

THE UNITED STATES
v.
DAVID MATTHEW HICKS

FINAL REPORT
OF THE INDEPENDENT
OBSERVER FOR THE
LAW COUNCIL OF AUSTRALIA

GUANTANAMO BAY, CUBA

LEX LASRY QC



"Laws can embody standards; governments can enforce laws--but the final task is not a task for government. It is a task for each and every one of us. Every time we turn our heads the other way when we see the law flouted--when we tolerate what we know to be wrong--when we close our eyes and ears to the corrupt because we are too busy, or too frightened--when we fail to speak up and speak out--we strike a blow against freedom and decency and justice."(Robert F. Kennedy June 21, 1961)

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1. Acknowledgements

- 1.1. In mid 2004, I was invited to accept the role of Independent Observer for the Law Council of Australia in the David Hicks case. By then Hicks had been in custody for well over two years. By then also a number of members of the legal profession and the Law Council as a professional body, had been protesting about the injustice of Hicks' situation and that of another Australian citizen, Mamdouh Habib, who was also incarcerated at Guantanamo Bay. At that time it was much less popular than it is now to protest about these cases to an Australian Government that was more than willing to accept the political benefits of community fear of random terrorist attack.
- 1.2. However, the Law Council continued to press the Government and the community generally to understand the principles involved in these cases. That argument was put by a succession of Presidents of the Law Council including Bob Gotterson QC; Stephen Southwood (now Justice Southwood of the Northern Territory Supreme Court); John North and the current President, Tim Bugg. This was, and remains, a very important matter of principle.
- 1.3. The invitation to me was extended by the Secretary-General, Peter Webb. Peter has been there throughout this case and has given consistent support to the Law Council and to me in observing the case, reporting the outcome and conducting the public debate. Similar support has come from the Director of Public Affairs, Elenore Eriksson who has answered every request and dealt with every enquiry conscientiously and with good humour. Likewise, there are others at the Law Council in the Public Affairs section who have assisted. Finally, I mention particularly Helen Donovan who has assisted me with this report and added great value to it and I thank her for that effort.

2. Introduction

- 2.1. This is the third report that I have had occasion to write for the Law Council of Australia in my capacity as its Independent Observer of the Military Commission proceedings against David Hicks conducted at the US military installation at Guantanamo Bay, Cuba. This report will be my final report in relation to the *Hicks* matter in view of his plea of guilty and subsequent sentencing at Guantanamo Bay during the week commencing 26 March 2007.
- 2.2. The previous reports, released in September 2004 and July 2005, concerned the progress of the matter, or lack of it, under a Military Commission regime established pursuant to Presidential Order and given some rudimentary form by a series of Military Commission Orders and Instructions issued by the US Secretary of Defense.
- 2.3. It will be recalled that the proceedings commenced against Mr. Hicks under that first regime did not advance far. After preliminary hearings on 25 August 2004 and on 1-3 November 2004, his case was adjourned until 15 March 2005 before being stayed indefinitely in November 2005 pending the outcome of a legal challenge commenced by another Guantanamo detainee. That challenge was ultimately resolved by the US Supreme Court in *Hamdan v Rumsfeld*¹ when the Court declared the Military Commission regime, as it then was, unlawful. For Hicks, the result was that the proceedings against him became null and void and he returned to the position he was in for the first two and half years of his imprisonment at Guantanamo Bay – detained indefinitely without charge.

¹ 126 S Ct. 2749 (2006)

- 2.4. The *Hamdan* decision in June 2006 prompted the US President to seek the endorsement of the Congress for a revised regime which would allow proceedings against Hicks and other selected Guantanamo detainees to be commenced afresh.
- 2.5. The *Military Commissions Act* 2006 (MCA) was therefore the legislative response by the US Congress to the judgment of the US Supreme Court in *Hamdan*. It created a Military Commission regime somewhat different from the one which was the subject of my earlier reports but one which, in my view, still failed to deliver the guarantee of an independent and impartial tribunal bound to apply internationally recognized fair trial standards.
- 2.6. In this report, I will briefly review these and other significant events which have occurred since my second report and offer some conclusions about the development of the Military Commission process. However, given the fact that important intellectual analysis of the process has already been done by eminent lawyers (to which I will later refer) and given the manner in which the Hicks case was ultimately resolved, my review will not be detailed. Instead this report will focus on the Hicks case and its final disposition.
- 2.7. Suffice to say in summary that it is my strong opinion that nothing that occurred during the week commencing the 26 March 2007 in any way diminished or affected the criticisms and concerns that I, the Law Council of Australia and many others have about this Military Commission process. Australia's moral authority continues to be compromised by the Government's willingness to support this process. That support proceeds on the fundamental premise that since 11 September 2001, a different and diminished criminal justice paradigm is necessary to deal with international terrorism. This new paradigm carries with it the implication that individual rights can be compromised whenever the Executive of a Government considers it necessary. The logic is not only nonsensical but dangerous. The Military Commission process at Guantanamo Bay is an example of that compromise and has attracted wide criticism from many eminent jurists. The response of the Australian Government generally, and of the Attorney-General in particular, has been to simply publicly ignore those criticisms and refuse to engage on the substantive legal issues. In the future under this flawed process, it is likely that some prisoners will be executed at Guantanamo Bay. That any Australian Government could condone such a possibility is shameful.
- 2.8. At the end of this report, I will outline my conclusions in more detail.

3. Background – Developments since July 2005

- 3.1. The key events in the development of the Military Commissions process since my report of July 2005 have been the enactment of the *Detainee Treatment Act* (DTA), the decision of the US Supreme Court in *Hamdan* and the subsequent enactment of the MCA. I describe these as key developments because they are each concerned with defining who has the authority to detain and try those held at Guantanamo Bay and pursuant to what law and under whose ultimate supervision. These are complicated by the determination of the US Administration to avoid the ordinary operation of the law and any independent judicial oversight.
- 3.2. It may just be the language which is used from time to time but the steps in the process of development of the Military Commissions regime appear to have taken on a chess-like dynamic with the US Administration and Congress on the one hand, and the Judiciary on the other, locked in an exchange of strategic moves. In itself, this approach has undermined confidence in the process.

3A. An historical summary

- 3.3. The intention of the US Administration in using Guantanamo Bay as a prison was to ensure that detainees were beyond the effective reach of the courts of any jurisdiction. According to the Administration, these detainees were not entitled to the protections of the Geneva Conventions or US domestic law. Their detention, the conditions of their detention and the procedures for their trial and punishment were all asserted to be a matter of Executive prerogative. That power was said to flow from the Authorization for the Use of Military Force (AUMF) having passed on 14 September 2001 which enlivened or confirmed the war powers of the President.
- 3.4. As I have already reported in my earlier reports, two judgments handed down by the US Supreme Court in June 2004 cast doubt on whether the Executive really did have the power to detain indefinitely anyone it designated as an enemy combatant and to try them before a Military Commission. In *Rasul v Bush*² the Supreme Court found, contrary to the submissions of the US government, that US Federal Courts did have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and held at Guantanamo Bay. Both Hicks and Habib were petitioners in that case. In *Hamdi v Rumsfeld*³, the Supreme Court found that a citizen detained at the direction of the Executive on the basis of his classification as an “*enemy combatant*” must have a fair opportunity to challenge that classification before a neutral decision maker.
- 3.5. The Administration quickly moved to counter the effect of the judgments. Within two weeks of the *Rasul* and *Hamdi* judgments, the US administration created a mechanism to validate, beyond the mere assertion of the Executive, the status of each detainee as an “*enemy combatant*”. By doing so, the Executive sought to validate the legality of each detainee’s imprisonment as an incident of the President’s war powers.
- 3.6. For this purpose, the Department of Defense established the Combatant Status Review Tribunals (CSRTs), to “*provide detainees at the Guantanamo Bay Naval Base with notice of the basis for their detention and an opportunity for them to contest their detention as enemy combatants*”. The CSRTs have been subject to considerable criticisms. This is primarily because the CSRTs commence with a presumption in favour of the Government’s conclusion that the detainee is an “*enemy combatant*”, leaving the detainee to rebut the presumption without the assistance of legal counsel, often without access to the secret evidence relied on by the government in support of the classification and with extremely limited ability to gather and present evidence on his own account.
- 3.7. For the judiciary, the CSRT process did not definitively dispose of the issues central to the legality of the detainees’ imprisonment or their eligibility for trial by Military Commission.
- 3.8. In the first instance decision in *Hamdan*⁴, a US District Court Judge, after deciding that the Geneva Conventions applied to Guantanamo detainees, found that Hamdan could not be tried before a Military Commission unless it was first determined by a competent tribunal that he was not entitled to prisoner of war status under the Third Geneva Convention. The CSRTs could not fill the role of such a tribunal because under their limited mandate they did not review a detainee’s status under the Geneva Conventions, only whether he was correctly designated as an *enemy combatant*.

² *Rasul et al. v Bush et.al.* 542 US (2004).

³ 542 US 507 (2004) – Decided June 2004. I have dealt with this judgment and its consequences in more detail in my second report – see page 11 and ff.

⁴ United States District Judge James Robertson – 8 November 2004. Referred to in my second report at page 15.

- 3.9. In *re Guantanamo Detainee Cases*,⁵ another US District Court judge, after deciding that Guantanamo detainees were entitled to certain protections contained in the US Constitution, found that the CSRT process was insufficient to meet the Constitutional guarantee that a person must not be denied his or her liberty without due process. As I have previously noted, Her Honour was critical of the fact that detainees had not been given access to all the material evidence on which their status as an “enemy combatant” had been confirmed. Also, the allegations of Mamdouh Habib that he been “rendered” to Egypt and tortured were raised in this case to demonstrate that any information obtained from the detainees was likely to have been obtained as the result of torture. Whilst not deciding the issue, the Judge was of the view that there was enough material to defeat the Government’s motion to dismiss. As I understand the state of the now public evidence, Habib’s coerced travel to Egypt and the fact of his torture is able to be corroborated. The Australian Government should be feeling very uncomfortable about this.
- 3.10. Although I was not involved in the process, I understand that Hicks was processed by the CSRT. The Pre-Trial Agreement that he signed recites that on 30 September 2004, the CSRT determined that he was an “*unlawful enemy combatant*” as a member of or affiliated with Al Qaeda. This is not likely to be true in that the word *unlawful* would not have been part of the classification as now required by the *Military Commissions Act*. Although I do not have the CSRT classification of Hicks, I note that in the Supreme Court recitation of the history in *Hamdan v Rumsfeld* the following appears:

*Meanwhile, a Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan’s continued detention at Guantanamo Bay was warranted because he was an “enemy combatant.”*⁶

That classification would also have been applied to Hicks.

