p. 240, para. 25.

³⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, para. 106.

⁴⁰ *Coard et al. v. United States*, Case No. 10.951, Report No. 109/99, *Annual Report of the IACHR 1999*, paras. 35 – 39.

One exception in the ICCPR potentially operates to exclude its operation in the context of armed conflict. Article 4 of the Covenant entitles States Parties to derogate from certain provisions of the Covenant “in time of public emergency which threatens the life of the nation”. This is a very limited exception, and it is doubtful whether it is available at all given the present circumstances in the “war on terror”. Furthermore, the exception is also limited by a procedural requirement. Before it can be invoked, a State Party which wishes to avail itself of the derogation must give a formal notification to all other States Parties to the Convention “of the provisions from which it has derogated and of the reasons by which it was actuated”. However, neither the United States nor Australia have entered any derogation to the Covenant in respect of the conflicts in Afghanistan and Iraq or the “war on terror” pursuant to Article 4.

Article 2 addresses the jurisdictional operation of the Civil and Political Covenant. Pursuant to Article 2, “each State Party ...undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [Covenant] without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

In relation to Guantánamo Bay, although in theory Cuba still retains ultimate sovereignty over the territory through a longstanding lease of the land occupied by the naval base to the United States,⁴¹ the United States has been held by its Supreme Court to have “exclusive control and jurisdiction” over the land occupied by the naval base, which it has retained now for over 100 years. In *Rasul v Bush*⁴² it was held that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. Such jurisdiction was found to extend to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, even where it does not have ultimate sovereignty. It was found that the Petitioners had been imprisoned in territory over which the United States exercises exclusive jurisdiction and control by the express terms of its lease agreements with Cuba in respect of the Guantanamo Base, and may continue to do so permanently if it chooses.

Further, although Article 2 of the Civil and Political Covenant refers to persons “within [a State Party’s] territory and subject to its jurisdiction”, the U.N. Human Rights Committee, which monitors implementation of the Covenant, has clarified that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party”.⁴³

⁴¹ Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, 16/23 February 1903, 6 Bevans 1113, Art. III. See also the supplemental agreement of 2 July/2 October 1903, 6 Bevans 1120; the lease was rendered perpetual by the Treaty on Relations with Cuba, Washington, 29 May 1934, 48 Stat 1682, Art. III.

⁴² *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

⁴³ Human Rights Committee, General Comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13, para.10.

To similar effect is the International Court of Justice advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* which recognized that the jurisdiction of States is primarily territorial, but concluded that the Civil and Political Covenant extends to “acts done by a State in the exercise of its jurisdiction outside of its own territory”.⁴⁴

Accordingly, the particular status of Guantánamo Bay under the international lease agreement between the United States and Cuba does not limit the obligations of the United States under international human rights law towards those detained there, including its obligations assumed under the Civil and Political Covenant.

Thus, prisoners held at Guantanamo Bay are entitled to the rights guaranteed in the ICCPR, in spite of the assertions of the United States to the contrary.

International Customary Law of Human Rights

The United States is also bound by the customary international law of human rights. Customary international law is established by authoritative state practice. The relevant norms have been codified in a number of documents. These include the American Declaration of the Rights and Duties of Man,⁴⁵ which binds the United States as a signatory of the Charter of the Organization of American States.

Customary international law obliges the United States to respect fundamental human rights. Among the fundamental human rights enshrined in the American Declaration (and therefore considered provisions of customary international law) is the right to a fair trial and the right to due process of law, including the right to an impartial and public hearing in courts previously established in accordance with pre-existing laws. Such rights are provided for in Articles 18 and 26 of the American Declaration.

Customary international law on human rights is also codified in the Universal Declaration.⁴⁶ The Universal Declaration is not a treaty, but a series of statements defining the civil, political, economic, social and cultural rights of human beings. It is the primary United Nations document establishing human rights standards and norms, and it forms the basis for many of the human rights instruments enacted since its adoption, including those referred to above. Through time, its various provisions have become so

⁴⁴ I.C.J. Reports 2004 (9 July 2004).

⁴⁵ Reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L. V/II.82 doc. 6 rev. 1 (1992).

⁴⁶ The Universal Declaration of Human Rights (‘UDHR’) is a declaration adopted by the United Nations General Assembly (A/RES/217, December 10, 1948 at Palais de Chaillot, Paris), outlining the organization’s view on the human rights guaranteed to all people. It was referred to by Eleanor Roosevelt as “a Magna Carta for all mankind”. The 1968 United Nations International Conference on Human Rights decided it “constitutes an obligation for the members of the international community” to all persons. The declaration has served as the foundation for the original two legally binding UN human rights Covenants, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. It continues to be widely cited by academics, advocates, and constitutional courts.

generally accepted by States that it can now be said to be a repository of customary international law.

