David Hicks – Military Commissions Act 2006 – Compliance with Common Article 3 of the Geneva Conventions , the *Hamdan* Decision and Australian Law

OPINION

The Questions for Analysis

1. This opinion answers the following questions:

   (a) whether the Military Commissions Act of 2006 [1] which passed into law in the United States on 17 October 2006 complies with Common Article 3 of the Geneva Conventions and is consistent with the decision of the Supreme Court of the United States in *Hamdan v Rumsfeld, Secretary of Defense* [2]; and

   (b) whether a trial conducted before a Military Commission established under the Military Commissions Act of 2006 would contravene Australian law ?

Executive Summary

2. In the *Hamdan* case, the Supreme Court of the United States found that Hamdan was a Common Article 3 protected person under the Geneva Conventions and was therefore entitled, as a minimum, to the protections provided for, including the right to a fair trial provided by Common Article 3(1)(d).

3. The Supreme Court also found that, at least in one respect, the Military Commission established by Presidential Order of 13 November 2001 (the "First Military Commission") failed to satisfy the requirements for a fair trial prescribed by Common Article 3(1)(d) of the Geneva Conventions, namely that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.

4. The Supreme Court left open other respects in which the First Military Commission failed to comply with the provisions of Common Article 3(1)(d).

5. The Military Commissions Act of 2006 passed into law in the United States on 17 October 2006. The legislation establishes a replacement military commission (the "Second Military Commission"). The present proposal, supported by the Australian government, is to charge and try David Hicks before the Second Military Commission.

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[1] The United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), enacting Chapter 47A of title 10 of the United States Code, is an Act of Congress (Senate Bill 3930 signed by President George W. Bush on October 17, 2006

[2] *Hamdan v Rumsfeld, Secretary of Defense* 548 U.S. (2006) ("*Hamdan*")

6. The Second Military Commission suffers from the same essential defects as the First Military Commission. In particular, its structure and procedures do not comply with Common Article 3(1)(d) of the Geneva Conventions.

7. The proposal to conduct a trial of David Hicks before the Second Military Commission would not be consistent with the decision of the Supreme Court of the United States in *Hamdan*.

8. A Military Commission established under the Military Commissions Act of 2006 would contravene the standards for a fair trial under Australian law, namely the standards provided for in the Australian *Criminal Code*, and counselling or urging a trial to take place before any such Military Commission with the requisite knowledge and intention would constitute a war crime under the Australian *Criminal Code.*

Background

9. On 13 November 2001 the President of the United States of America ("the United States") issued a Presidential Order relating to the detention, treatment, and trial of certain non-citizens in the war against terrorism and did so purportedly pursuant to the authority vested in him as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States ("the Presidential Order").

10. The Presidential Order purportedly provided authority to the Secretary of Defense of the United States to detain any individual subject to the Presidential Order at an appropriate location designated by the Secretary of Defense outside or within the United States.

11. From time to time the Presidential Order was supplemented by Military Instructions numbered 1 – 10 issued progressively by the Secretary of Defense of the United States.

12. Since his capture in November 2001 at Kondoz, Afghanistan, David Hicks has been determined by the President of the United States to be an individual subject to the Presidential Order and has been detained by the President of the United States at a location designated by the Secretary of Defense, namely at U.S.Naval Station Guantánamo Bay, Cuba ("Guantánamo Bay"), purportedly pursuant to the Presidential Order.

13. The Presidential Order also established the First Military Commission to try individuals subject to the Presidential Order and further provided for such individuals to be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

14. In July 2003 it was declared by the government of the United States that David Hicks was eligible for trial before the First Military Commission.

15. On 10 June 2004 David Hicks was charged with certain offences to be tried before the First Military Commission. David Hicks pleaded not guilty to all of the charges.

16. In August 2004 pre-trial hearings before the First Military Commission commenced, followed by further pre-trial hearings in November 2004. During these hearings legal counsel on behalf of David Hicks filed motions challenging the jurisdiction of the First Military Commission and the validity of the charges and the trial process under US and international law. The First Military Commission deferred ruling on these motions and postponed the commencement of the trial until at least March 2005.

17. The First Military Commission trial was further delayed by the Appointing Authority (the US Secretary of Defense or his designee) from December 2004 until July 2005.

18. David Hicks' trial was further delayed as a result of a number of civil suits brought by other individuals challenging their detention at Guantánamo Bay and trial by military commission, including the *Hamdan* proceeding which involved a direct challenge to the Presidential Order which established the First Military Commission.

19. The trial of David Hicks before the First Military Commission was stayed by the United States District Court for the District of Columbia on 14 November 2005 pending delivery of the judgment in the *Hamdan* case.

20. The Supreme Court of the United States handed down its decision in *Hamdan* on 29 June 2006. The Court held invalid the military commissions established for the trial of David Hicks and other Guantánamo Bay detainees, including the First Military Commission, because their structure and procedures breached a US federal statute, the Uniform Code of Military Justice (the "UCMJ"), and violated the Third Geneva Convention which was incorporated by the UCMJ.