- 3.11. As though to demonstrate the *ad hoc* nature of this process a new problem has arisen since the conclusion of the Hicks case because the CSRT classifications were as *enemy combatant* rather than an *unlawful alien enemy combatants* which is the statutory requirement to invoke to jurisdiction of the Military Commission under the 2006 *Military Commissions Act*. In a recent case that has required that charges against a detainee be dismissed, albeit “*without prejudice*”.

3B. The Detainee Treatment Act

- 3.12. Congress responded to these judgments with the *Detainee Treatment Act* (DTA) passed in December 2005. Congress chose not to address the Court’s findings that the CSRTs did not meet the due process requirements of the US Constitution or the requirements of the Geneva Conventions with respect to determining POW status. On the contrary, through the DTA, Congress affirmed that the Executive controlled CSRTs are the primary and only proper forum for determining the status of a detainee, the legality of his detention, and his eligibility for Military Commission trial. The DTA purports to limit detainees’ access to US courts to a narrow right of appeal from a final decision of a CSRT or Military Commission, with grounds for appeal essentially limited to procedural irregularities and certainly not broad enough to encompass any form of merits review. The DTA expressly precludes Guantanamo detainees from bringing *habeas corpus* or any other form of review application before US courts.

⁵ United States District Judge Joyce Green – 31 January 2005. See the analysis in my second report at page 21 & ff.

⁶ Judgment page 5.

- 3.13. It is worth noting that the DTA was the legislation which incorporated the so-called “*McCain Amendment*” prohibiting “*cruel, inhuman, or degrading treatment or punishment*” of detainees and providing for “*uniform standards*” for interrogation. It was this amendment in respect of which the President said in his signing statement on 30 December 2005:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.

This seemed to be generally regarded as the President announcing his intention to by-pass the prohibition as and when he thought it was necessary.

3C. The Decision in Hamdan v Rumsfeld

- 3.14. The opinions of the US Supreme Court in *Hamdan v Rumsfeld* were handed down in June 2006. Hamdan had filed a petition for a writ of *habeas corpus*, arguing that the Military Commission convened to try him was illegal and lacked the protections required under the Geneva Conventions and United States Uniform Code of Military Justice (UCMJ). Hamdan’s petition was granted in part by the District Court but the decision was reversed by the Court of Appeal, prompting a further appeal to the Supreme Court.
- 3.15. On the preliminary issue of jurisdiction, the majority of the Supreme Court found that, as a matter of statutory construction, the DTA did not preclude its jurisdiction to hear *habeas corpus* applications, particularly those filed before the DTA came into effect.
- 3.16. The substantive question then considered by the Supreme Court was whether, and pursuant to what law, the President was authorized to establish Military Commissions of the type established in November 2001. The majority of the Court held:
- The Military Commissions were not expressly authorized by any Act of the US Congress. In particular the Court found that neither the AUMF, the DTA, nor the UCMJ could be read to provide specific, overriding authorization for the commissions convened to try Hamdan and others nominated for trial.
 - To the extent that the UCMJ, the AUMF, and the DTA nonetheless acknowledge a general freestanding Presidential power to convene Military Commissions, it is a power which may only be exercised in circumstances justified under the Constitution and the law, including the law of war.
 - Even where such justification can be found, the President’s power to convene a Military Commission is not without conditions. The UCMJ requires that the power be exercised in compliance not only with the American common law of war, but also with the UCMJ itself, insofar as applicable, and with the rules and precepts of the law of nations including the four Geneva Conventions signed in 1949.
 - Given that the structure and procedures of the Military Commission convened by the President to try Hamdan violate both the UCMJ and the Geneva Conventions, it lacks the power to proceed.

- 3.17. Specifically, the majority found that according to Article 36 of the UCMJ the procedural rules governing trials before courts-martial and Military Commissions should, in so far as practicable, be uniform. Although the Court accepted that this requirement for uniformity was not inflexible and did not preclude all departures from courts-martial procedures, the Court held that any such departure must be tailored to the exigency that necessitates it. In the *Hamdan* matter the Court found that no case of necessity had been made out for the dramatic divergence between the Military Commission procedures and the ordinary rules and procedures of courts-martial.
- 3.18. In this context the Court referred in particular to the following:
- The ability of the Military Commission to allow, on very broad grounds, for an accused and his civilian counsel to be excluded from, and precluded from ever learning, what evidence was presented during any part of the proceeding the official who appointed the Commission or the Presiding Officer decides to close;
 - The admission by a Military Commission of any evidence that, in the presiding officer's opinion, would have probative value to a reasonable person, irrespective of whether it was hearsay evidence or evidence obtained by coercion; and
 - Procedures which allowed for the accused and his civilian counsel to be denied access to classified and other protected information so long as the presiding officer concluded that the evidence was probative, and that its admission without the accused's knowledge would not result in the denial of a full and fair trial.
- 3.19. With respect to the Geneva Conventions the Court found that regardless of how the conflict in Afghanistan or with Al Qaeda was classified, Hamdan was at least entitled to the protection of Common Article 3. That article 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.*"
- 3.20. The Court noted that while Common Article 3 does not define a *regularly constituted court*, other sources define the words to mean an '*ordinary military court (that is) established and organized in accordance with the laws and procedures already in force in a country.*' The regular military courts in the US system are the courts-martial established by Congressional Statute.
- 3.21. The Court held that the requirement that a Military Commission be *regularly constituted* can only be dispensed with in circumstances where some practical need explains deviations from courts-martial practice. As above, the Court found that no such need had been demonstrated in this case. The Court noted that Common Article 3's requirements are general and crafted to accommodate a wide variety of legal systems, but they are requirements nonetheless. The Court held that the Military Commission convened to try Hamdan did not meet those requirements.
- 3.22. With the Court accepting that for the sake of the argument Hamdan was a dangerous individual who would, given the opportunity, cause great harm or death to innocent civilians they nonetheless expressly held that the Government must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment.
- 3.23. The consequence of the judgment in *Hamdan* was that the Military Commission process as it then was became unlawful. The three charges Mr. Hicks was facing under that process were never formally disposed of, but they effectively lapsed and can be regarded as null and void.

3D. The Military Commissions Acts 2006 and the Manual for Military Commissions

- 3.24. As I have already said, the response of the US Government to the Supreme Court's opinion in *Hamdan* was the *Military Commissions Act* of 2006 (MCA). The MCA provides for the establishment of a new Military Commission regime to replace the previous system found to be unlawful by the Supreme Court. The MCA does not give any appearance of representing an accommodation by the US Government of the judgment in *Hamdan*, but rather a way of diminishing its effect.
- 3.25. The lesson that the US administration took from the *Hamdan* decision was not that it failed because it had established a regime which violated the UCMJ and the Geneva Conventions, but rather that it failed because it had established, *without express Congressional approval*, a regime which violated the UCMJ and the Geneva Conventions. Thus, their solution was not to establish a new system which honoured all the requisite fair trial standards, but rather to effectively obtain Congressional approval for the old system with some modification. One of those modifications was to enable the role of the judiciary to be more precisely circumscribed.
- 3.26. The provisions of the MCA which address the Geneva Conventions and the UCMJ provide a particularly stark example of the manner in which Congress chose to respond to the *Hamdan* decision.
- 3.27. The MCA simply asserts *as a fact* that Military Commissions established pursuant to the MCA do comply with Common Article 3 of the Geneva Conventions (s948b(f)). However, lest a court might disagree, s948b(g) of the MCA provides that an alien unlawful combatants subject to trial by Military Commission may not invoke the Geneva Conventions as a source of rights.
- 3.28. The MCA also asserts that the procedures for Military Commissions contained in the MCA are based upon the procedures in the UCMJ, but then explicitly states that the UCMJ does not apply to trial by Military Commission and does not bind Military Commissions (s948(b)(c)).
- 3.29. The MCA was signed into law by President George W Bush on 17 October 2006. During the course of the signing ceremony, he said:⁷

*The bill I'm about to sign also provides a way to **deliver justice to the terrorists we have captured**. In the months after 9/11, I authorized a system of military commissions to try foreign terrorists accused of war crimes. These commissions were similar to those used for trying enemy combatants in the Revolutionary War and the Civil War and World War II. Yet the legality of the system I established was challenged in the court, and **the Supreme Court ruled that the military commissions needed to be explicitly authorized by the United States Congress**.*

*And so I asked Congress for that authority, and they have provided it. With the Military Commission Act, the legislative and executive branches have agreed on a system that meets our national security needs. **These military commissions will provide a fair trial**, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them. These military commissions are lawful, they are fair, and they are necessary. (Emphasis added)*

⁷ <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>

- 3.30. It will be noted that the President, in his opening words, purported to resolve an issue against the detainees which Military Commission trials might have been more appropriate to deal with – has it been proved beyond reasonable doubt that in the particular case the accused is a terrorist? Apparently the President was already satisfied about that and so, in a few words, demonstrated the lack of independence which infects this process.
- 3.31. Later in January 2007 the Secretary of Defense, Robert M. Gates, published the *Manual for Military Commissions* (MMC) which set out in more detail the procedures for appointing members, judges and counsel to a Military Commission, pre-trial procedures, appeal procedures, the rules of evidence, standards of proof and the elements of relevant offences.
- 3.32. There are a number of issues raised by the MCA and the MMC which are of considerable concern. These issues have been widely discussed and do not require elaboration here – it is sufficient to state them to identify the unfairness of the Act.
- The Military Commissions only deal with alien unlawful enemy combatants – not US citizens who, even when arrested abroad and charged with terrorist-related offences, are dealt with in US domestic criminal courts.
 - The MCA permits any foreigner, arrested anywhere, who is deemed to fall within the broad definition of an alien unlawful enemy combatant, to be tried before a Military Commission. The MCA does not limit the Military Commissions to trying war crimes, but instead lists a number of offences, previously unknown to the law of war, as triable under the Act. The MCA does not limit the Military Commissions to trying crimes committed in a particular geographic location or to crimes committed in a particular period. Rather, the MCA affirms the assertion that the United States is engaged in a global war with no geographic boundaries and has been at war in this way for an indefinite period commencing some time before September 11 2001.
 - While the jurisdiction of the Military Commissions is dependent on the accused being an alien unlawful enemy combatant⁸, if the CSRT has found that a detainee has this status, then the military commission must accept this finding as conclusive (948d(c)).
 - The MCA denies jurisdiction to any court, justice or judge to consider an application for a writ of *habeas corpus* filed on behalf of a Guantanamo Bay detainee, including any application filed before the commencement of the Act.
 - Regardless of the prejudice that might accrue to an accused as a result of the delay in bringing proceedings against him, the MCA denies him the ability to file a motion to dismiss the charges pursuant to the speedy trial provisions of the UCMJ (s948(b)(d)(A)).