Additionally, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950⁴⁷ incorporates the basic human rights which are now recognized as provisions of customary international law, most of which are derived from the Universal Declaration.

Many of the treaty obligations to be found in the Geneva Convention and the Civil and Political Covenant are re-statements of what has been accepted by the international community as restatements of international customary law. An example of a treaty law which is also customary international law is to be found in Article 3 of the Geneva Convention, which prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. This provision has been said to set forth the most fundamental requirements of the law of war.⁴⁸

Given the universality of customary international law norms, which include the bedrock requirement for a fair trial, it is not properly open to contend that they have no application to the United States in relation to David Hicks and the other prisoners held at Guantanamo Bay and the trials by Military Commission to which they have been subjected.

The Military Commission Breaches International Law

The breaches of international law in the establishment and operation of the Military Commission are manifest. The unique process to which David Hicks and his fellow detainees are being subjected falls short of international law standards in that it: (a) fails to ensure an impartial determination of prisoners' guilt or innocence; (b) does not provide for appeal to an independent judicial body; (c) occasions detention without trial for inordinate periods; and (d) does not prevent the admission of evidence obtained through coercion, including evidence obtained by the use of cruel, inhuman or degrading treatment.

The Military Commission Violates The Right to Independent and Impartial Determination

The right to be tried by an independent and impartial tribunal is a cardinal component of international human rights law which is protected by all major human rights treaties. The Civil and Political Covenant provides by Article 14(1): "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone

⁴⁷ 4 Nov., 1950, 213 U.N.T.S. 221.

⁴⁸ *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

This right is also enshrined in the Geneva Convention where Article 3(1)(d) prohibits

“at any time and in any place whatsoever with respect to the above-mentioned persons . . . the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

This is reinforced by Article 102 of the Geneva Convention which provides that Prisoners of War are to be tried by the same courts, according to the same procedure as in the case of members of the armed forces of the Detaining Power.

The common source of all these instruments is the entitlement to a fair trial by an independent tribunal, enshrined as one of the “equal and inalienable rights of all members of the human family” in the Universal Declaration, as stated in its preamble. Further, Article 19 provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

The European Court of Human Rights (the “ECHR”), whose decisions are a useful indicator of the application of international human rights law, has determined a number of cases which provide guidance as to how the requirement for independence and impartiality should be approached.

In *Findlay v. United Kingdom*,⁴⁹ the ECHR held that in order to decide whether a tribunal is independent it is necessary to consider: (i) how the members of the tribunal are appointed; (ii) their term of office; (iii) the existence of guarantees against outside pressure; and (iv) whether the tribunal *appears* to be independent. To determine impartiality, one must look at whether the members of the tribunal are free from personal prejudice and bias, both subjectively and objectively. A tribunal must not only be impartial, it must be seen to be impartial. The Court held that there may be a violation of Convention Article 6(1) where “the impartiality of the courts in question was capable of appearing to be open to doubt”.

In *Findlay*, the Court determined that “[s]ince all the members of the court-martial which decided Mr Findlay’s case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay’s doubts about the tribunal’s independence and impartiality could be objectively justified.” It followed that a violation of the standard set by the Convention for a fair trial had occurred.

⁴⁹ 24 Eur. H.R. Rep. 221 (1997).

More recently, the Court considered the case of *Ocalan v Turkey*.⁵⁰ The ECHR observed in relation to a Turkish State Security Court which tried the accused Mr. Ocalan, and which for the most part included a military officer sitting with two civilian judges:

“What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacks independence and impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified.”

A factor in the Court’s assessment in the *Ocalan* case was the fact that the accused Mr. Ocalan had been engaged in a lengthy armed conflict with the Turkish military authorities. In this context, the presence of a military judge – “undoubtedly considered necessary because of his competence and experience in military matters – can only have served to raise doubts in the accused’s mind as to the independence and impartiality of the court.”

Applying its stated test, the Court concluded that the Ankara State Security Court, which convicted Mr. Ocalan, was not an independent and impartial tribunal within the meaning of Article 6 of the European Convention on Human Rights and that Article 6 had been violated.

The Lack of Independence and Impartiality of the Military Commission

The Military Commission system, as established and implemented by the United States to try prisoners at Guantanamo Bay, does not safeguard this most fundamental of rights. Its deficiencies go well beyond those relied upon in the *Findlay* and *Ocalan* cases to establish a failure to comply with international standards. The system lacks the necessary degree of independence to be, and to be seen to be, impartial and therefore compliant with the requirements of international law. The following characteristics lend support to this argument:

- It is alleged that David Hicks has been engaged in armed conflict with the U.S. military and has been classed as an “enemy combatant”.
- The Military Commissions are composed of officers of the U.S. military.
- Officers appointed to serve on the Military Commissions are under the command of, appointed by, and are effectively serving at the pleasure of, the President or his delegate.
- The President or the Secretary of Defense, exercising authority delegated by the President, finally determines the verdict and sentence imposed on the accused.