21. The further effect of the *Hamdan* decision was that the charges against David Hicks instituted before the First Military Commission were struck down and rendered ineffective.

22. Following the *Hamdan* decision, the President of the United States recommended to the United States Congress the passing of and procured the passing by Congress of the *Military Commissions Act of 2006* (the "Military Commissions Act 2006"). The Military Commissions Act 2006 was approved

and signed by the President of the United States on 17 October 2006 and thereafter became law in the United States.

23. The Military Commissions Act 2006, *inter alia*, provides for the establishment of the Second Military Commission to try David Hicks and other detainees imprisoned by the government of the United States at Guantánamo Bay and elsewhere.

24. David Hicks was not charged with any offence between the time of his capture in November 2001 and 10 June 2004 when he was charged with offences before the First Military Commission.

25. Since the *Hamdan* decision was delivered on 29 June 2006 David Hicks has been free of any charges and to date has not been charged with any further offence before the Military Commission.

The Geneva Conventions – Common Article 3

26. Australia is and has been a High Contracting Party to and bound by the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Third Geneva Convention Relative to the Treatment of Prisoners of War and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, all dated 12 August 1949 (collectively called the "Geneva Conventions") (entry into force for Australia 14 April 1959) and their additional Protocols of 1977 (entry into force for Australia 21 December 1991).

27. Further, both the United States and Afghanistan are and have been a High Contracting Parties to and bound by the Geneva Conventions at all relevant times.

28. Common Article 1 of the Geneva Conventions provides that:

> The High Contracting Parties undertake to respect and ensure respect for the present convention in all circumstances.

29. Common Article 3(1) of the Geneva Conventions relevantly provides [with emphasis in bold added]:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all

> circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) ……;
>
> (b) ……..;
>
> (c) ……..;
>
> **(d) 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.**

The Rome Statute and the Australian Criminal Code

30. The Rome Statute of the International Criminal Court (the "Rome Statute") entered into force on 1 July 2002.

31. Australia deposited its instrument of ratification to the Rome Statute on 1 July 2002 and it entered into force for Australia on 1 September 2002**.**

32. From 1 September 2002, the International Criminal Court had jurisdiction to exercise its functions and powers as provided in the Rome Statute on the territory of Australia and over persons within the territory of Australia.

33. Pursuant to Article 27 the Rome Statute applies equally to all persons in Australia without any distinction based on official capacity, and official capacity such as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official in no case exempted or exempts a person from criminal responsibility under the Rome Statute.

> Article 27(1) provides:
>
> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> Article 27(2) provides:
>
> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

34. The Rome Statute defines war crimes which are generally recognized in customary international law. Among the war crimes specified in the treaty are war crimes arising from the failure to afford a fair trial.

35. Article 8 of the Rome Statute relevantly provides [with emphasis in bold added]:

> 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
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> 2. For the purpose of this Statute, "war crimes" means [and includes]:
>
> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (i) - (v) ……
>
> (vi) **Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial**;
>
> (b) ……..
>
> (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
>
> (i) - (iii)……
>
> (iv) **The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.**

36. Pursuant to Division 268 of the *Criminal Code* (being the Schedule to the *Criminal Code Act* 1995, Commonwealth of Australia) (the "*Criminal Code*") the Rome Statute has been incorporated into the domestic law of Australia. By this means, the war crimes defined in the Rome Statute are made crimes under Australia's *Criminal Code*.

Section 268.1 of the *Criminal Code* provides:

(1) The purpose of this Division is to create certain offences that are of international concern and certain related offences.

(2) It is the Parliament's intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court.

(3) Accordingly, the *International Criminal Court Act 2002* does not affect the primacy of Australia's right to exercise its jurisdiction with respect to offences created by this Division that are also crimes within the jurisdiction of the International Criminal Court.

37. Subdivision F of Division 268 of the *Criminal Code* is devoted to codifying war crimes which are serious violations of Common Article 3 of the Geneva Conventions that are committed in the course of an armed conflict that is not of an international character.

38. The *Criminal Code* provides for the following war crime to be a criminal offence under the laws of Australia [with emphasis in bold added]:

Subdivision F—War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict

268.76 War crime—sentencing or execution without due process

(1) A person (the *perpetrator*) commits an offence if:

(a) the perpetrator passes a sentence on one or more persons; and

(b) the person or persons are not taking an active part in the hostilities; and

(c) the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are not taking an active part in the hostilities; and

(d) either of the following applies:

(i) there was no previous judgment pronounced by a court;

(ii) **the court that rendered judgment did not afford the essential guarantees of independence and impartiality or other judicial guarantees; and**

(e) **if the court did not afford other judicial guarantees—those guarantees are guarantees set out in articles 14, 15 and 16 of the Covenant** [the ICCPR]; and

(f) the perpetrator knows of:

(i) if subparagraph (d)(i) applies—the absence of a previous judgment; or

(ii) if subparagraph (d)(ii) applies—the failure to afford the relevant guarantees and the fact that they are indispensable to a fair trial;

and

(g) the perpetrator's conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 10 years.