⁸ Under s. 948a of the MCA, the term is defined as meaning:

- ‘(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- ‘(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

- With respect to the rules for the disclosure and admission of evidence before a Military Commission, under Rule 505(e)(3) of the MCM it is possible to avoid both the accused and his lawyer seeing particular classified material. The Government's application that this happen is to be dealt with by the Commission *in camera* and *ex parte*.
- Similarly, it appears possible under Rule 505(e)(6) that both the accused and his lawyer may be prevented from knowing the sources, methods, or activities by which the US acquired the evidence admitted against the accused, although a military judge may require the prosecution to present to the Military Commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of those sources, methods, or activities. Again, the Government's application is to be considered *in camera* and *ex parte*.
- The MCA purports to exclude statements obtained by torture (see section 948r and Rule 304), but allows for the admission of statements obtained in circumstances where the degree of coercion used is in dispute. The only test is whether the totality of the circumstances renders the statement reliable and possessing sufficient probative value. Even evidence obtained using cruel, inhuman or degrading interrogation techniques is possibly admissible, if obtained prior to December 2005. In the rules, torture is defined as meaning an intentional infliction of severe physical or mental pain. The distinction between coercion and torture is not clear.
- The rules relating to coercion also apply to statements by an accused person. An admission, which has been forcibly coerced from an accused person (in circumstances where he was unable to invoke the right to silence or seek the assistance of legal counsel), is admissible, provided that the interrogation methods used did not equate to torture and the statement is deemed reliable and sufficiently probative. On that basis, the MCA's guarantee that an accused can not be forced to testify against himself before a Military Commission is rendered meaningless.
- The MCA Rules in relation to evidence are still based on the concept that evidence is admissible if the evidence has probative value to a reasonable person (as determined by the Judge)⁹. Under section 949a of the MCA, 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 provided the proponent of the evidence gives sufficient notice to the other party to allow a chance to meet the evidence. Hearsay within hearsay may also be admitted. The MCA and MCM do not require the party seeking to admit hearsay evidence to demonstrate that reliance on evidence in that form is necessary in the circumstances and not unfairly prejudicial. On the contrary, under the MCA and MCM the onus is placed on the party opposing the evidence, (in most cases the accused) to demonstrate that it should be excluded on that basis that it is unreliable and lacking in probative value.¹⁰
- The Convening Authority, responsible for determining whether charges sworn against a detainee should be referred for trial before a Military Commission, may also rely on hearsay evidence in making that decision.

⁹ See section 949a.

¹⁰ See section 949a and Rules 801 – 807.

- Rule 703(b)(3)(B) of the MCM does not require the military judge to adjourn or abate proceedings before a Military Commission, even when a witness “*of central importance to the resolution of an issue essential to a fair trial*” is unavailable to give evidence unless the reason for the witness’s unavailability is within the control of the United States. This diverges from UCMJ procedures. It may mean that highly incriminating evidence extracted from former Guantanamo Bay detainees is admitted at trial even though those detainees, now returned to their country of origin, are not produced as witnesses to be cross-examined. The result in practice would be that the accused, rather than the prosecuting authority, would ultimately bear the consequences of the delay in bringing proceedings against him.
- One of the important criticisms of the earlier Military Commission regime was that time spent in custody prior to trial was not to be taken into account in fixing a sentence upon conviction. Under the present legislation and rules there does not appear to be any provision which determines whether pre-trial detention does or does not count toward the sentence. In the particular case of Hicks, the panel of officers who were to determine the sentence to be imposed on him was directed by the judge that the time Hicks had been in US custody since the end of 2001 was to not count toward the sentence they fixed.

3.33. Subsequent to the enactment of the MCA, and in view of the fact that Hicks would be dealt with under this legislation, a legal opinion was prepared by Hon. Alastair Nicholson AO RFD QC¹¹ and Peter Vickery QC¹² which analysed the requirements of Common Article 3 of the Geneva Conventions. In the opinion of these highly respected authors, the Military Commission process established under the MCA “...*suffers from the same essential defects as the First Military Commission.*” In their view, the structure and procedures do not comply with Article 3(1)(d) of the Conventions prohibiting “...*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.*” In particularising their criticisms, the authors referred to the various means by which the lack of independence and impartiality of the Military Commission is demonstrated, coupled with the failure of the MCA to exclude evidence obtained by coercion and hearsay evidence. They also referred to the excessive delay in bring Mr. Hicks to trial. Obviously, I respectfully agree with those criticisms. Further those criticisms have never been properly answered – certainly not by the Australian Government.

3.34. Finally, I would refer with respect to an article written by Professor John Cerone who is co-chair of the American Society of International Law Human Rights Interest Group and also Associate Professor of Law and Director of the Center for International Law and Policy at the New England School of Law. In the article entitled *The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and US Law*, he concluded:

Under US law, the US legislature is free to deviate from the understanding of the law of armed conflict held by others. However, if it does so, it risks placing the US in default of its international obligations. Also, to the extent it purports to create criminal liability for conduct that was not prohibited under international law or US law at the time it occurred, it risks running afoul of the principle against ex post facto criminalization, as recognized in international law well as US constitutional law. Finally, the extent to which

¹¹ A former Justice of the Supreme Court of Victoria and former Chief Justice of the Family Court of Australia.

¹² Queens Counsel since 1995 and *Special Rapporteur, International Commission of Jurists.*

the Act purports to limit the power of US courts to interpret the international law of armed conflict, including by stipulating certain interpretations, may raise separation-of-powers concerns. All of these issues are likely to arise in the ongoing litigation over the detainees at Guantanamo Bay.

- 3.35. After the MCA was signed into law by the President in September 2006, legal challenges to the new regime were immediately foreshadowed. There was speculation that litigation of this type would result in further delays in instituting and prosecuting fresh proceedings against David Hicks and other detainees designated for trial. This did not occur.
- 3.36. To date, the lower courts have upheld the constitutional validity of the so called *habeas stripping* provisions of the MCA which deny them jurisdiction over detainees' applications for relief. The courts have confirmed that those provisions apply even to applications that were pending before the MCA was passed. Moreover, the lower courts have found that the effect of the MCA on their jurisdiction is such that they are unable even to stay Military Commission proceedings pending the outcome of higher court challenges.
- 3.37. On 2 April 2007, the US Supreme Court – by a majority of six to three – declined to hear a consolidated appeal from two of these lower court decisions (*Boumediene v. Bush and Al Odah v. United States*).¹³ However, this does not necessarily signal the end of the Supreme Court's involvement in the Military Commissions. Two of the judges in the majority left open the possibility that the Court might entertain the application at some time in the future, once the applicants have exhausted other avenues for relief, including their limited appeal rights under the DTA. In the meantime, the Court has made no finding on the merits of the claim. The Military Commission regime established by the MCA may yet be found to be, in whole or in part, unlawful.

3E. Conclusion on the background

- 3.38. From the time of my last report in July 2005 to the swearing of fresh charges in February 2007, there was no progress in the resolution of David Hicks' case. The Australian Government first represented that David Hicks' lawyers bore some responsibility for this delay, then later attributed the blame to legal challenges in general, describing them as beyond the control of the US Government. For example according to the ABC, on 16 November 2005 the Prime Minister, John Howard, said:

The latest delay is not the fault of the American Government or the Australian Government – the latest delay is a result of legal action taken by Mr. Hicks's lawyers.

With all due respect, this is nonsense and demonstrates why Australia's moral authority has been compromised by the attitude of the Australian Government. The Prime Minister is there referring to the delay being caused by the proceedings in *Hamdan v Rumsfeld* in which the Military Commission process, by which the Prime Minister wanted Hicks to be dealt with, was ultimately held to be unlawful.

- 3.39. As is apparent from the summary of events set out above, the delay was always the responsibility of the US administration and was a direct consequence of its desire to maintain complete control over the fate of the detainees at Guantanamo.

¹³ 127 S. Ct. 1478, decided April 2, 2007

- 3.40. The Supreme Court found in *Rasul*, *Hamdi* and *Hamdan* that the Executive had overestimated and thus incorrectly drawn the boundary of its unfettered authority. However, the response was not to accept the principles of the Court's decisions but rather to minimize and avoid its effect. For the time being at least, there is nothing to prevent the Military Commissions proceeding short of the obstacles that the process has created for itself obstructing progress.

4. The Case of David Hicks

4A. The Original Charges

- 4.1. Under the previous Military Commission regime, David Hicks had been facing three charges. In short form, those charges were conspiracy, attempted murder by an unprivileged belligerent and aiding the enemy. Each of the charges was inherently flawed. The first two charges, according to many international humanitarian law experts, were based on offences which were unknown to law of war. The third charge raised the obvious question of how David Hicks could be convicted of aiding the enemy when he appeared to owe no formal allegiance to the United States.
- 4.2. In *Hamdan*, the Supreme Court Justices who considered the issue came to the same conclusion about the charge of conspiracy¹⁴:

The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war. Moreover, that conspiracy is not a recognized violation of the law of war is confirmed by other international sources, including, e.g., the International Military Tribunal at Nuremberg, which pointedly refused to recognize conspiracy to commit war crimes as such a violation. Because the conspiracy charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan.

4B. New Charges

- 4.3. Section 950v of the MCA lists the offences which are triable by Military Commission and Part IV of the MMC sets out the elements of those offences. The offences listed are significantly different from those found in *Military Commission Instructions No.2*, which detailed the offences which could be tried before the previous Military Commission regime. Therefore, with the demise of the first regime and the establishment of the new Military Commission system, it seemed inevitable that the nature of the charges against David Hicks would also have to change.
- 4.4. On 2 February 2007, Marvin W. Tubbs II of the Office of the Chief Prosecutor, Office of Military Commissions, swore two charges against David Hicks. In summary those charges alleged Attempted Murder in Violation of the Law of War and Providing Material Support for Terrorism. The Charge Sheet is attached to this Report as Appendix "A".

¹⁴ Taken from the "syllabus" or head note of the judgment.