⁵⁰ *Ocalan v. Turkey* - 46221/99 [2003] ECHR 125 (12 March 2003).

- The Secretary of Defense (or his designee) is responsible for approving and referring for trial the charges prepared by the Prosecution.
- In effect, the same official (or his delegates) is responsible for the original detention, for laying the charges against a prisoner, selecting the members of the tribunals that will hear the charges (over whom he exercises command authority), and making the final decision as to the prisoner's guilt or innocence of those same charges.
- The members of both the Commissions themselves and the Review Panel are chosen not by ballot or rotation (the methods by which judges are commonly detailed to a case in the United States, the U.K. and elsewhere), but by the Secretary of Defense.
- The Secretary of Defense also has the power to remove them at any time, simply by making a unilateral decision that there is "good cause" for so doing.⁵¹
- The members of these tribunals are, therefore, appointed effectively at the discretion of one individual and have no security of tenure, but can be removed or replaced at any time.
- Given the degree of control exercised by the Secretary of Defense over both their appointment and their removal, it is not difficult to see how this system might operate, or appear to operate, as an improper influence on members of the Military Commissions and the Review Panel, thereby in law affecting their ability to act independently and impartially.

It follows from the acceptance of some or all of these points, whether cumulatively or independently, that the Military Commission system established by the United States to try David Hicks and the Guantanamo Bay detainees does not provide adequate guarantees of prisoners' fundamental right at international law to trial by an independent and impartial tribunal.⁵²

The Military Commission Violates The Right Of Appeal To An Independent Judicial Body

The Presidential Order gives exclusive jurisdiction over cases like those of David Hicks to members of the Executive Branch of government. The Executive Branch is thus prosecutor, judge, and jury, with the power to impose sentences of life imprisonment or

⁵¹ Since "good cause" is either very broadly defined, or not defined at all, in the relevant Military Commission Instructions, and since there is no provision for review of a decision by the Secretary to remove a member of a commission or Review Panel, this power appears to be essentially unfettered.

⁵² See too: *Hamdan v Rumsfeld*, Supreme Court of the United States No. 05-184, *Amicus Curiae* Brief of 422 Current and Former Members of the United Kingdom and European Parliaments in Support of the Petitioner, 5 January 2006.

death. Even in the case of U.S. courts martial an appeal is open to independent judges of the Court of Appeal for the Armed Forces.

Pursuant to the Detainee Treatment Act of 2005, the United States Court of Appeals for the District of Columbia Circuit has now been granted a limited capacity to review the final decisions of Military Commissions made pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).⁵³

However, the jurisdiction of the Court of Appeals on such an appeal is limited to the consideration of:

(i) whether the final decision was consistent with the standards and procedures specified in the Military Order; and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.⁵⁴

It is noted that “Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States” and “For purposes of this section, the term ‘United States’, when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba”⁵⁵.

Thus appeal rights to the Court of Appeals under the Detainee Treatment Act of 2005 are limited in practice to a consideration as to whether the standards and the procedures established under the Military Order were adhered to. The key stricture limiting the exercise of a meaningful right to appeal to an independent court lies in the inability of the Court of Appeals to review the adequacy of the standards or procedures of the Military Commission which are provided for.

For example, under the rules of the Commission, evidence can be admitted if, in the opinion of the Presiding Officer, (or in certain circumstances by a majority of the Commission), it would have ‘probative value to a reasonable person.’ Thus provided the requisite opinion is formed that the evidence would have ‘probative value to a reasonable person.’ it may be admitted into evidence, regardless of any inherent unfairness involved in obtaining the evidence. Further, because the ‘standards and procedures’ of the Military Commission will on the face of it have been observed, the prospects of overturning the ruling on appeal will be extremely limited, even if the evidence was obtained by unfair coercion.

⁵³ Amendment to Section 2241 of title 28, United States Code Paragraph (A)

⁵⁴ Amendment to Section 2241 of title 28, United States Code, Paragraph (C)

⁵⁵ Amendment to Section 2241 of title 28, United States Code, Paragraph (D) (f) and (g)

Still less is the Court of Appeals entitled to embark upon an enquiry as to the impartiality or otherwise of the Military Commission based upon the appointment to the Commission of military officers of the United States armed forces. The appeal rights, such as they are, do not provide a facility for any review to a court in respect of the independence and impartiality of the participants in the Military Commission process – a facility open to the European Court of Human Rights as illustrated by the cases of *Findlay v United Kingdom* and *Ocalan v Turkey*.