(2) ……...

(3) ……

(4) To avoid doubt, a reference in subsection (1) or (2) to a person or persons who are not taking an active part in the hostilities includes a reference to:

(a) a person or persons who are *hors de combat* ; or

(b) civilians, medical personnel or religious personnel who are not taking an active part in the hostilities.

39. Section 268.31 of the *Criminal Code* provides for a war crime in similar terms where the perpetrator's conduct takes place in the context of, and is associated with, an armed conflict that is an international armed conflict. Section 268.31 provides [with emphasis in bold added]:

Subdivision D—War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions

268.31 War crime—denying a fair trial

(1) A person (the *perpetrator*) commits an offence if:

(a) **the perpetrator deprives one or more persons of a fair and regular trial by denying to the person any of the judicial guarantees referred to in paragraph (b); and**

(b) **the judicial guarantees are those defined in articles 84, 99 and 105 of the Third Geneva Convention and articles 66 and 71 of the Fourth Geneva Convention;** and

(c) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and

(d) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and

(e) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 10 years.

(2) Strict liability applies to:

(a) the physical element of the offence referred to in paragraph (1)(a) that the judicial guarantees are those referred to in paragraph (1)(b); and

(b) paragraphs (1)(b) and (c).

40. Section 11.1 of the *Criminal Code* provides that a person who attempts to commit an offence under the *Criminal Code* is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

41. Section 11.2 of the *Criminal Code* provides that a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

42. Section 11.4 of the *Criminal Code* provides that a person who urges the commission of an offence is guilty of incitement.

43. The combination of sections 15.4 and 268.117 of the *Criminal Code* provides that the offences comprising the war crimes in Division 268 of the *Code* apply with extra-territorial effect:

(a) whether or not the conduct constituting the alleged offence occurs in Australia; and

(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

The *Hamdan* Decision

44. In *Hamdan*, the Supreme Court of the United States found that Hamdan was a Common Article 3 protected person and was therefore entitled, as a minimum, to the protections provided by the provisions, including the right to a fair trial

provided by Common Article 3(1)(d). As was expressly stated in the Opinion of the Supreme Court: [3]

> Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

45. A similar finding may be made in relation to David Hicks arising from the circumstances of his capture and subsequent detention.

46. Alternatively, if the case is that David Hicks was captured in the course of an international armed conflict, he is entitled to be treated as a prisoner of war until a tribunal constituted in accordance with Article 5 of the Third Geneva Convention has determined he is not entitled to that status. Although David Hicks has been before a Combatant Status Review Tribunal ("CSRT") [4], these tribunals have not operated in a manner consistent with Article 5, and therefore, as a matter of international law, Hicks continues to be entitled to be treated as a prisoner of war. In these circumstances, the war crime of denying a fair trial provided by section 268.31 of the Criminal Code becomes potentially applicable.

47. However, consistently with the finding and reasoning of the Supreme Court in the *Hamdan* case, David Hicks is at least a protected person within the meaning of Common Article 3 of the Geneva Conventions, and the opinion is provided primarily on this basis.

Requirement for a "Regularly Constituted Court"

48. The requirement for a "regularly constituted court" is not defined in the Geneva Conventions.

49. In the Opinion of the Supreme Court in *Hamdan*: [5]

> While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines " 'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted");64 see also *Yamashita*, 327 U. S., at 44 (Rutledge, J., dissenting) (describing military commission as a court "specially constituted for a particular

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[3] 548 U.S. (2006) at page 69

[4] Combatant Status Review Tribunals have been conducted by the United States Department of Defense for the purpose of confirming whether the detainees held at Guantánamo Bay were 'unlawful enemy combatants' as defined by the U.S. Department of Defense.

[5] 548 U.S. (2006) at page 69

> trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

50. Further, as Kennedy J. observed in *Hamdan*: [6]

> The concept of a "regularly constituted court" providing "indispensable" judicial guarantees requires consideration of the system of justice under which the commission is established, though no doubt certain minimum standards are applicable. See *ante*, at 69.70; 1 Int'l Committee of the Red Cross, Customary International Humanitarian Law 355 (2005) (explaining that courts are "regularly constituted" under Common Article 3 if they are "established and organised in accordance with the laws and procedures already in force in a country").

51. If the definition of the International Committee of the Red Cross is accepted, Military Commissions established under the Military Commissions Act 2006 clearly do not comply with Common Article 3. Military Commissions in any form did not exist at the time of the capture and commencement of the detention of David Hicks.