- 4.5. Both charges were sent to the Convening Authority for Military Commissions, the Hon. Susan J. Crawford, to decide whether, on the basis of the information available, to dismiss them or refer them for trial by Military Commission. On 1 March 2007, Crawford referred the charge of Providing Material Support for Terrorism for hearing before a Military Commission but declined to refer the charge of Attempted Murder in Violation of the Law of War.
- 4.6. Providing material support for terrorism was not a charge available under the previous Military Commission regime. It was introduced as a crime triable by Military Commission by section 950v(25) of the MCA, which describes the offence as follows:
- (A) *OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.*
- (B) *MATERIAL SUPPORT OR RESOURCES DEFINED.—In this paragraph, the term ‘material support or resources’ has the meaning given that term in section 2339A(b) of title 18.*
- 4.7. The elements of the offence are set out in greater detail the MMC Part IV 6(25).
- 4.8. The charge laid against Hicks contained two specifications. That is important because in the proceedings in March 2007, he pleaded guilty to specification 1 but not guilty to specification 2. Specification 1 alleged that Hicks intentionally provided material support or resources to an international terrorist organization being Al Qaeda which was engaged in hostilities against the United States. It also alleged that Hicks knew that Al Qaeda was such an organization and the conduct of Hicks was in the context of an armed conflict between Al Qaeda and the US and its Coalition partners. Specification 2 alleged that Hicks intentionally provided material support or resources to be used in preparation for or carrying out an act of terrorism and that he knew or intended that the material support was provided for that purpose and was also in the context of the alleged armed conflict. It can be seen that specification 2 is a significantly more serious offence.
- 4.9. There are a number of observations to be made about the process of charging David Hicks and the single charge ultimately pursued against him.
- 4.10. It has always been my position, the position of the Law Council of Australia and, at least from a rhetorical perspective, the Australian Government, that regardless of one’s personal views of the conduct allegedly engaged in by David Hicks overseas, he should not be subject to criminal sanction for that conduct if, at the time and place of its commission, it did not amount to an offence under any applicable law. To adopt any other position would place one irreconcilably at odds with international human rights law, as reflected in Article 15(1) of the *International Covenant on Civil and Political Rights*.
- 4.11. From the outset, the position of the Australian Government was that David Hicks’ alleged conduct did not amount to an offence in Australia at the time it was committed and that it was not appropriate to introduce laws to retrospectively criminalize his actions. Nonetheless the position of the Australian Government was also that, if the allegations against David Hicks were true, he should be subject to punishment. Thus the inability to

prosecute David Hicks in Australia was consistently cited as a reason for refusing to seek his repatriation. The public comments of senior government Ministers reflected the view that, if David Hicks were returned to Australia without facing trial, he would be free, not by virtue of the fact that he had committed no crime in Australia but because of a technicality or loophole which meant only that his conduct was not a crime *at the relevant time*.

- 4.12. In my view, as a result of this reasoning, the Australian Government never sufficiently concerned itself with the legitimacy of the charges brought against Hicks by the United States. On the contrary, the Australian Government refused to address whether Hicks' alleged conduct, already judged reprehensible and warranting punishment, might nonetheless not amount to a recognized offence under applicable US law either.
- 4.13. It is provided by the MCA that it codifies offences that have traditionally been triable by Military Commissions and does not establish crimes that did not exist before its enactment. Thus, because it is merely declarative of existing law it is not limited in application to crimes which occurred after its enactment.¹⁵ In the case of the offence of *providing material support for terrorism* that provision is without foundation.
- 4.14. On 8 March 2007 a written advice was provided by nine eminent lawyers¹⁶ some with expertise in international law. In essence, that advice concluded that the offence charged against Hicks of providing material support for terrorism under section 950v(25) of the MCA was not a charge constituting a war crime contrary to Law of War. They also opined that the charge was clearly retrospective in its application to Hicks and was a "*recently invented and new war crime*". The authors note that retrospective criminal laws are prohibited under Article 1 of the US Constitution. To the extent that it was claimed by the Australian Government that the MCA was some kind of "*codification*" of existing law, the authors also noted that there are offences under the domestic law of the US and contained in the *US Criminal Code* and which carry a similar description. However as they point out there are some fundamental differences including the substantial difference in the maximum penalties, the simplification of the elements of the offence, and the fact that the domestic offences were not, at all relevant times, applicable to a foreign national operating outside the territory of the United States as Hicks was.
- 4.15. With respect, I agree with the advice and I doubt there is a satisfactory argument that can be made to the contrary – none was attempted. It seems to me that there are a number of propositions which are beyond dispute:
- *Providing material support for terrorism*, prior to the enactment of the MCA, has never been recognized as an offence under the law of war.
 - Not being part of the law of war, the basis on which the offence is claimed to be one *traditionally triable by military commission*, is unclear. The fact that one of the elements of the offence listed in the MMC is that *the conduct took place in the context of and was associated with an armed conflict* is obviously an attempt to situate the offence within the traditional jurisdiction of Military Commissions. However, adding this element to the crime does not overcome the problem that the offence, as described in the MCA, was not part of the general body of law governing armed conflict at the time David Hicks was in Afghanistan.

¹⁵ Section 950p

¹⁶ Peter Vickery QC; Professor Tim McCormack; The Hon. Alastair Nicholson AO RFD QC; Professor Hilary Charlesworth; Gavan Griffith AO QC; Professor Andrew Byrnes; Mr. Gideon Boas; Professor Stuart Kaye and Professor Don Rothwell. It should be noted that Professor McCormack was a proposed expert witness in the Hicks case to be called on behalf of the defence.

- The MCA offence appears to be a simplified amalgam of two domestic criminal offences found in s2339A and s2339B of the US Criminal Code. However the MCA offence does not require the prosecution to prove all the elements of the Criminal Code offences and it attaches a higher maximum penalty. Therefore, while clearly *based* on the Criminal Code offences – the MCA offence it is a new and different offence.
- Neither of the Criminal Code offences applied to David Hicks in Afghanistan during the full period which was the subject of the charge, that is, December 2000 to December 2001. Section 2339A specifically only applied to people “*within the United States*” until amended on 26 October 2001. The extra-territorial operation of s2339B was not explicitly expressed in Criminal Code until 2004, and even then was described in such a manner that it would not have applied to David Hicks.
- In any event, and more importantly, the MCA does purport to be incorporating s2339A and s2339B. It does not purport to authorize offences against those sections of domestic law to be tried by Military Commission if they are alleged to have been committed by a certain type of person (i.e. *alien unlawful enemy combatant*) in certain circumstances (i.e. *in the context of and associated with armed conflict*). If that was the case, questions would have to be answered about why such charges could not simply be brought and heard before an ordinary US Court. The MCA does not purport to rely on the Criminal Code as the source or origin of any of the listed offences and does not purport to authorize any new offences, taken from the Criminal Code or any other Acts, to be tried by Military Commission. The MCA purports only to be codifying existing but unwritten offences which make up the body of crimes traditionally triable by Military Commission. With respect to the offence of “providing material support for terrorism”, that claim is without legal basis.

4.16. Of course, the fact now remains that David Hicks chose to plead guilty to the charge notwithstanding that it was clearly retrospective. In my view, this does not alter the fact that the charge was brought and prosecuted in violation of international law.

4.17. Finally, it is worth extracting some comments attributed to Chief Prosecutor Colonel Morris Davis on this issue of retrospectivity. In *The Age* online dated 26 March 2006, the Colonel Davis is quoted by journalist Mark Coultan as follows:

Colonel Morris 'Moe' Davis said David Hicks's defence team was claiming that the offence he faces – material support of terrorism – was being applied against him retrospectively.

He said this defence was argued to prevent people being punished for something that they couldn't have known was wrong.

But he said Hicks's father had told him “It's wrong to take up arms against our own”.

Colonel Davis said it was going to be hard to argue that “Gee, I had no idea that what I was doing was wrong when I reported in to al-Qaeda and got a rifle and hand grenades and went out to fight against my countrymen and their allies”.

He said he was not going to get into the specifics of the evidence, but it's certainly “in the public domain the comments (by Terry Hicks) made in December 2001 when he said: ‘In my eyes, David Hicks is a terrorist’.”

Colonel Davis said that the offence of material support for terrorism had been in US law since the Okalahoma bombing.

- 4.18. If Colonel Davis is reported accurately, on the eve of the first hearing of the Hicks case, his attitude is breath-taking. At best it shows a fundamental misunderstanding about the policy against retrospective laws and Mr. Terry Hicks' new found status as a law-maker will no doubt come as a surprise to him. At worst, those comments were deliberately designed to blur the reality of the charge which had been laid. Col. Davis' comments also beg the inevitable question of why, if the offence that Hicks is charged with has been part of US law since the Oklahoma bombing which occurred in 1995 with the law coming into force in 1996, was not Hicks charged with that offence before a US Federal Court when he was first taken into custody?
- 4.19. In my opinion the comments of Col. Davis, if accurately reported, were deplorable.

5. The Proceedings on 26 March 2007

- 5.1. The first hearing in the fresh proceedings against David Hicks occurred on 26 March 2007. The defence team (and presumably the prosecution team) travelled to Guantanamo well in advance of the hearing. The arrangement under which I travelled to Guantanamo was that we left Andrews Air Force Base near Washington DC early on Monday 26 March arriving at Guantanamo Bay around 10:00am. The hearing was intended to commence at 1:00pm but, in fact, commenced about 2:00pm.
- 5.2. The primary purpose of the hearing on 26 March 2007 was to arraign Hicks on the one charge he then faced. However, on the previous day, Sunday 25 March 2007, a conference involving David Hicks' defence counsel, the prosecution and the presiding military judge had been held pursuant to Rule 802 of the *Manual for Military Commissions*. I, of course, did not attend that conference but it became clear that during the discussion a number of issues had arisen about recognition of civilian counsel and scheduling for the trial, which would also need to be addressed at the hearing.
- 5.3. Further, in advance of the hearing there was publicity suggesting that motions might have been presented before the Military Commission in which the defence and prosecution would complain about each other's conduct. I will deal with the actuality below. A motion in relation to the alleged prosecutorial misconduct was filed but did not proceed.
- 5.4. Rather than providing a chronological running sheet of the proceedings, I intend to record below each of the issues which arose during the hearing and how it was addressed. I then intend to provide some general observations and comments on the nature of the proceedings.

5A. Standing of Defence Counsel

- 5.5. When the hearing commenced, David Hicks was represented at the bar table by two detailed, (i.e. military appointed), defense counsel, namely Major Michael Mori and Ms Rebecca Snyder, and one civilian defence counsel, Mr. Joshua Dratel.
- 5.6. After establishing that David Hicks did not require an interpreter, the Military Judge engaged with Hicks on the issue of defence counsel. The Judge explained to David Hicks his entitlements in relation to both detailed and civilian defence counsel. The Judge sought and obtained from David Hicks an assurance that he understood these entitlements.

- 5.7. David Hicks stated that he wished to be represented by Major Mori, Mr. Joshua Dratel and Ms Rebecca Snyder plus others if necessary. He expressed the desire to have “equality” with the prosecution during the future of the case.
- 5.8. However, the issue of Hicks’ legal representation proved, in practice, to be far more complicated and by the time the hearing actually advanced to Hicks’ arraignment only Major Mori remained at the bar table with both Mr. Dratel and Ms Snyder having been denied standing as defence counsel.

