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Written statement* submitted by the South Asia Human Rights Documentation Centre (SAHRDC), a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[28 February 2007]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

David Hicks – Still in legal limbo five years on

Recently described by the United States Ambassador to Australia as "[an] ideologically ruthless fanatic who would kill Australians without blinking an eye",[1] David Hicks is an Australian citizen, who has been held without trial at the US naval base in Guantánamo Bay, Cuba, for over five years. He is alleged to have been active within four militant or terrorist groups in the last decade: the Kosovo Liberation Army (KLA), Lashkar-e-Toiba (LeT), the Taliban and al-Qaeda. He has yet to be tried.

The Hicks case is important precisely because Hicks himself appears to be so unsympathetic. According to government allegations, Hicks is a dangerous man. Perhaps he is. But this is a smokescreen obscuring the moral and legal bankrupcy of the US government's Guantánamo detention policy as well as allied governments' acquiescence in the US's folly. If Hicks is such a bad actor, he should be tried and convicted in a court of law, not in a show trial purpose-built to secure convictions.

Hicks in Guantánamo

Hicks travelled to Kosovo where he joined the KLA in their fight for independence. He then joined LeT in Pakistan in November 1999, converted to Islam and begun studying Arabic.[2] Sometime during his stay in Pakistan, he decided to travel to Afghanistan and attend al-Qaeda training camps. He was allegedly fighting alongside Taliban forces in December 2001 when he was captured by the Northern Alliance.[3] Hicks was transferred to US custody in exchange for a cash bounty. He was one of the first detainees held in Camp X-Ray in January 2002, and has remained at Guantánamo Bay ever since.[4]

After being charged with various crimes in June 2004, Hicks was scheduled to be tried by military commission—rather than a court—beginning in November 2005.[5] His trial by commission was postponed, pending the US Supreme Court's review of the military commission system established by President George W. Bush.[6] In *Hamdan v. Rumsfeld*, the Court held that military commissions "lack[] power to proceed because [their] structure and procedures violate both the [United States' code of military justice] and the Geneva Conventions."[7]

The US Congress scrambled to overrule *Hamdan* legislatively and passed the ill-considered Military Commissions Act of 2006 (MCA) shortly before the November 2006 congressional elections.[8] Although U.S. military prosecutors have reportedly prepared new draft charges against Hicks under the MCA, those charges must pass through an internal military review process in order to "determine *whether* there is enough evidence to support

[1] Australian Associated Press, "Gitmo detainees 'ruthless fanatics': ambassador", *The Australian*, 14 February 2007.
[2] Ibid.
[3] Ian Munro and Penny Debelle, "Bring Hicks home", *The Age*, 2 December 2006.
[4] Alfred W. McCoy, "Outcast of Camp Echo: The Punishment of David Hicks", *The Monthly*, June 2006.
[5] Australian Broadcasting Commission, "Pentagon sets Hicks hearing", *ABC NEWSONLINE*, 27 September 2005.
[6] *Hicks v. Bush*, 397 F.Supp.2d 36 (D.D.C. 2005).
[7] 126 S.Ct. 2749, 2759 (2006).
[8] Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

formal charges against Hicks."[9] At the time of this writing, these charges are yet to be approved and a time for trial has yet to be set.

Further, though a divided panel of the D.C. Circuit Court of Appeal has recently decided that it has no jurisdiction to hear *habeas corpus* appeals from Guantánamo detainees under the MCA,[10] this issue and the constitutionality of the MCA are likely to be appealed to the US Supreme Court. Adding to the state of uncertainty surrounding whether and when Hicks will be charged with anything resembling a crime is a vow by some Democratic members of the U.S. Congress—now in the majority—to "'undo[] what was done'" by the MCA.[11]

A legal strategy of impunity

The US government's Guantánamo detainee predicament would be laughably childish if it were not so grave. Every time the government fears a legal setback or impediment, it changes the rules of the game or makes up new rules entirely in order to avoid accountability.