52. Further and in addition, it is strongly arguable that the Military Commissions were not and will not be "regularly constituted" because: they apply only to persons who were not citizens of the United States; they have no application to the armed forces of the United States; and they have been established for the specific purpose of putting detainees on trial who are found to be "*unlawful enemy combatants*" by the Combatant Status Review Tribunal (the CSRT)[7], including those who have been given this status and who are imprisoned at Guantánamo Bay. The Military Commissions are special tribunals which have no other purpose but to try a relatively small group of persons who are the subject of designation by the CSRT.

53. The Military Commissions have been established wholly outside the regular system of criminal courts and courts-martial which have long held a respected position in the legal system of the United States and internationally.

54. The Second Military Commission contemplated by the Military Commissions Act 2006 will not be a regularly constituted court within the meaning of Common Article 3 of the Geneva Conventions.

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[6] 548 U.S. (2006) concurrence of Kennedy J. at page 8

[7] See: Section 948d. (c) Military Commissions Act 2006

Requirement to Afford "all the judicial guarantees which are recognized as indispensable by civilized peoples"

The Hamdan Case

55. Similarly, the requirement to afford "all the judicial guarantees which are recognized as indispensable by civilized peoples" is not defined in the Geneva Conventions.

56. In the Opinion of Stevens J in *Hamdan*: [8]

> Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U. S. T., at 3320 (Art. 3, 1(d)). Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." Taft, The Law of Armed Conflict After 9/11: Some Salient Features, 28 Yale J. Int'l L. 319, 322 (2003). Among the rights set forth in Article 75 is the "right to be tried in [one's] presence." Protocol I, Art. 75(4)(e).

57. Further, in *Hamdan*, Stevens J. and the majority of the Supreme Court expressly noted one particular failure to comply with the standards for a fair trial set by Common Article 3:[9]

> ……as noted in Part VI.A, *supra*, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.

The Protocol 1 (Article 75) Definition

58. Protocol 1 additional to the Geneva Conventions of 12 August 1949 relates to the Protection of Victims of International Armed Conflicts ("Protocol 1"). It was adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts and entered into force on 7 December 1979.

59. As observed by the Supreme Court in *Hamdan*, many of the guarantees recognized by customary international law as essential for a fair trial are described in Article 75 of Protocol I.

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[8] 548 U.S. (2006) at page 70
[9] 548 U.S. (2006) at page 71

60. Article 75(4) of Protocol 1, includes the following basic guarantees:

> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
>
> (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> ……
>
> (e) Anyone charged with an offence shall have the right to be tried in his presence;
>
> (f) No one shall be compelled to testify against himself or to confess guilt;
>
> (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> …….

The Rome Statute and the Australian Criminal Code Definition

61. In Australia the Common Article 3 requirements for "judicial guarantees which are recognized as indispensable by civilized peoples" have received statutory definition in section 268.76 of the *Criminal Code*.

62. The "judicial guarantees which are recognized as indispensable by civilized peoples" in Common Article 3(1)(d) are authoritatively defined in Australia in section 268.76 of the *Criminal Code* as:

- The necessity to provide for a trial by a court which affords the "essential guarantees of independence and impartiality" (Section 268.76 (1)(d)(ii)); and
- The guarantees set out in Articles 14, 15 and 16 of the International Civil and Political Covenant (Dictionary definition of "*Covenant*" in the Criminal Code and Section 268.76 (1) (e)).

63. Section 268.31 is to similar effect by incorporating references to Articles 84, 99 and 105 of the Third Geneva Convention and Articles 66 and 71 of the Fourth Geneva Convention.

The ICCPR

64. The International Covenant on Civil and Political Rights (the "ICCPR") came into force for Australia on 13 November 1980.

65. The United States has also been a party to and bound by the ICCPR since it ratified the Covenant on 8 September 1992.

66. Pursuant to section 268.76 of the *Criminal Code*, and of relevance to the case of David Hicks, Article 14 of the ICCPR has been incorporated into the domestic law of Australia in the context of war crimes.

67. Article 14 of the ICCPR provides that [with elements of importance to the case of David Hicks emphasized in bold]:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be **entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law**. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
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> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> a) **To be informed promptly** and in detail in a language which he understands of the nature and cause **of the charge against him**;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) **To be tried without undue delay**;
>
> (d) **To be tried in his presence**, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) **To examine, or have examined, the witnesses against him** and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Features of the Military Commission Established Under the Military Commissions Act 2006 which Fail to Comply with Common Article 3

Requirement for an Independent and Impartial Tribunal

68. 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. Section 268.76 (1)(d)(ii)) of the Australian *Criminal Code* specifically recognizes the importance of the right. Further, the ICCPR also emphasizes its importance by providing in Article 14(1): "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law**". [emphasis in bold added] The right to a trial before an "impartial and regularly constituted court" is also recognized in Article 75 (4) of Protocol 1 to the Geneva Conventions 1949.