5Ai. The Issue of Ms Snyder’s role in the Proceedings

- 5.9. Both Major Mori and Ms. Rebecca Snyder had been detailed to represent David Hicks before the Military Commission by the Chief Defence Counsel (Colonel Dwight Sullivan). Each asserted before the Military Judge that he or she were qualified and sworn and in a position to conduct the case.
- 5.10. The Judge, however, indicated that in his opinion Ms Snyder could not be detailed defence counsel because, while she was employed by the Office of Military Commissions Defense Counsel, she was employed as a civilian and was not on active duty in the US Military. The Judge indicated that on his reading of Military Commission Rule 502(d)(i) detailed defence counsel are required to be serving members of the US Military. The Judge also referred to the *Military Commissions Act* itself and in particular section 949c (b)(3) (A) – (E) which sets out the requirements for civilian defence counsel. In response, Ms Snyder referred to section 948k (a)(2) of the MCA which provides for assistant detailed defence counsel. Her submission was, in effect, that the assistant detailed defence counsel was not required to be a person who was on active duty but in fact may be a civilian. She also referred to articles 70 of the *Uniform Code of Military Justice* (UCMJ) and various other provisions. Section s948k of the MCA, provides for the detailing of trial counsel (i.e. prosecution counsel) and military defence counsel. The section provides that military defence counsel must be “a judge advocate (as so defined)” who is, *inter alia*, “certified as competent to perform duties as defense counsel before general courts-martial by the Judge-Advocate General of the armed force of which he is a member”.
- 5.11. At the same time, s.949c(b)(3)of the MCA, which sets out the requirements for civilian defence counsel, only provides for an accused to be represented by a civilian lawyer “retained by the accused”. The section makes no allowance for the Government to retain, that is to hire and pay, civilian counsel on behalf of the accused. As Ms Snyder was purporting to represent David Hicks in her capacity as a public servant employed by the Department of Defense and paid for by the US Government, according to the Judge she could not qualify as civilian defence counsel either.
- 5.12. In response to the arguments advanced by the Judge, Ms Snyder relied on section 948k(a)(2) of the MCA which specifically provides for assistant detailed defence counsel. Her submission was, in effect, that there are no Military Commission Rules or provisions of the MCA which require assistant detailed defence counsel to be a member of the Armed Services on active duty rather than a civilian.
- 5.13. The Judge decided not to issue a ruling on the matter but instead indicated that the defence should submit a brief as to why Ms Snyder should be recognized. He also suggested that, as Ms Snyder was a member of the part time military, she may be able to resolve the problem by obtaining Military Orders. In the interim, the Judge opted not to recognize Ms Snyder as defence counsel. However he indicated that Ms Snyder may be able to remain at the bar table pursuant to Military Commission Rule 506(d). Under that Rule the presiding military judge has the discretion to allow a person to be seated at the

counsel table who is not qualified to serve as counsel. The Judge adjourned the hearing to provide the defence team an opportunity to consider Ms Snyder's position.

- 5.14. Upon resumption of the hearing, David Hicks himself made it clear that he did not want Ms Snyder to remain at the table as a consultant. When the Judge indicated that Ms Snyder may be of some value in that capacity, Hicks specifically asked "*Can she represent me?*" The Judge indicated that she could not but that she may be able to in the future. Hicks then indicated that he did not see any need for Ms Snyder to be at the table and that he did not want her to be there. He stated that he wanted Ms. Snyder to represent him. At that point Ms Snyder left the courtroom.

5Aii. The Issue of Mr. Joshua Dratel's role in the Proceedings

- 5.15. After addressing the standing of Ms Snyder, the Judge then turned his attention to Mr. Dratel. As noted above, Mr. Dratel did not purport to appear as detailed defence counsel but rather as civilian counsel retained by David Hicks. Section 949c(b)(3)(A) – (E) of the MCA sets out the requirements for civilian defence counsel. In particular, section 949c(b)(3)(E) requires that, in order to appear before a Military Commission, civilian counsel must sign a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings. Rule 502(d)(3), which expands upon and clarifies section 949c(b)(3) of the MCA provides that counsel must have signed an agreement prescribed by the Secretary [of Defense] pursuant to 949c(b)(3)(E) of the MCA.
- 5.16. In the absence of a prescribed agreement from the Secretary of Defense, the presiding Judge, in his role as Chief Justice of the Military Commissions, had issued his own prescribed form for defense counsel to sign. The Judge indicated that a problem had arisen with Mr. Dratel because he had been unwilling to sign the form issued by the Judge.
- 5.17. It appeared that Mr. Dratel had proposed an alternative form of consent agreement by way of letter which, in the opinion of the Judge, was insufficient. In essence, Mr. Dratel was prepared to offer his agreement to be bound by all applicable rules *presently in existence*. However, in the Judge's view, in order to have standing before the Military Commission as civilian defence counsel, Mr. Dratel was required to agree to comply with all applicable rules, which, at least by implication, also included rules which might come into existence in the future.
- 5.18. The difficulty for Mr. Dratel with the Judge's position was that the regulations in relation to the conduct of defence counsel had not yet been promulgated. Mr. Dratel's submission was that he was not prepared to agree to be bound by rules which he might later, in all conscience, not be able to comply with. He noted that the Secretary of Defense was presently preparing to promulgate regulations in relation to the participation of defence counsel and he was unaware as to whether those rules were imminent.
- 5.19. The argument, as Dratel adverted to, was not a purely academic or technical in nature. Dratel submitted that a similar issue had arisen in 2003 and gave as an example the fact that he was called upon to agree to conversations with his client being monitored, which he rejected. Ultimately, arrangements concerning that particular obligation were worked out in such a manner that Mr. Dratel could participate in the Military Commission proceedings. Mr. Dratel submitted that, as in 2003, he was again willing to entertain an accommodation with respect to any proposed rules for defence counsel but that he was not willing to agree to a blank check on obligations. He noted that the Judge seemed determined to make it an "*all or nothing*" situation.

- 5.20. In addition to his in principle objection to what the Judge was proposing, Mr. Dratel further submitted that the Judge simply did not have the power to dictate the terms of any consent form that civilian defence counsel must sign. In support of that argument Dratel referred to Rule 502(d)(3) and noted that the power to prescribe the terms of any agreement is specifically and exclusively conferred on the Secretary of Defence and that there is nothing in the MCA or Rules to indicate that the power is delegable. Mr. Dratel submitted that by seeking to prescribe and impose a form of agreement upon him, the Judge was usurping an authority reserved to the Secretary of Defense.
- 5.21. Mr. Dratel submitted generally that the problem was symptomatic of the Military Commission process in that everything was *ad hoc* and unpredictable. He observed that a similar situation had occurred with Ms Snyder. He submitted that the Judge was making regulations to overcome gaps which were *ultra vires* his role and that, as a result, he was about to deny Mr. Hicks another lawyer. Mr. Dratel concluded by saying that he was in compliance with the Federal Statute and he was not a “*potted plant*” (a reference to a remark made by counsel for Oliver North, Brendan Sullivan, during the *Iran-contra* case when criticised for objecting during the proceedings).
- 5.22. The Judge indicated that, in his view, there was no merit in the submission that what he was doing was beyond his authority. The Judge adhered to the view that Mr. Dratel must sign the form issued by him and thereby agree to consent to all applicable rules, without qualification.
- 5.23. In the absence of such agreement, Mr. Dratel was also denied standing as defense counsel.
- 5.24. As had occurred with Ms Snyder, Mr. Hicks was asked whether he wished Mr. Dratel to remain sitting at Counsel’s table notwithstanding he was unable to act as defence counsel. Mr. Hicks responded that there was no point in having Mr. Dratel sitting there. He added: “*I am shocked – I just lost another lawyer*”. The Judge told Mr. Hicks there might be value in Mr. Dratel remaining at the table but Hicks indicated: “*I want him as my lawyer but not as a consultant at the table*”.
- 5.25. Mr. Dratel then left the hearing room.

5B. The Attire of the Accused

- 5.26. After the issues surrounding the standing of defence counsel had been resolved with both Ms Snyder and Mr. Dratel leaving the hearing room, the next issue dealt with by the Judge was the attire of Mr. Hicks. David Hicks appeared before the Military Commission with very long hair and wearing what appeared to be prison clothing.
- 5.27. The Judge observed that a suit and tie was the encouraged attire of an accused person and casual smart attire was the minimum. The Judge observed that the idea of this was to protect the presumption of innocence although His Honour did not refer to the fact that Hicks was brought into the court room being held by two Military guards who sat either side of him throughout the proceedings.
- 5.28. To my mind, the idea that any *presumption of innocence* could be protected by changing the attire of Hicks after the public statements of the President, the Secretary of Defense and various Australian politicians over the years about the detainees at Guantanamo, and Hicks in particular, was laughable.

5C. *Voir Dire* on the Presiding Judge

- 5.29. The proceedings then focussed on the Presiding Judge himself. Rule 902d(2) allows for a procedure whereby the presiding judge may be examined to see whether grounds can be established such that he or she should be disqualified from acting as the Judge.
- 5.30. The Judge appointed to preside over the proceedings against David Hicks was a Military Judge, Colonel Kohlmann. Col. Kohlmann is licensed to practice law in Pennsylvania and is a member of the US Marine Corps. He has a Juris. Doctor degree from Delaware Law School graduating in 1987 and Master of Arts (National Security and Strategic Studies) from the US Naval War College in 2002. Col. Kohlmann's military service has not been in combat. He has several military awards or decorations including Legion of Merit, Meritorious Service Medal (3 stars), Joint Service Commendation Medal and the Navy-Marine Corps Commendation Medal.
- 5.31. Col. Kohlmann is a very experienced judge. He was a designated a judge from 1998-2001 and from July 2005 to the present time. He has presided over more than 405 completed special and general courts-martial.
- 5.32. Whilst at the Naval War College in March 2002, Col. Kohlmann wrote a paper entitled *Forum Shoppers Beware: The Mismatch between the Military Tribunal Option and United States National Security Strategy*. The conclusion he expressed in that paper is worth quoting in full:

*Just as the United States had the power to proceed into Iraq in March of 1991, it now has the power to prosecute suspected terrorists in ad hoc military tribunals. And just as there was potential benefit in a unilateral offensive into Iraq, convictions might be more easily secured and secrets more easily guarded in trials conducted by military tribunals. However, if we view international terrorism as a world issue in which we expect the assistance of others, we should resist the easy solution of conducting ad hoc proceedings just because we can. If we elect to conduct national trials instead of seeking an international forum, **we should seek to maximize the appearance of fairness** so as to limit avenues for complaint of victor's justice. The appearance of fairness may [be] best achieved by prosecution of terrorist suspects in United States Federal District Courts.*

*The members of al-Qaeda may or may not "deserve" trials in a time-tested and jurisprudentially sound forum. However, the world-respected reputation of United States criminal courts has not been built nor maintained for the benefit of any evil person. **For the benefit of rigorous due process is reaped not only by those that stand accused in our courts, but also by the larger portion of our society that never stand accused, but have trust and confidence in the fact that the government is both protecting them and being as fair as possible.** The use of an established court system at this critical time should not be viewed as an action on behalf of accused terrorists, **but rather as a representation to needed international partners that the course of our ship of state is steady, and properly chartered for the rough waters ahead.** (Emphasis added)*

- 5.33. Despite the opinion expressed in the article, Col. Kohlmann served as a presiding judge in the previous Military Commission regime. He was involved in the case of Binyam Ahmed Muhammad. According to information available on the website of the US

Department of Homeland Security¹⁷ an issue arose in that case about whether Muhammed was entitled to represent himself before the Military Commission. Colonel Kohlmann is reported as having informed Muhammed that he was not permitted to represent himself. Those proceedings appear to have ended in a stalemate.