This strategy began with the choice of the US naval base at Guantánamo Bay Cuba as a facility to detain indefinitely "enemy combatants" captured outside US borders during the "war on terror". Guantánamo was chosen because of its unique status as foreign sovereign territory that also happened to be under the complete control of the US military. US government lawyers calculated that the WWII-era case of *Johnson v. Eisentrager* would prevent Guantánamo detainees from invoking U.S. judicial review just as in *Johnson*, Germans tried by military commissions in China could not bring *habeas corpus* petitions in the US.[12] The US Supreme Court disagreed in its June 2004 *Rasul v. Bush* decision and resoundingly concluded that it could consider the detainees' legal challenges.[13]

Rather than rethink its approach to the detainee issue, the US government settled on a process of ratifying continued detention of those it held at Guantánamo through so-called "Combatant Status Review Tribunals" (CSRTs), which supposedly reviewed whether or not a detainee was properly classified as an enemy combatant. Authorities would then proceed to try some of those reconfirmed as enemy combatants before military tribunals whose rules of procedure had been tailor-made in favour of the prosecution. Once again, the US Supreme Court in *Hamdan* invalidated the US government's attempt to place its thumb on the scales of due process, rejecting the military commission procedures on domestic and international humanitarian law grounds.[14]

As part of a recurring pattern, the US Congress and the President did not re-examine the legal and moral basis for the continued detention of inmates at Guantánamo in the wake of *Hamdan*, but rather drafted and approved the MCA—thereby reintroducing many of the problematic aspects of the military commissions criticized by the Court in *Hamdan*. These include the potential admissibility of evidence obtained via methods of interrogation

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[9] Jane Holroyd, "Fresh Hicks Charges Drafted", *The Age*, 3 February 2007 (emphasis added).
[10] *See Boumediene v. Bush*, No. 05-5062, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007).
[11] Roxana Tiron, "Senate Dems plan overhaul of military tribunals bill", *The Hill*, 16 November 2006.
[12] 339 U.S. 763 (1950).
[13] 542 U.S. 466 (2004).
[14] *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2759 (2006).

amounting to torture,[15] which is particularly relevant in Hicks' case. Hicks has stated that in his time at Guantánamo he has been subjected to sleep deprivation, beaten around the head and torso with objects such as rifle butts, anally penetrated with objects, shackled and/or handcuffed extremely tightly for extended periods, threatened with death at gunpoint, and forcibly drugged.[16]

The retroactivity trap

Because the MCA was passed long after Hicks allegedly committed his offences, some observers, including Australian Human Rights QC Lex Lasry and Amnesty International Australia, have argued that the MCA's application to Hicks is impermissibly retroactive.[17] The US government's response to this argument is that Hicks' alleged offences were all crimes in civilian law well before 2001 and that the MCA's provisions merely mimic long standing provisions of US criminal law.[18] But as Hick's lawyer Major Michael Mori points out, the US government's position makes little sense:

> It's one way or the other. [Either] [i]t's retrospective, meaning Hicks shouldn't be at Gitmo any more and facing a commission, or it's not retrospective and that means for the past five years they should have taken him to a federal court…If it's not retrospective, why was he languishing for all these years? [19]

Conclusion

Responding to growing criticism within Australia regarding David Hicks' continued detention, Australia's Foreign Minister Alexander Downer recently announced that Hicks would be tried by a US military commission and likely return to Australia "by the end of the year" whether or not he was convicted.[20] However, there are a number of legal challenges left to be resolved before any trials will be conducted by military commissions under the MCA. Further, the US government's past pattern of intransigence in providing Guantánamo detainees with even a modicum of due process suggest more delaying tactics yet to come. On the other hand, if Foreign Minister Downer's optimism is based on a political understanding, and David Hicks is released without trial or conviction, what legitimate purpose has his detention served? And why has Australia not acted with more alacrity to protect its own citizen's right to due process?

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[15] 10 U.S.C. §§ 949d(e), 949d(f), 948r(c)-(d).
[16] "The David Hicks Affidavit", *Sydney Morning Herald*, 10 December 2004.
[17] Liz Porter, "War crime risk for MPs in 'retro' case against Hicks", *The Age*, 11 February 2007; Amnesty International Australia, "More about the Military Commissions Act Update: Draft charges announced", 7 February 2007.
[18] Ian Munro, "'Retrospective' charge different to old law: Mori", *The Age*, 7 February 2007.
[19] Ibid.
[20] "Hicks to return home 'this year'", *BBC News*, 18 February 2007.