69. With all of these instruments, the common source of the entitlement to a fair trial before an independent and impartial tribunal is the principle enshrined as one of the "equal and inalienable rights of all members of the human family"

in the Universal Declaration of Human Rights [10].. Article 10 of the Universal Declaration 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."

70. 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.

71. In *Findlay* v. *United Kingdom*, [11] 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".

72. 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.

73. More recently, the Court considered the case of *Ocalan v Turkey*. [12] 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.

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[10] On 10 December 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. For the reference to the "equal and inalienable rights of all members of the human family" See: the Preamble to the Universal Declaration

[11] 24 Eur. H.R. Rep. 221 (1997).

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

74. 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 person's mind as to the independence and impartiality of the court."

75. 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.

Failure of the Military Commissions to Satisfy the Essential and Basic Requirement for an Independent and Impartial Tribunal

76. The Military Commission system, as established and implemented by the United States to try prisoners at Guantánamo 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.

77. The following characteristics of the new Military Commissions to be established under the Military Commissions Act 2006 make this plain:

- It has been alleged that David Hicks has been engaged in armed conflict with the U.S. armed forces. He has been classified by the US Combatant Status Review Tribunal as an "unlawful enemy combatant" (s. 948d.(c) of the Military Commissions Act 2006);

- The Military Commission will be composed of officers appointed from the U.S. armed forces who will act as the jury on questions of fact and will determine the sentence if an accused is found guilty by them (s. 948i (b); s. 949m(a) and (b));

- All members of the U.S. armed forces are under the command of the President of the United States, however all of the services except the Coast Guard are part of the US Department of Defense, which is under the administration of the US Secretary of Defense;

- Officers appointed to serve on the Military Commission will be under the command of, appointed by, and will be effectively serving at the pleasure of, the US President or his delegate, the US Secretary of Defense;

- Members of Military Commissions appointed to sit on trials will not be selected by rotation, ballot, roster or a system of appointment organized internally by the Military Commission, consistently with the usual procedure in an independent criminal court or court-martial;

- The US Secretary of Defense will appoint the members of the armed forces to hear military commission trials (s. 948h. & s.948i.(b));

- The US Secretary of Defense will prescribe by regulation the manner in which military judges are to be appointed to military commissions (s. 948j(a));

- The US Secretary of Defense will prescribe by regulation the manner in which trial counsel and military defense counsel are to be appointed to military commissions (s. 948k(a)(4));

- The US Secretary of Defense may, both before and after a military commission has been assembled, "excuse" a member of a military commission from sitting "for good cause" (s. 948i(c) & s. 948m(b));

- The US Secretary of Defense may appoint new members of the armed forces to hear a military commission trial, in the event that the number sitting on a trial falls below the prescribed number (at least 5 members) in the course of a trial (s. 948m(c));

- The prosecuting authority which charges accused persons and is in a position to plea bargain on those charges is under the administration of the US Secretary of Defense;

- The US Secretary of Defense will be directly involved in a number of key procedural issues, including the determination of "elements and modes of proof" and may prescribe the principles of law and evidence which will apply in military commission trials (s. 949a.);

- The US Secretary of Defense may prescribe additional regulations for the use and protection of classified information during a military commission trial (s.949d.(f)(4));

- The US Secretary of Defense authorizes the interrogation techniques contained in the US Army Field Manual. Interrogation techniques authorized by the US Secretary of Defense between 2 December 2002 and 9 September 2006 included treatment amounting to the use of physical coercion, as set out in the attached Schedule "A";

- Defense counsel may obtain witness statements and other evidence, but only in accordance with such regulations as prescribed by the US

Secretary of Defense, who may also define exceptions and limitations as to what evidence may or may not be admissible in a proceeding (s. 949j (a));

- The US Secretary of Defense may also, as a matter of his or her sole prerogative and discretion, modify the findings and sentence of a military commission, albeit only in a fashion that is not less favorable to an accused than the findings and sentence determined by the military commission (s. 950b.);

- The US Secretary of Defense is also the representative of the US Executive who is responsible for detaining the prisoners who are subject to a military commission trial;

- In short, the same official, the US Secretary of Defense, is responsible for the original detention of accused persons, selecting the members of the tribunals that will hear charges against them, prescribing important procedural rules for the running of trials and making the final decision as to an accused person's guilt or innocence.

78. The clear lack of independence and impartiality may be illustrated by the following hypothetical: a citizen is charged by the police with an offence of aiding others to attack members of the police force and destroy items of police property. The presiding judge who determines the law at the trial is a policeman. A jury is selected for the trial by the Chief of Police. The jury consists entirely of policemen. The Chief of Police then reviews the decision of the jury before the decision becomes final. How could the citizen be guaranteed a fair trial under these circumstances? Still less, how could such a system even approach the appearance of a fair trial?

79. Any military commission established under the Military Commissions Act 2006 would manifestly violate the essential pre-conditions for an independent and impartial tribunal required to satisfy Common Article 3 of the Geneva Conventions.