- 5.34. The *voir dire* on the Judge commenced with Col Kohlmann disclosing the fact that Colonel Fran Gilligan of the Office of Military Commissions was a person he had met in 1990. He explained that he served on a committee of military justice for one year which met every six weeks and that he and Gilligan were both on that committee and that he also saw Gilligan occasionally at the US Army JAG School.
- 5.35. Colonel Kohlmann was then asked a series of questions by Major Mori on behalf of Hicks. That questioning commenced on the topic of regulations governing civilian attorneys. The Judge agreed that the case of Hicks had been referred to the Military Commission before those regulations were promulgated and that he as the Chief of the Military Commissions had formulated an agreement for civilian defence counsel in order to “fill a hole” – that hole being the absence of regulations. It was suggested to the Judge that the preliminary Instructions issued by him in that regard were created to help the Government in circumstances where it had moved to commence proceedings without appropriate regulations in place.
- 5.36. The Judge was then questioned about whether at the time that the scheduling of proceedings was under consideration he had received notice that Hicks’ civilian defence counsel had commitments on a certain date and, even with that knowledge, had scheduled a conflicting hearing. The Judge agreed that the first hearing, being the arraignment hearing, was scheduled for 20 March 2007 and that a conference under Rule 802 had been scheduled for 25 March 2007 despite the fact that the Judge had been informed that Mr. Dratel could not be present.
- 5.37. In response to questioning about his role in the first Military Commission regime, the Judge said that he had no concern about the prospect of any criminal liability arising from his participation in that regime which was found unlawful by the United States Supreme Court.
- 5.38. The Judge was then questioned about the *Forum Shoppers Beware* paper he wrote in 2002 to which I have referred above. At the time that he wrote that paper, Col. Kohlmann was of the view that *ad hoc* Military Tribunals were the most unsatisfactory option to deal with international terrorism and has now changed his opinion, arguably as a consequence of being asked to occupy the position of the chief judge of the Military Commission process. Ultimately at the end of the exchange with Major Mori, the Judge expressed the opinion that people would always complain about the Military Commission process no matter how well run it was.
- 5.39. At the conclusion of this questioning process, Major Mori then launched an application, pursuant to Rule 902¹⁸, to challenge for cause in relation to the Judge. The application would inevitably fail because there was no real basis on which the judge could be required to disqualify himself on the application as it had been conducted.

¹⁷ <http://www.globalsecurity.org/security/library/news/2006/04/sec-060407-afps02.htm>

¹⁸ This Rule provides for the disqualification of a military judge on the grounds of lack of impartiality and also provides some specific grounds for disqualification.

- 5.40. Major Mori initially submitted that there was personal bias on the part of the Judge in relation to both David Hicks and his counsel. However, ultimately it became clear that what Major Mori was actually submitting was apprehended bias rather than actual bias although that seemed to alter as the application was developed.
- 5.41. In his submissions in support of the disqualification application, Major Mori made reference to the following matters:
- the fact that the Judge had scheduled proceedings at times and on dates not convenient to defence counsel;
 - the fact that the Judge had created rules in relation to the basis on which civilian defence counsel could appear thus solving a short-coming on the part of the Government;
 - the ruling delivered by the Judge earlier in the proceedings concerning Ms Snyder and Mr. Dratel;
 - an asserted friendship between the Judge and various individuals including the former prosecutor Colonel Borch, Colonel Gilligan, Major General Altenburg (the former appointing authority) and Colonel Brownback (former Judge under the previous Military Commission regime). Ultimately Major Mori was compelled to accept that these were acquaintances rather than friendships but nonetheless claimed that it gave the appearance of some kind of predisposition on the part of the Judge;
 - the paper published by the Judge in 2002, on the basis of which Major Mori claimed the Judge should have objected to participating in the Military Commissions. He submitted that the Judge's opinion on the Military Commissions had changed and there was some self interest on his part in participating in the Military Commission process.
- 5.42. In relation to some of these matters, Major Mori clarified that the application was based on an apprehension of bias, but he claimed an actual bias was manifest in the direct steps taken by the Judge in relation to civilian defence counsel.
- 5.43. At the end of his submissions, which were not responded to by the prosecutor, the matter was adjourned.
- 5.44. The Judge later delivered a ruling on the motion to disqualify him under Rule 902. He noted that the application was made on the basis of his lack of impartiality and on the specific ground of personal bias or prejudice. He addressed the matters raised by Major Mori in support of the application as follows:
- a) As to the scheduling of the first hearing: the Judge indicated that the scheduled timing of the initial hearing and Rule 802 conference was based on the fact that charges were served on Mr. Hicks on 1 March 2007. He noted that the MCM Rules (Rule 707) required an arraignment of Mr. Hicks within 30 days of service, which in this case meant by the end of March 2007. He noted that the last week in March commenced on 26 March 2007 and thus he scheduled the arraignment hearing for 20 March to cope with exigencies. The Judge then noted that when he was requested to adjourn the arraignment hearing because of the unavailability of counsel he did so. To my mind this did appear to completely answer the application that had been made by Major Mori on this point.

- b) As to Mr. Dratel's lack of availability for the Rule 802 conference he scheduled, the Judge noted that the conference was to be conducted for the Judge's benefit and he wanted time to respond to the issues which might be raised during that conference. He noted that he agreed to an additional Rule 802 conference on the morning of the 26th March 2007 which Mr. Dratel could attend.
- c) As to the role of Mr. Dratel and Ms Snyder in the proceedings: the Judge noted that he had "*paved the way*" for Mr. Dratel to participate in the proceedings and indicated that in his opinion Mr. Dratel had declined to bring himself within the Federal Code and that the situation did not amount to any personal bias by him. The Judge noted that he had made no ruling in relation to Miss Snyder.
- d) As to the suggestion that he had made new rules to assist the Government: the Judge indicated that he regarded himself as obliged to issue Rules of Court.
- e) As to his prior conduct in the old Military Commissions regime: the Judge indicated that that was of no consequence.
- f) As to his associations with various individuals who had been referred to during the course of the application: the Judge noted that he had been 31 years in the Military and none of the material established friendships with any of the people who were referred to.

5.45. In the Judge's opinion the combined effect of all matters would not amount to either actual or perceived bias. In his opinion nothing would lead a reasonable person to question the Judge's impartiality pursuant to Rule 902(a). The application was therefore dismissed.

5D. Arraignment

5.46. The next step in the proceedings was that Mr. Hicks was arraigned and in answer to the question it was stated by Major Mori on Mr. Hicks' behalf that the pleas were reserved.

5E. Scheduling

5.47. The final issue which was addressed at the 26 March hearing was the scheduling of the trial. The litigation timetable proposed by the prosecution had evidently been the subject of discussion at the Rule 802 conferences held in advance of the hearing. A consensus position had evidently not been reached.

5.48. According to the Judge, at the Rule 802 conference held on 25 March, the litigation schedule had been discussed but there was no cooperation or input from the defence in relation to that schedule. The defence had apparently indicated that information would be provided later after contact with Mr. Dratel.

5.49. At the hearing, a litigation schedule was tendered by the prosecution and became an exhibit. It was challenged by Maj. Mori.

5.50. Major Mori indicated that the Defence objected to the trial schedule because it effectively excluded Mr. Dratel by failing to accommodate his other commitments. The Judge responded by noting that at that stage Mr. Dratel was not counsel in the case. At any rate, he inquired of Major Mori as to why Hicks should come third in Mr. Dratel's priorities.

- 5.51. Major Mori submitted, in effect, that the timetable was simply too tight and that he would be unable to raise all the legal motions by 7 April (which was the date imposed by the Schedule to do so). He noted that there was also only 13 days to challenge the Military Commissions Act which was just not enough. Major Mori said he had spent three years working on the case focused on charges that no longer exist. This was, he said, an “*enormous*” case.
- 5.52. The prosecution made no submissions.
- 5.53. The Judge responded that the case simply could not be adjourned into 2008 and that in many respects the request for further time was based on the commitments of Mr. Dratel who was not counsel in the case. Even if he was, the Judge indicated that Mr. Dratel’s other cases should be able to be adjusted. Ultimately the Judge indicated that if the defence wanted to pursue adjournment or deviation from the timetable, a motion for continuance would be necessary and that, if filed, it would be dealt with in a reasonable fashion.
- 5.54. The hearing then concluded.

5F. The Motion in Relation to Prosecutorial Misconduct

- 5.55. I should note that during the hearing the Judge noted that a motion for prosecutorial misconduct had been filed on the 20 March 2007. It would appear that that motion was signed by Mr. Dratel and Ms Snyder.
- 5.56. The motion was not dealt with in the course of the hearing, although the Judge advised that it was discussed at a further Rule 802 conference held during an adjournment break. As the motion was signed by Mr. Dratel and Miss Snyder, neither of whom were being recognized by the Military Commission as at 26 March 2007, its status appeared uncertain and with the course events took later in the evening, it became irrelevant to the proceedings

5G. Unexpected Resumption

- 5.57. At the conclusion of the hearing, as arranged, we left the Military Commission building and were transported across Guantanamo Bay to the airport to return to Washington DC. At a little after 7:00pm we were informed by Captain Patrick McCarthy of the JTF Detainee Operations section that the Judge may “*wish to go back on the record*” because there was a prospect of a plea of guilty. We left the aircraft and were transported back to the Military Commission and the hearing before the Judge resumed at 8.25pm.
- 5.58. The Judge indicated that during the long recess another Rule 802 conference had been held and he had been advised that Mr. Hicks wished now to enter pleas and proposed that he be re-arraigned. The essence of the plea was a plea to the count or charge of providing material support to terrorism. The charge laid against Hicks is attached as Appendix “A” and it will be seen that in that charge there are two specifications. As earlier outlined, the difference between the two specifications is essentially a difference between allegations of association and training on the one hand in specification 1 and allegations of providing material support for a specific terrorist act in specification 2. Upon arraignment Hicks pleaded guilty to specification 1 but not guilty to specification 2 and therefore to the charge guilty.