A meaningful and independent appeal process, including the right to appeal in relation to the fundamental right to an impartial hearing, is a central aspect of due process. The right to appeal is guaranteed by the Geneva Conventions and the Civil and Political Covenant. Article 106 of the Third Geneva Convention requires states to ensure Prisoners of War the right to appeal convictions for war crimes “in the same manner as the members of the armed forces of the Detaining Power.” The ICCPR similarly recognizes the importance of a separate review of any tribunal’s decisions concerning both the guilt of the accused and his punishment: Article 14(5) provides that: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

Authoritative international law rulings have emphasized the importance of the right to a meaningful appeal process. As the International Criminal Tribunal for Yugoslavia has observed, the language of Article 14(5) of the ICCPR “reflects an imperative norm of international law,”⁵⁶ which compels states to provide the defendant in a criminal case the opportunity to correct error or injustice through an effective and independent superior judicial body. The Human Rights Commission of the United Nations, as a further example, has found that Spain was in breach in of Article 14(5) in relation to a system that narrowed the grounds for appeal before normal civilian courts for certain types of offenses.⁵⁷

In the light of these standards, a breach of Article 106 of the Third Geneva Convention and Article 14(5) of the Civil and Political Covenant arising from the deficient appeal process provided by the Presidential Order is patent.

The Military Commission Denies The Right To An Expeditious Trial

It is also a fundamental principle of international law that a person detained on suspicion of a criminal offence must be tried without delay and that pre-trial detention should be an exception, and be as short as possible. This right is enshrined in the Geneva Conventions, the Civil and Political Covenant and numerous other international instruments.

⁵⁶ *Prosecutor v. Hazim*, Case No. IT-96-21, (ICTY Appeals Chamber Decision of Nov. 22, 1996)

⁵⁷ *Vazquez v. Spain*, H.R.C. Communication No. 701/1996, U.N. Doc. CCPR/C/69/D/701/1996 (Aug. 11, 2000); See too *op cit.* Note 61.

The then U.S. Deputy Secretary of Defense Paul Wolfowitz, has testified that a compelling reason to deviate from established procedures for military justice was that Military Commissions would permit speedy trials.⁵⁸ However, not a single Commission trial has taken place in the four years since the attacks of September 11, 2001.

The Third Geneva Convention contains a provision designed to protect the right to an expeditious trial. Article 103 provides that a trial of a Prisoner of War “shall take place as soon as possible”, and “in no circumstances” shall pre-trial confinement exceed three months. It is further provided that “any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty”, a form of relief not provided for in the rules of the Military Commission.

Article 9(3) of the Civil and Political Covenant is to similar effect. It states that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release”. Further, Article 14(3) sets out the minimum guarantees for individuals charged with a criminal offense, including the right to be tried without undue delay.

As has been observed by the Human Rights Committee of the United Nations, long delay between arrest and trial inevitably affects the value of any evidence submitted at trial when it eventually occurs and may therefore prejudice the defense, for example where the judgment is based on statements by witnesses made many years after the relevant events occurred.⁵⁹ Further, the prejudice to an accused is likely to be exacerbated by mental deterioration resulting from prolonged confinement, particularly solitary confinement.

Despite its clear obligations under international law, the United States has held David Hicks in detention at Guantanamo Bay for a period of more than four years without bringing him before a judge or “other officer authorized to exercise judicial power” to determine his Prisoner of War status, and without affording him a trial. It would appear that much of this period has been spent in solitary confinement or in conditions tantamount to solitary confinement. Although the United States eventually selected Hicks for trial by Military Commission, he is one of only a handful of the hundreds of prisoners at Guantanamo Bay who is subject to even this imperfect process.

Detention without trial for a prolonged period such as this clearly contravenes international law. Indeed, much shorter periods of pre-trial detention have been found to give rise to a violation. For example, the Human Right Committee has held that, in the absence of a satisfactory explanation by the detaining State Party, a pre-trial detention of

⁵⁸ Military Commissions, Hearing before the Senate Armed Services Cte., 107th Cong. (Dec. 12, 2001) (testimony of Paul Wolfowitz).

⁵⁹ *Cagas v. The Philippines*, H.R.C. Communication No. 788/1997, U.N. Doc. CCPR/C/73/D/788/1997 (Oct. 23, 2001).

twenty-three months breached articles 9(3) and 14(3) of the Civil and Political Covenant⁶⁰ and a period of twenty-two months' pre-trial detention was held to breach the same articles.⁶¹

In the case of David Hicks, the delay in bringing on a trial is manifest:

- He was captured near Konduz, Afghanistan in November 2001 and has been in the custody of the United States armed forces since that time, being imprisoned in Guantanamo Bay Cuba since January 2002;
- He was not charged with any offence until 10 June 2004;
- In August 2004 pre-trial hearings commenced, followed by further pre-trial hearings in November 2004. During these hearings the defence filed motions challenging the jurisdiction of the Commission and the validity of the charges and the trial process under US and international law. The Commission deferred ruling on these motions and postponed the commencement of the trial until at least March 2005;
- The Commission trial was further delayed by the Appointing Authority (the Secretary of Defense or his designee) from December 2004 until July 2005;
- Hick's trial has also been delayed as a result of a number of civil suits brought by other persons challenging their detention at Guantanamo Bay and trial by Military Commission, including the case of *Hamdan v Rumsfeld* which involves a direct challenge to the Presidential Order. This case is presently before the Supreme Court of the United States. The trial of David Hicks was stayed by the US Federal Court in November 2005 pending delivery of the judgment in the *Hamdan* case.