Failure of the Military Commissions to Exclude Evidence Obtained by Coercion

80. The Military Commission rules do not exclude evidence obtained by the use of moral or physical coercion exerted on a prisoner in order to induce him to admit himself guilty of the act of which he is accused. This would amount to a breach of the requirement for a fair hearing provided by Article 14(1) of the ICCPR and the essential guarantees provided by Article 75(4)(f) of Protocol 1.

81. Section 948r. of the Military Commissions Act 2006 needs to be read in full. It provides:

> **Sec. 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements**
>
> (a) In General- No person shall be required to testify against himself at a proceeding of a military commission under this chapter.
> (b) Exclusion of Statements Obtained by Torture- A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.
> (c) Statements Obtained Before Enactment of Detainee Treatment Act of 2005- A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that--
>
> (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
> (2) the interests of justice would best be served by admission of the statement into evidence.
>
> d) Statements Obtained After Enactment of Detainee Treatment Act of 2005- A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that--
>
> (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
> (2) the interests of justice would best be served by admission of the statement into evidence; and
> (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

82. Evidence obtained under torture is clearly excluded from a trial before a Military Commission under the Military Commissions Act 2006. This is a notable improvement upon the First Military Commission process established by the Presidential Order of 13 November 2001. It was not until the issue of Military Instruction No.10 on 24 March 2006 by the General Counsel of the Department of Defense (U.S.) that evidence in Military Commission trials which had been obtained by torture was purportedly excluded. However, the definition of "torture" contained in Military Instruction No 10 was significantly narrower than that contained in the international Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the "Convention Against Torture").[13] On its face, Military Instruction No. 10 did not exclude evidence obtained by the use of mental torture, "short of physical torture" or evidence which may have been obtained by coercive techniques involving the use of cruel, inhuman or degrading treatment in contravention of the Convention Against Torture, but again "short of physical torture".

83. However, section 948r.of the Military Commissions Act 2006, even though it goes further than Military Instruction No.10, still permits a wide discretion to the presiding military Judge to receive evidence obtained by coercion into evidence in circumstances which would not be permitted in a regular criminal

[13] Both Australia and the United States are parties to the Convention Against Torture

court or a court-martial and in circumstances which would be regarded by the general law as being unfair.

84. The importance of the protection against the admission of evidence obtained under coercion is particularly evident in the case of trials of detainees held at Guantánamo Bay. On 2 December 2002 interrogation techniques contained in the US Army Field Manual were authorized by the US Secretary of Defense which operated between 2 December 2002 and 15 January 2003. The US Secretary of Defense then authorized further interrogation techniques contained in the US Army Field Manual which remained in force until 9 September 2006. [14] All interrogation techniques authorized by the US Secretary of Defense since 2 December 2002 include treatment amounting to the use of physical coercion, as set out in the attached Schedule "A".

85. Accordingly, in this respect, the conduct of a Military Commission trial under the Military Commissions Act 2006 has the clear potential to violate Article 14 (1) of the ICCPR and Article 75(4)(f) of Protocol 1 giving rise to a contravention of Common Article 3 of the Geneva Conventions.

Failure of the Military Commissions to Exclude Hearsay Evidence

86. The rules of the Military Commission permit the Prosecution to rely upon hearsay evidence, thereby denying to an accused person any adequate opportunity to present his defense by cross examining the authors of the statements presented against him, in breach of Article 14(3)(5) of the ICCPR and Article 75(4)(g) of Protocol 1.

87. Section 949a. (b) of the Military Commissions Act 2006 provides:

> (E)(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title.
> (ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.

[14] In contrast to the previous version of the manual, the 9 September 2006 edition states that the Geneva Conventions are to be applied to all detainees in US military facilities.

88. Accordingly, section 949a. (b) of the Military Commissions Act 2006 provides for a lesser standard of evidence than is required for a trial before a regular criminal court of a court-martial. It also provides that certain hearsay evidence of a classified nature may not be available to the accused, but may be acted upon by the Commission. In such circumstances the protection purportedly given by ss (ii) becomes illusory. This is unacceptable, particularly given the very serious penalties which are open in the sentencing process, which in the case of David Hicks, resulting from an agreement between Australia and the United States, carries the potential for a sentence of imprisonment including life imprisonment, and for others charged before a Military Commission, the potential for the death penalty.

89. Section 949a. (b) of the Military Commissions Act 2006 expressly contemplates a breach of Article 14(3)(5) of the ICCPR and Article 75(4)(g) of Protocol 1, and hence a breach of Common Article 3 of the Geneva Conventions..

Failure of the Military Commissions to Permit an Accused to be Privy to all of the Evidence

90. A notable shortcoming of the Military Commissions Act 2006 is the facility to exclude an accused from parts of the evidence adduced against him. This is remarkable in the light of the specific observations of the Supreme Court in the *Hamdan* case, where the majority of the Court was particularly troubled by this aspect of the First Military Commission process, noting that this procedural defect violated Common Article 3 of the Geneva Conventions.