- 5.59. Upon that plea being entered the Judge asked Hicks whether it was necessary for him to review to his rights in relation to counsel. David Hicks responded that there was no need for that to occur and that he wished to be represented by Miss Snyder, Mr. Dratel and Major Mori.
- 5.60. The Judge then asked him a series of questions in relation to the proceedings which had occurred that day and in particular whether or not the departure of Miss Snyder had affected his plea of guilty. He said it had not. He was also then asked whether the departure of Mr. Dratel had affected his plea and he likewise indicated that it had not. It was noted that he was now represented by Major Mori alone and that there was no need for anyone else to represent him. Mr. Hicks then formally waived his rights to civilian counsel both in relation to Miss Snyder and Mr. Dratel. He indicated that all those matters had been discussed with Major Mori and that the issue of representation had not affected his plea.
- 5.61. The Judge then indicated that by 1600 hours (4:00pm) on 27 March 2007 an agreed statement of the elements of the offence and the details of the factual support for each of those elements was to be filed by the parties.
- 5.62. The hearing was then adjourned.
- 5.63. After the completion of the proceedings a media conference was conducted at the media centre which was conducted by the Office of Military Commissions and the Prosecution. The Defence did not participate in the media conference.

5H. General Observations on the Proceedings of 26 March

5Hi. Ad hoc rules and procedures

- 5.64. When interviewed by the Australian media from Guantanamo Bay I described the proceedings I observed on 26 March as “*shambolic*”. As Mr. Dratel noted during his submissions on whether he would be permitted to participate in the hearing, many of the requisite rules and procedures were not in place and there was a degree of improvisation by the Judge. This led to a situation where there appeared to be a preference for actually advancing the case and dealing with matters of substance by way of Rule 802 conferences, away from public scrutiny, where no rules were necessary. There was a Rule 802 conference on 25 March, again on the morning of 26 March, during an adjournment of the first session and between the first session and the resumption of the hearing for the guilty plea. There was an additional request for an 802 conference made during the first session that was refused by the Judge. A means for resolving issues seemed to be to discuss them in private and then present the outcome to the public as something of a *fait accompli*. This carries obvious implications for transparency and raises questions regarding due process.

5Hii. A contrived affair

- 5.65. Further, it now appears that at the time that these matters were being played out in the Military Commission hearing room on Monday 26 March 2007, the pre trial agreement in relation to Mr. Hicks’ plea of guilty had already been finalized. According to an interview conducted between Major Mori and Mr. Kerry O’Brien of the *7.30 Report* on 3 April 2007 the pre trial agreement was finalised at about midday on Monday 26 March 2007. Thus, much of what was occurring was contrived and being done for public and media consumption. Even Hicks had a speaking role to play which he discharged at the appropriate time. However, it should be said, as Mori did in the interview, that at that

stage Mr. Hicks had not entered a plea and the agreement was one which could be adhered to or not and Hicks could have withdrawn from it at any time. Now being aware of the terms of the agreement and the relatively short period of further imprisonment it provided for, I would have thought the prospects of Mr. Hicks not adhering to it were remote indeed.

6. Sentencing Hearing – 30 March 2007

- 6.1. It was anticipated that the Military Commission hearing would commence early and as a result we were arranged to be present at the Military Commission by 7am on 30 March.
- 6.2. Military officers offered me the opportunity to view David Hicks in order to make some assessment of his condition. I declined on the basis that I thought such a thing was a waste of time and had the appearance of being voyeuristic. However, I asked the officers whether it would be possible for me to speak with Hicks for the purpose of indicating to him who I was and why I was present. Bearing in mind that Mr. Hicks' father and sister had returned to Australia I thought that might be, however briefly, to his benefit. I was informed that that could only happen with Major Mori's approval and that they would make enquiries. I was later informed that Major Mori rejected my request without any reason and so ended the prospect of having any brief discussion with him. It was never subsequently explained to me why a brief contact between Hicks and me was unacceptable.
- 6.3. At 8.15am the Military Commission hearing commenced. By this stage Hicks' hair had been cut and he was attired in a business suit thus reviving the presumption of innocence, although by now he had pleaded guilty.
- 6.4. At the commencement of proceedings the Judge outlined that there had been a number of conferences involving him and prosecution and defense counsel held pursuant to Rule 802. At those conferences there had been discussions about the terms and nature of the plea, the *voir dire* procedures to be adopted for vetting Military Commission panel members tasked with determining the sentence and the nature of the instructions to be given to the Panel members.
- 6.5. The Judges noted a number of documents which had apparently been settled between the parties and which became exhibits in the proceeding. A document the Judge described as a *sanitized* charge sheet became exhibit 28. The pre-trial agreement became exhibit 27. An amended form of that agreement became a separate exhibit 30. An agreed stipulation of fact became prosecution exhibit 1. The convening order which established the particular Military Commission had been in some way modified on 29 March 2007 and that document became exhibit 29.
- 6.6. In turn there was a protective order in relation to Military Commission members which both parties to the trial agreed to. The order was in following terms:

IT IS HEREBY ORDERED:

a. The identities of all commission panel members will not be reported or otherwise disclosed in any way without the prior release approval of the Office of Secretary Defense (Public Affairs) [sic]. No drawings, sketches, photographs or videotape of commission panel members are permitted either inside or outside of the courtroom without prior release approval by OSD (PA) and the individual.

b. This prohibited conduct applies to all spectators of the military commission proceedings, to include members of any press or other news organization, Non-governmental Organization (NGO) representatives, or any one else whether viewing the proceedings in official or private capacity.

Violation and Remedy. Any breach of this Protective Order may result in disciplinary action or other sanctions.

- 6.7. It was then necessary for a further arraignment to occur through Hicks' counsel on the basis that the specification and the charge he faced and to which he was pleading guilty had been modified. Specifically, paragraphs 1 to 35 of the charge sheet had been altered to mirror the agreed stipulation of fact.
- 6.8. Once Hicks had entered his guilty plea in response to the revised charge, the Judge then addressed him directly confirming that he had pleaded guilty and informing him that he wished to discuss that plea and the facts in relation to it with him directly. He reminded Hicks that a plea of guilty was the strongest form of proof of the allegations in the charge and informed him that he needed to be satisfied that Hicks understood every aspect of his plea.

6A. The Basis of Hicks' Plea of Guilty

- 6.9. It is important to understand that the basis on which David Hicks pleaded guilty was that he was convinced that the prosecution could prove their case against him beyond reasonable doubt – that is, he entered a so-called *Alford* plea.¹⁹
- 6.10. The Judge reminded David Hicks that he could plead not guilty but by pleading guilty he waived his rights in relation to self incrimination, the entitlement to stand trial, the right to confront witnesses against him and the right to give evidence himself. Asked whether he agreed to give up those rights and answer questions, Hicks said he was.
- 6.11. Hicks then took an oath that was administered by the prosecutor and was then questioned by the Judge. He was informed that he could be prosecuted for perjury.
- 6.12. Hicks was primarily questioned in relation to two documents. The first was a Stipulation of Fact, a copy of which is attached to this report and is Appendix "B". That document is a document signed by Hicks, by his Military defence lawyer Major Mori, and by the prosecutor Lieutenant Colonel Kevin Chenail. The second document was the pre-trial agreement.
- 6.13. In relation to the stipulation of fact, Hicks was asked by the Judge whether he had reviewed the contents of the document and he said he had. The Judge reminded Hicks that after his plea his admission could not be contradicted and that that information contained in the stipulation of fact would be used by the Commission for the purpose of sentencing. The document then became exhibit 1 for all purposes.
- 6.14. The Judge then explained to Hicks the elements of the offences and referred to the fact that this plea of guilty was in the category of "pleas" known as *Alford* which meant that by his plea Hicks was indicating that he was convinced the prosecution could prove the offence against him beyond reasonable doubt. The Judge explained what *beyond reasonable doubt* meant, indicating that a doubt was required to be an honest misgiving

¹⁹ This plea originated in the US Supreme Court in *North Carolina v. Alford* (1970), 400 US 25. The procedure is apparently designed to enable an accused person to plead guilty on the basis of accepting that there is a strong case against him while protesting his innocence.

and not just fanciful. The Judge noted that it did not require proof to a factual certainty and must exclude hypotheses consistent with innocence. He also noted that the test of proof beyond reasonable doubt applied to each element of the offence although each fact was not required to be proved at that standard.

- 6.15. The Judge then explained to Mr. Hicks the elements of specification 1 of the charge that the prosecution would be required to prove. Those elements included a description of Hicks' actions, said to constitute the provision of material support to an organization, coupled with his intentions to provide that support in the knowledge of the organization being a terrorist organization. They also included the need to prove that the support was provided in the context of an armed conflict and that Hicks was an alien unlawful combatant.
- 6.16. The Judge then explained what material support for terrorism means referring to the various legislative provisions in relation to international terrorist organizations and al Qaeda in particular.
- 6.17. At the end of that process Hicks himself responded, in answer to a leading question, that having reviewed the evidence he believed that the elements of the offence described what the prosecution could prove against him.
- 6.18. The Judge then went paragraph by paragraph through the stipulation of fact. In relation to each paragraph Hicks appeared to accept the truth of what was alleged against him.
- 6.19. At the end of the review of the stipulation of fact the Judge asked some questions of Hicks about the sources of information from which the material contained in the stipulation of fact was derived. Hicks said he understood that the information came from interrogations of him and that there had also been interrogations of others. He indicated that he had been shown some notes of those interrogations or some kind of record but had not been shown any video tape. Whatever record he had, he had in hard copy and he said that "*I went over them*". He said he had discussed with his counsel which portions of that material would be admitted on his trial and he said, as always in answer to leading questions, that he was satisfied that the evidence would establish his guilt and that he was satisfied with his lawyer's advice so far as those matters were concerned.
- 6.20. Hicks was then taken to the pre-trial agreement of 26 March 2007. The fact that the document had been signed by Mr. Dratel meant that Mr. Dratel was also advising Mr. Hicks at the time the agreement was entered into. In response to enquiry from the Judge Hicks said he did not wish to make any further inquiry of Mr. Dratel about the matter.
- 6.21. It was pointed out to him that the maximum punishment under the Military Commissions Act and the Manual for Military Commissions for the offence to which he had pleaded guilty was life imprisonment, but that the pre-trial agreement had provided that the maximum penalty which could be imposed by the Military Commission panel would be 7 years.
- 6.22. It was noted that all parties including Mr. Hicks himself had signed the pre-trial agreement.
- 6.23. It was noted that there was some amendments to the pre-trial agreement which related to the ability of the agreement to bind Mr. Hicks' family. Specifically, in relation to paragraph 2 of the agreement, paragraph 2(b), which referred to Hicks' family, was deleted. The effect of the deletion was to limit the prohibition on communicating with the media, contained in paragraph 2, to Hicks himself.