The Military Commission Violates The Right To A Fair Trial Because It Does Not Exclude Evidence Obtained Through Coercion, including Evidence Obtained by the use of Cruel, Inhuman or Degrading Treatment.

The Presidential Order and the subsequently issued Military Instructions do not impose any explicit bar to evidence in the nature of confessions or otherwise being procured by borderline interrogation methods which may amount to cruel, inhuman or degrading treatment. Such evidence may be admissible against David Hicks and other Guantanamo prisoners by a Military Commission.

On March 24, 2006, the General Counsel of the Department of Defense (U.S.) issued Military Commission Instruction No. 10, "Certain Evidentiary Requirements" in response

⁶⁰ *Brown v. Jamaica*, H.R.C. Communication No. 775/1997, U.N. Doc. CCPR/C/65/D/775/1997 (Mar. 99).

⁶¹ *Sextus v. Trinidad and Tobago*, H.R.C. Communication No. 818/1998, U.N. Doc CCPR/C/72/D/818/1998 (July 16, 2001); See too *op cit.* Note 52.

to growing public concern that evidence acquired through torture might be admissible in military commission proceedings.

Military Instruction No. 10 purports to exclude evidence in Military Commission trials which has been obtained by torture. However, the definition of “torture” contained in the Military Instruction is significantly narrower than that contained in the international Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Convention Against Torture”).

There are also serious doubts as to whether the Military Instruction will be effective in any event in providing protection against the reception of evidence obtained by torture, even if the narrower definition of torture is accepted.

Further, the Military Instruction does not exclude evidence which may be obtained by coercive techniques involving the use of cruel, inhuman or degrading treatment in contravention of the Convention Against Torture.

The Convention Against Torture⁶² entered into force on June 26, 1987, in accordance with article 27 (1). The Convention has been ratified by a total of 140 countries, including the United States and Australia.⁶³ It may therefore be considered as setting a world standard on the prohibition of torture.

The Convention by Article 1 defines torture as:

“[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The United States adopted a narrower definition of “torture” as a reservation to the treaty when it signed the Convention Against Torture in 1994.⁶⁴ This narrower definition has been incorporated into Military Instruction No 10.

Under the Military Instruction, in order to constitute torture, an act must be “specifically intended to inflict severe physical or mental pain or suffering” and “mental pain or

⁶² General Assembly resolution 39/46

⁶³ 1465 U.N.T.S. 85 was ratified by the United States in October 1994 and by Australia on 8 August 1989 (Australian Treaty Series [1989] ATS 21).

⁶⁴ U.S. Department of State, Initial Report of the United States of America to the UN Committee Against Torture, Annex I, U.S. Reservations, Declarations, and Understandings and Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment

suffering” is defined as “the prolonged mental harm caused by or resulting from the:

- (1) Intentional infliction or threatened infliction of severe physical pain or suffering;
- (2) Administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (3) Threat of imminent death; or
- (4) Threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.”

The Military Instruction definition of torture is narrower than that used in the Convention Against Torture in two principal respects. The Convention definition includes severe mental suffering which is not accompanied by physical torture, whereas the Military Instruction does not exclude evidence obtained by use of torture techniques which may involve mental torture unaccompanied by physical torture. Secondly, the Convention definition applies to any act by which severe mental suffering is intentionally inflicted, whereas the Military Instruction definition is limited by the requirement for prolonged mental harm to be caused, thereby implicitly permitting the introduction of evidence obtained by the use of mental harm which is not prolonged.

For example, the Military Instruction would admit evidence acquired from a detainee who is subjected to prolonged incommunicado detention in which he saw no one but his interrogators for months from whom he suffered an orchestrated and relentless program of verbal abuse. Because no physical pain or physical suffering is involved, evidence obtained as a result of this treatment would not be excluded.

The Military Instruction definition may also allow into evidence statements made by a detainee, who fears he is going to receive electric shocks when he is forced to wear a hood and stand on a box with electrical wires attached to him. If no prolonged mental harm is proved to be suffered, evidence obtained as a result of this treatment would similarly not be excluded.

Thus the Military Commission process does not exclude evidence obtained by torture, if the internationally recognized Convention standard is applied.

Further, the Military Instruction contains inadequate safeguards to make even the narrow prohibition against torture a meaningful protection. The new rule falls far short of the procedural safeguards contained in rules for courts-martial and federal courts to ensure statements acquired through torture or other cruel and abusive treatment are not admissible in trial.