91. In spite of these authoritative observations of the Supreme Court, the military commission process established under the Military Commissions Act 2006 virtually repeats the procedures of the First Military Commission in relevant respects.

92. Section 949d (f) is a lengthy section which provides a facility for an accused to be excluded from certain evidence presented during a trial, essentially on the ground that the Military Judge determines that the information contained in the evidence is "protected" and is "privileged from disclosure" if "disclosure would be detrimental to the national security".

93. Section 949d (f) provides:

> (f) Protection of Classified Information-
>
> (1) NATIONAL SECURITY PRIVILEGE- (A) Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. The rule in the preceding sentence applies to all stages of the proceedings of military commissions under this chapter.

(B) The privilege referred to in subparagraph (A) may be claimed by the head of the executive or military department or government agency concerned based on a finding by the head of that department or agency that--

(i) the information is properly classified; and

(ii) disclosure of the information would be detrimental to the national security.

(C) A person who may claim the privilege referred to in subparagraph (A) may authorize a representative, witness, or trial counsel to claim the privilege and make the finding described in subparagraph (B) on behalf of such person. The authority of the representative, witness, or trial counsel to do so is presumed in the absence of evidence to the contrary.

(2) INTRODUCTION OF CLASSIFIED INFORMATION-

(A) ALTERNATIVES TO DISCLOSURE- To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable--

(i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission;

(ii) the substitution of a portion or summary of the information for such classified documents; or

(iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

(B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES- The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.

94. It can be readily seen that the processes contemplated by section 949d (f) are prone to generate very grave unfairness in the course of a trial. The following observations provide some examples:

- The section provides the opportunity to delete some items of classified information which may involve the alteration of emphasis or even the meaning of the evidence and the source of the evidence;

- The section provides a facility for the production of a summary of the classified evidence to an accused person. Such a process gives an accused no proper facility to know what the actual evidence presented against him is, and lessens his ability to test the summary against the original document. Again the potential is there to alter the emphasis or even the meaning of the evidence and to deny the source of the evidence;

- The section provides a facility for preventing an accused from knowing the sources, methods or activities by which the United States acquired the evidence. This could be central to an accused challenging the reliability of the evidence adduced against him; and

- The military Judge may examine and determine a claim for the denial of information from an accused in mid – trial, when the information is claimed to be classified and the review of the material in support of such a claim may take place *in camera* in the absence of an accused person.

95. Accordingly, by section 949d (f) of the Military Commission Act 2006, the rules of the Military Commission provide, among other things, that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding if the presiding officer decided to "close" the commission. Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods or activities, and "other national security interests." The appointed military defense counsel are required to be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the accused what took place therein.

96. This procedure denies to an accused person any adequate opportunity to present his defence and is in breach of Article 14(3)(4 & 5) of the ICCPR and Article 75(4) (e) and (g) of Protocol 1, and in turn constitutes a violation of Common Article 3 of the Geneva Conventions.

Excessive Delay in Bringing David Hicks to Trial

97. There is much truth in Gladstone's maxim 'justice delayed is justice denied'.[15] The principle is of great antiquity and finds expression in *Magna Carta*: '*To none will we sell, to none deny or delay, right or justice*.' The right to a trial without unreasonable delay or to release is declared in Articles 9(3) and 14(3) of the ICCPR and in the landmark Charter of Human Rights and Responsibilities recently introduced into Victoria [16] as well as numerous other constitutions and international conventions throughout the world.

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[15] William Gladstone (1809 – 1898) was a British Liberal Party statesman and Prime Minister (1868-1874, 1880 – 1885, 1866 and 1892 – 1894).

[16] Charter of Human Rights and Responsibilities Act 2006 Act No. 43/2006, Section 21(5)

98. Long delay between arrest and trial inevitably affects the value of any evidence submitted at a trial when it eventually occurs and may prejudice the capacity to provide a fair judgment of the case. Further, an accused may be prejudiced by mental deterioration resulting from prolonged and seemingly limitless incarceration.

99. The right to a trial without unreasonable delay or to release is universally recognized in civilized legal systems as a right of fundamental importance.

100. After 5 years of imprisonment, much of it in solitary confinement, David Hicks' basic right to an expeditious trial has been cruelly violated. Months of solitary confinement has exposed him to the kind of torment which the rule of law has never tolerated.

101. Insofar as international law reflects the same principles, the detention of Hicks and others at Guantánamo Bay does not constitute humane treatment and blatantly violates the fundamental protections prescribed by Common Article 3 of the Geneva Conventions.