The Military Instruction leaves open a number of critical procedural questions concerning evidence which may have been obtained under torture. The Military Instruction merely instructs the prosecutor not to offer any statement determined by the prosecution to have been made as a result of torture. It also instructs the Military Commission not to admit as evidence statements established to have been made as a result of torture, except in proceedings against a person accused of torture.

It is therefore unclear how the Military Commission is to decide whether a statement was made as a result of torture. The Military Instruction is silent as to which party has the burden to prove evidence was the result of torture and is silent on the standard by which the Military Commission will determine who has prevailed. Elsewhere, the Military Commission rules instruct the Commission to consider evidence that is probative to a reasonable person.

Moreover, the Military Instruction does not indicate what the prosecution is to do if there is a possibility the statement was acquired through abuse. If counsel for the accused suggests the statement was the result of abusive interrogations, the rules do not establish whether the prosecution must conduct its own inquiries and provide the results to the defence and the Military Commission.

Further, the instruction provides no guidance on whether the prosecution must make its own independent determination of whether interrogation methods constituted torture, or whether it accepts determinations made by others, e.g. those conducting the interrogations, or senior Pentagon or Department of Justice officials.

It is also likely to be extremely difficult for the defence to determine whether or not the statements of third persons were obtained by torture. The Military Commission rules permit hearsay evidence to be used (ie, the evidence of a person who made the statement who does not attend a hearing to testify). It is therefore open to prosecutors to offer second- or third-hand accounts of what a person said. For example, the prosecution can present a U.S. or even foreign intelligence agent who will testify as to what a person said during interrogation, and that recounted statement can be admitted as evidence. The prosecution can also present a written statement by someone who does not appear in the hearing. How can the defence team determine if the people making such statements introduced into evidence were tortured if they do not appear as witnesses, or if defence counsel are not otherwise permitted to question them?

Given the manifest gaps in the proposed procedures relating to evidence which may have been procured under torture, the Military Commission procedures cannot be said to operate with any sufficient guarantee that they will operate to exclude such evidence.

Finally and significantly, the Military Instruction does not bar the use of evidence acquired by abusive and coercive interrogations that may fall short of torture on either its narrow or wide definitions, but nonetheless violate the prohibitions against cruel, inhuman or degrading treatment contained in the Convention Against Torture and the as well as in Article the International Covenant on Civil and Political Rights. Article 7 of the

ICCPR provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

There is no practical way to determine where cruel, inhuman or degrading treatment ends and torture begins. The failure to prohibit evidence acquired through the former undermines the prohibition against the latter.

Cruel, inhuman and degrading treatment is prohibited by international law as well as under domestic U.S. law, specifically by the McCain Amendment. However, under the Military Instruction, the prosecution could introduce statements acquired by forcing chained detainees to sit in their own excrement or depriving them of sleep for days, if this treatment was not proven to amount to “severe physical suffering” was not proven to be “calculated to disrupt profoundly the senses or the personality”.

The Detainee Treatment Act of 2005 was signed by President Bush on 30 December 2005. Section 1003 of the Act introduces a prohibition of cruel, inhuman or degrading treatment or punishment of any person in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. Sub-section 1003 (b) eliminates any geographical limitation on the applicability of the prohibition.

In sub-section 1003 (d), the term ‘cruel, inhuman, or degrading treatment or punishment’ means “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984”.

Critically, the prohibition does not prevent a Military Commission admitting evidence obtained by coercion by the use of cruel, inhuman, or degrading treatment, whether the evidence was obtained by these means either before or indeed after the coming into force of the Detainee Treatment Act on 30 December 2005.

The *Amicus Curiae* Brief of 422 Current and Former Members of the United Kingdom and European Parliaments in Support of the Petitioner in *Hamdan v Rumsfeld*⁶⁵ observes that:

“In the case of Guantanamo prisoners, these fundamental rules of international law are far from theoretical. Press reports and eyewitness accounts from such facilities as Abu Ghraib, Guantanamo itself, and others have raised serious doubts about the nature, extent and intensity of interrogation techniques employed in connection with the war on terror. These reports underline the seriousness of the due process lacunae in the military commissions’ rules of evidence.”

⁶⁵ *Op cit.* Note 52

The Obligations of Australia – The Principle Of Non-Refoulement

Operation of the ICCPR is premised on the fact that a State Party exercises a sufficient degree of control either over an area as a whole or over particular individuals.

Under the principle of non-refoulement, a State may be considered responsible for a breach of its obligations under international human rights law, even when the actual violation of an individual's fundamental rights takes place outside its national territory and under the jurisdiction of a third State. In the words of the ECHR: "A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction."⁶⁶

The main application of this principle – usually in the context of refugee law - arises when a State hands over a person to another State in circumstances where there are reasonable grounds to believe that there is, in the formulation of the European Court, a "well-founded fear" or a "real risk" that he or she will suffer a violation of his or her fundamental rights in the receiving State.⁶⁷

In this regard, the Human Rights Committee of the United Nations has stated that:

"If a State Party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State Party itself may be in violation of the Covenant. This follows from the fact that a State Party's duty under Article 2 of the Covenant would be negated by the handing over a person to another State (whether a State Party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over."⁶⁸

Specifically with respect to the Civil and Political Covenant, the Human Rights Committee has noted that:

"the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm ... either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."⁶⁹

⁶⁶ *Ilascu and Others v. Moldova and Russia*, judgment of 4 July 2004, para. 317 (citing *Soering v. United Kingdom* Series A, No. 161 (1989), paras. 88-91) cited in Borelli *op cit.* Note 8.

⁶⁷ *Op cit.* Borelli Note 8, and the cases cited therein,

⁶⁸ *Kindler v. Canada* (Comm. No. 470/1991), UN Doc. CCPR/C/48/D/470/1991 (1993), para. 6.2

⁶⁹ See: Human Rights Committee General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights, 26 May 2004, CCPR/C/21/Rev.1/Add.13 (General Comments).

However, the principle of non-refoulement is not necessarily confined to conduct involving the physical transfer of an individual by one State to another. Although this jurisprudence may be seen as a significant extension to the reach of international human rights law, a respectable view is that the responsibility of a State involved in such cases should be based simply on the recognition of a causal link between an act carried out by the State with respect to an individual within its jurisdiction and potential violation of that individual's fundamental rights committed by a third State.⁷⁰ In the words of the European Court of Human Rights, “[a] State’s responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.”⁷¹

The Obligations of Australia – Extraterritorial Application of Human Rights Treaties

The scope of the *ratione loci* of human rights treaties permits their application in the case of extraterritorial conduct. According to Theodore Meron:

“In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state’s obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction or de facto jurisdiction) over persons outside national territory, the presumption should be that the state’s obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise. (see ‘Extraterritoriality of Human Rights Treaties,’ 89 *AJIL* (1995) 78 at 80-81.”

Ultimately this is so because treaties are to be interpreted “in good faith” and “in the light of its object and purpose” (Article 31(1) of the Vienna Convention). Further, reference to the object and purpose of a treaty assumes particular importance in the case of human rights treaties (see Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* (2001) at 17). Consequently, “any ambiguity in the terms must be resolved in favour of an interpretation that is consistent with the humanitarian character of the Convention”.

Guantanamo is the clearest case of a state, in this case the United States, exercising power and authority over persons outside its national territory. It has done so by creating offshore detention facilities, to which it forcibly transports persons seized in various countries, detains them indefinitely without charge and exercises complete dominion over their treatment and fate.

⁷⁰ See Borelli *op cit* Note 8.

⁷¹ *Ilascu and Others v. Moldova and Russia*, judgment of 4 July 2004, para. 317 (citing *Soering v. United Kingdom* Series A, No. 161 (1989), paras. 88-91).

In the case of David Hicks, it is contended that Australia too cannot shield itself from the operation of the human rights and humanitarian law treaties to which it is a party simply because the conduct in breach of these treaties is occurring beyond its sovereign territory and directly at the hands of another party, the United States.

The Conduct of Australia

The conduct of Australia needs to be analysed against its treaty obligations prescribed by Article 26 of the Vienna Convention on the Law of Treaties which provides “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

The relevant conduct in this case consists of acts of omission as well as commission. Even though Australia has not been involved in the physical handing over of David Hicks to the authorities of the United States for imprisonment at Guantanamo Bay or to face trial by Military Commission, it is concluded that Australia is arguably in breach of the principle of non-refoulement by failing to actively seek full compliance with international law standards in respect of the Military Commission system or, in the event of such efforts not being successful, failing to seek the return of David Hicks to Australia when it has clearly been in a position to do so. Such conduct by omission was bound to have “sufficiently proximate repercussions on rights guaranteed by the Convention”.

The government of the United Kingdom, also a close ally of the United States in the “war on terror”, secured the release of all of its nationals held in Guantanamo Bay by diplomatic means. However, Australia has to date failed to follow the British example.