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

- He was captured near Kondoz, Afghanistan in November 2001 and has been in the custody of the United States armed forces since that time, being imprisoned in Guantánamo 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 challenging detention at Guantánamo Bay and trial by Military Commission, including the *Hamdan* case which involved a direct challenge to the Presidential Order which established the First Military Commission. The trial of David Hicks was stayed by the US Federal Court in November 2005 pending delivery of the judgment in the *Hamdan* case;

- An effect of the *Hamdan* decision was to declare the First Military Commission and all charges laid before it, including the charges preferred against David Hicks, invalid;

- Following delivery by the Supreme Court of the *Hamdan* decision on 29 June 2006, further delay was occasioned by the preparation and passing of the Military Commissions Act 2006. Having passed through Congress, this Act was approved and signed by the President of the United States on 17 October 2006;

- As at the date of writing, David Hicks has not been charged before any new Military Commission established under the Military Commissions Act 2006, nearly 5 years after his detention commenced.

103. 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 Rights Committee of the United Nations has held that, in the absence of a satisfactory explanation by the detaining State Party, a pre-trial detention of twenty-three months breached articles 9(3) and 14(3) of the Civil and Political Covenant [17] and a period of twenty-two months' pre-trial detention was held to breach the same articles. [18]

104. It is not fairly open to attribute this inordinate delay to Mr Hicks and his lawyers. It was the illegal system of trial created by government of the United States which gave rise to the legitimate and successful court challenge to the First Military Commission. Further, there remains no explanation for the unconscionable 2.5 year delay prior to David Hicks being charged on 10 June 2004.

105. The reality is that following the *Hamdan* case, the already inordinate delay is likely to be compounded several times over if David Hicks is exposed to a trial before a re-vamped Second Military Commission. Like its predecessor, the Second Military Commission is a legal experiment which is vulnerable to legal challenge. Indeed, by its very structure and the nature of its trial procedures, such a challenge is invited. If David Hicks or others pursue their legal entitlements through the appeal process in the United States, further delays of some years will be inevitable.

106. David Hicks has not been promptly charged and has not been, and will not be, brought to trial without undue delay in breach of Article 14(3)(1 & 3) of the

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[17] *Brown* v. *Jamaica*, H.R.C. Communication No. 775/1997, U.N. Doc.CCPR/C/65/D/775/1997 (Mar. 99).
[18] *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.

ICCPR and Article 75(4) (a) of Protocol 1, which in turn constitutes a violation of Common Article 3 of the Geneva Convention.

Conclusion

107. Having analyzed the requirements of Common Article 3 of the Geneva Conventions in the context of the provisions of the Military Commissions Act 2006 and the standards established for a fair trial by international law, we are of the opinion that Military Commissions which purport to conduct trials under the new Act will violate Common Article 3.

108. The Second Military Commission suffers from the same essential defects as the First Military Commission. In particular, its structure and procedures do not comply with Common Article 3(1)(d) of the Geneva Conventions.

109. It follows that the proposal to conduct a trial of David Hicks before the Second Military Commission would not be consistent with the decision of the Supreme Court of the United States in *Hamdan*.

110. We are further of the opinion that a trial conducted before a Military Commission established under the Military Commissions Act 2006 would contravene the standards for a fair trial under Australian law, namely the standards provided for in the Australian *Criminal Code,* and to counsel or urge a trial to take place before such a body with the requisite knowledge and intention would constitute a war crime under sections 11.1, 11.2, 11.4 and 268.76, alternatively section 268.31, of the Australian *Criminal Code*.

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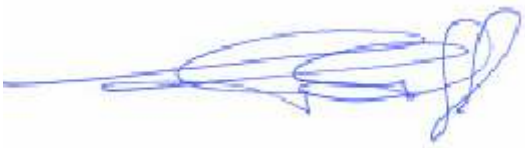

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9 November 2006

SCHEDULE "A"

Interrogation techniques contained in the US Army Field Manual which were approved for use by the US Secretary of Defence between 2 December 2002 and 15 January 2003 included:

(i) The use of stress positions (like standing) for a maximum of four hours;

(ii) Detention and isolation up to 30 days;

(iii) The detainee may have a hood placed over his head during transportation and questioning;

(iv) Deprivation of light and auditory and literary stimuli;

(v) Removal of all comfort items;

(vi) Forced grooming, shaving the facial hair etc.

(vii) Removal of clothing.

(viii) Interrogation for up to 20 hours.

(ix) Using detainees individual phobias (such as fear of dogs) to induce stress.

Interrogation techniques contained in the US Army Field Manual which were approved for use by the US Secretary of Defence between 15 January 2003 and 9 September 2006, included:

(i) Incentive/removal of incentive i.e. comfort items,

(ii) Change of scenery down (*sic*) might include exposure to extreme temperatures and deprivation and auditory stimuli;

(iii) Environmental manipulation: altering the environment to create moderate discomfort (e.g. adjusting temperature or producing unpleasant smells);

(iv) Sleep adjustment; adjusting the sleep times of the detainee (e.g. reversing sleep cycles from night to day). This technique is not sleep deprivation;

(v) Isolation: clearly isolating the detainee from any other detainee while still complying with basic standards of treatment.