Far from taking the course of presenting firm and appropriate diplomatic advice to the United States seeking compliance with international law standards in the conduct of the Military Commission, or seeking the return of David Hicks to Australia, the Australian government has not only failed to denounce his detention at Guantanamo Bay and the establishment of the Military Commission designed to try him, it has condoned and actively assisted the United States in the conduct of its trial by Military Commission. It has done so, not only by public encouragement of the process,⁷² but also in a practical way by formulating and achieving modifications to the proposed procedure to be applied to David Hicks. On 23 November 2003, as a result of an agreement between the United States and Australia, the United States has committed to a number of undertakings to be observed in David Hicks’ trial⁷³. These include:⁷⁴

- conversations between Mr Hicks and his lawyers will not be monitored

⁷² For example the public statement of the Prime Minister of Australia, John Howard, observed on SBS News, 9.30 pm 11 May 2006: “*Our view is that David Hicks should be brought to trial before the Military Commission as soon as possible.*” See too: Australian Government Attorney General’s Department – David Hicks FAQ www.ag.gov.au/agd Last observed 28 May 2006

⁷³ Research Note no. 33 2004–05 “Progress of the United States Military Commission trial of David Hicks”, Angus Martyn, Law and Bills Digest Section 14 February 2005, Parliamentary Library of the Australian Parliament, Canberra, Australia.

⁷⁴ See: Australian Government Attorney General’s Department – David Hicks FAQ *op cit* Note 76

- the prosecution does not intend to rely on evidence that will require Mr Hicks or his civilian lawyer to be excluded from proceedings
- subject to security requirements, Mr Hicks' trial will be open, the media allowed to attend and Australian officials will be able to observe proceedings
- an independent legal expert sanctioned by the Australian Government will be able to observe the trial(s), and
- if Mr Hicks is convicted, he will not face the death penalty and arrangements will be made for him to serve any sentence in Australia 'in accordance with Australian and U.S. law'.

However, none of these modifications come close to addressing the fundamental structural defects in the Military Commission process, or render it compliant with the standards required by international law. Further and importantly, by entering into this agreement, Australia has in fact become complicit in the breaches of international law perpetrated by the United States in that it has become knowingly involved in the breaches and has aided and abetted their commission.

The Conduct of Australia - Responsibilities Under International Law

Although Article 2 of the Civil and Political Covenant is framed in terms of the obligations of State Parties such as Australia and the United States towards individual persons as right-holders under the treaty, every State party has a legal interest in the performance by every other State party of its obligations. This follows from the fact that the basic human rights recorded in the treaty are *erga omnes* obligations (obligations to the international community as a whole) and that, as indicated in the preamble to the treaty,⁷⁵ there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.⁷⁶

Further, the Human Rights Committee of the United Nations, the UN body responsible for the implementation of the Civil and Political Covenant, has recently noted:⁷⁷

⁷⁵ The preamble to the Civil and Political Covenant includes the following: "*Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms*"

⁷⁶ The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. Article 55 of the Charter provides: "*With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:..... . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*"

See too: Human Rights Committee General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights, 26 May 2004, CCPR/C/21/Rev.1/Add.13.

⁷⁷ *Ibid.*

“[T]he Committee commends to States Parties the view that violations of Covenant rights by any State party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.”

At the very least, Australia, by neglecting to draw to the attention of the United States the clear breaches of its international law obligations and failing to call upon it to comply fully, has been derelict in the discharge of its own responsibilities under international law and the moral duty it owes to its citizen David Hicks.

Conclusion

Some improvements have been made to the trial procedures to be used by the Military Commission and Australia has participated in this exercise. These matters are set out on the web-site of the Attorney-General “David Hicks Frequently Asked Questions”.⁷⁸ The Attorney-General’s web-site is at pains to point out the steps that have been taken to make the system appear to be fair and to assert that this is the case. However, the measures, such as they are, do not address the deep seated structural issues which militate against the possibility of a fair trial being conducted in accordance with international standards as identified in this report. In fact they seek to disguise a fundamental assault on the rule of law and the traditional values placed in a fair trial which have been developed over centuries.

The obligations and protections established in human rights treaties and international customary law are fundamental components of the modern, liberal world order that the United States, together with its allies and other like-minded nations, has striven to establish and promote. The war on terror, like any other war, should not be conducted in a legal “black hole”. It should be governed by the international standards of human rights and respect for the rule of law.

It is crucial for international legal order that the United States abides by its legal commitments and does so in good faith. As was stated eloquently by the European *Amici* in their submission to the Supreme Court in the *Hamdan* case:

“The threat of terrorism is real. Governments around the world confront the dangers, and the hard choices posed by confronting those dangers. To meet the danger the world needs not only military might, but renewed and sustained commitment to the rule of law and to fundamental principles of human dignity and respect for human rights. In short, the world needs the United States to resume its role as a standard bearer for the principles of the rule of law and the

⁷⁸ See: Australian Government Attorney General’s Department – David Hicks FAQ www.ag.gov.au/agd
Last observed 28 May 2006

protection of human rights and fundamental freedoms which are the shared heritage of a civilized world.”⁷⁹

Australia, in standing by and failing to take appropriate action, which is so readily available for it to take, is not serving its own interests, the interests of its strategic partner or international legal order. Still less is it serving the interests of its citizen.

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⁷⁹ *Op cit* Note 52.