- 6.24. Mr. Hicks was also specifically asked whether it was the case that no pressure had been placed on him forcing him to sign the agreement. He responded that it had not.
- 6.25. There was then a break at Mr. Hicks' request at 9.25am and 25 minutes later the hearing continued.
- 6.26. Oddly, when the hearing resumed the Judge did not return directly to questioning Hicks on the plea agreement. Instead, upon resumption, Mr. Hicks was asked directly by the Judge whether the allegations concerning his personal actions and knowledge which had been referred to him during the discussion of the stipulation of fact were consistent with his own recollection of what he did. This was a potentially important question to be asking in the circumstances of an *Alford* plea. At this point the judge did not suggest that before he answered that question Hicks should consult with Major Mori and Major Mori did not request such an opportunity.
- 6.27. The Judge was, in effect, asking Mr. Hicks to accept absolutely that what was said in the stipulation of fact was true and it seemed to me to be a diversion from the basis on which it was understood Mr. Hicks was pleading guilty – i.e. that he accepted that the prosecution could prove the case against him beyond reasonable doubt. In any event, and presumably without legal advice, Mr. Hicks answered *yes* to the question and the hearing proceeded.
- 6.28. The discussion returned to the pre-trial agreement. Hicks was then taken through the formalities of the agreement and was referred to some particular parts of it. It is unnecessary for me to recite the process in full since it simply involved Hicks adopting the terms of the agreement set out in the document itself. The document is attached as Appendix "C" and its content is the subject of separate discussion in a later section of this report.
- 6.29. However, it is worth noting that Hicks was referred in particular to the passage in paragraph 1 of the agreement which reads: "*I offered to plead guilty, freely and voluntarily, because I am guilty, and because it will be in my best interest that the convening authority grant me the release set forth in appendix A*". This passage, to my mind, again appears entirely inconsistent with the *Alford* plea.
- 6.30. It is also worth noting that paragraph 1(a) of the appendix to the offer for a pre-trial agreement was referred to although not entirely. As can be seen in the agreement the maximum period of confinement that may be adjudged and approved (by the Military Commission panel) is a period of 7 years. As it transpired, the Convening Authority agreed to suspend any portion of the sentence to confinement in excess of 9 months.
- 6.31. This aspect of the agreement was not revealed at this point in the hearing. Mr. Hicks was simply informed that if the Military Commission panel's sentence was less than that agreed by the Convening Authority then the sentence could not be increased and he would get the benefit of that verdict.
- 6.32. Before the plea was accepted, Hicks again agreed with the contents of the agreement. He again indicated that he was satisfied with his legal advice and yet again confirmed that the agreement had been entered into of his own free will without being forced. He again reiterated that he understood the terms of the agreement.
- 6.33. Then, in one further and final contradiction of the *Alford* plea, Hicks stated, as always in answer to questions from the Judge, that he was pleading guilty because on the evidence ***and his recollection*** he was convinced that the Prosecution could prove the case against him beyond reasonable doubt.

- 6.34. Following the process of inquiry, the Judge then announced that he was satisfied that Mr. Hicks' plea of guilty was voluntary and announced that it would be accepted. Mr. Hicks was then informed that he may yet withdraw the plea of guilty for good reason.
- 6.35. The Judge also indicated that the request for dismissal of specification 2 of the charge was granted and that it would be dismissed with prejudice on the announcement of the sentence.
- 6.36. The Judge announced the formal finding that the Military Commission found David Hicks guilty of providing material support to terrorism. There was then an adjournment at 10.45am.

6B. The Judge's ruling on whether the charge was properly established

- 6.37. The Judge indicated that he needed not only to determine whether or not Hicks clearly understood his position and accepted the factual allegations against him but that he was also required to rule on whether the facts that Hicks admitted were sufficient to constitute the elements of the offence. To my recollection, the Judge did not ever embark on that exercise.
- 6.38. This was a remarkable oversight. One of the elements of the offence charged against Hicks was that it was committed in the context of an armed conflict. The charge against David Hicks covered the period December 2000 to December 2001. In order to accept the plea and find the charge proven the Judge was required to find that the United States was engaged in an armed conflict throughout this period. In my view the stipulation of fact is not clear on this point. Paragraphs 17 and 19 to 25 of the stipulation of facts contain allegations about Al Qaeda's violent intentions and activities towards the United States dating back to 1989 but I am not sure that this is sufficient to demonstrate an armed conflict, particularly when the AUMF was not passed by Congress until 14 September 2001. I would have expected that whether the allegations contained in the stipulation of fact were sufficient to establish a state of armed conflict was a question worthy of some judicial consideration.
- 6.39. Further, the majority of the conduct described in the stipulation of fact relates to Hicks undertaking training with Al Qaeda and LET. This conduct is asserted to constitute the provision of support to a terrorist organization. While the definition of "material support" incorporated into the MCA clearly includes training, it is not clear that it incorporates receiving rather than providing training. The Judge did not explore what aspects of Hicks's conduct, as described in the stipulation of facts, he was satisfied amounted to providing material support for terrorism.
- 6.40. The Judge was also required to be satisfied that Hicks was an alien unlawful enemy combatant. In paragraph 2 of the Stipulation of Fact, to which Hicks has agreed, he acknowledges that he has that status. The Stipulation also provides that the CSRT made a determination that Hicks was an unlawful enemy combatant but as we now know those classifications are not in accordance with the MCA. I do not believe the Combatant Status Review Tribunal's determination was tendered as an exhibit. The Judge should not have simply have accepted this Stipulation of Fact which proves to be inaccurate. Hicks' admission as to his legal status is of no value because that status must be established before the CSRT.²⁰

²⁰ MCA section 948a.

6C. Empanelling the Members of the Commission

- 6.41. At 2.35pm the Commission resumed for the purpose of empanelling members of the Military Commission Panel to determine the sentence. Exhibit 26 was a “*Sentencing Worksheet*” which was a document required to be completed by the members of the Military Commission Panel. The Judge indicated that he had provided details of the *voir dire* process and the sentencing instructions. It appeared that both were acceptable to the Prosecution and Defence. There was also some discussion about various documents to be given to the Panel and a questionnaire of the Panel had been reviewed by Major Mori.
- 6.42. At 2.40pm the Panel members entered the room and were sworn.
- 6.43. The Panel members were then given a preliminary instruction by the Judge to the effect that they were required to act fairly and impartially. He said they were also required to follow directions from the Judge. They were informed that Mr. Hicks had pleaded guilty and that the Judge had accepted his plea. They were informed that it was their duty to determine the sentence which required “*wise discretion*”. He told them that they would be hearing evidence and they would be given instructions. They were instructed to keep an open mind until that process was completed. They were told there would be a *voir dire* at which questions would be asked and they may be challenged. They were informed that they must disclose any reasons why they may not participate and the Judge gave them some examples of reasons as to why they might not be able to participate. He explained the questions were not to embarrass them and that it was not an adverse result to them to be excused. They were then informed as to how they should respond to questions.
- 6.44. The Panel were then asked the following questions:
- Whether anyone actually knew David Hicks.
 - Whether anyone knew anyone referred to in specification 1 of the charge.
 - Whether anyone was of the view that they could not provide Hicks with a fair trial on the question of sentence.
 - Whether they had prior knowledge of any of the events.
 - Whether any member of their families had been charged with similar offences.
 - Whether any member of their family was a victim of the provision of material support for terrorism.
 - Whether any of them had served in Afghanistan.
 - Whether any family member or friend had been killed or wounded in Afghanistan.
 - Whether any friend had been killed as a result of an act of terrorism.
 - Whether any of them had suffered the impact of act of terrorism.
 - Whether any of them had previously served as members of a Military Commission.
 - Whether any of them had been involved in law enforcement either as a police officer or military police officer.

- Whether any members of the Commission were responsible for grading other members of the Commission.
- Whether any of the members of the Military Commission had dealings with the parties including the Judge, the Prosecutor or the Defence.
- Whether they knew the Convening Authority. General Thomas Hemmingway, Colonel Morris Davis, Colonel Dwight Sullivan.
- Whether any of them were professional lawyers.
- Whether any of them had read anything about the case in the media in the last 5 ½ years.
- Whether any of them had read anything in the media about the case in the last week.
- Whether any of them had previously had a connection with Guantanamo Bay.
- Whether any of them had been in any way connected with the detainee operations at Guantanamo Bay.
- Whether any of them had been involved in the operations in relation to detainees either at Bagram in Afghanistan or on various US vessels.
- Whether any of them had an inelastic view as to punishment.

6.45. Various answers were given to those questions by the Military Commission members. In summary, no one knew David Hicks. Further, no one believed they would be unable to provide him with a fair trial on sentence and no one had prior knowledge of any events. None of the Military Commission members had been charged with similar offences or were in any way victims of terrorism. None of the officers had served in Afghanistan. One member had a friend wounded in Afghanistan. No members had any friends killed as a result of terrorism or were in any way impacted by an act of terrorism. All members of the Military Commission had previously served on the earlier form of Military Commission with the exception of three potential members. None were involved in law enforcement or in grading other members and none had any dealings with the parties including the Judge, the Counsel involved in the case or other authorities from the Pentagon.

6.46. Six potential members of the Commission had been aware of the case in the media in the previous 5 ½ years and four of them had seen publicity about the matter in the last week. They were all asked questions about that. Only one member had had a previous connection with Guantanamo Bay and only one member had been involved in any way in Afghanistan or on various US vessels as requested.

6.47. All considered they could provide a fair, impartial and open minded trial and so ended that process.

6.48. The next step in the process was that each member who had provided a positive response in the way that I have outlined was brought back into the hearing room on his/her own and questioned. I see no benefit in going into the detail of that questioning since none of the issues that were raised were of significance. A number of the members had served on previous Military Commissions or Court Martials and in the main they had been Court Martials of members of the Military usually for sexual offences.

6.49. The *voir dire* ended at 3.50pm and two members were deleted from the panel, leaving eight members to sit as the Panel to determine the case.

6D. Evidence and Submissions

6.50. At 4.25pm the hearing began and each member of the Panel read the Stipulation of Facts which had been read out and distributed. Apart from the Stipulation of Facts the only other material placed before the members of the Commission was David Hicks' un-sworn statement which was spoken to the Commission by Major Mori.

6.51. In summary, Major Mori told the Commission Panel that in May 1998 David Hicks went to Japan to a horse farm and then returned in August 1998 to home. He then went back in 1998 and in May 1999 went to Albania as a member of Kosovo Liberation Army (KLA). His activities there were among other things concerned with Kosovo refugees and he was well received. Major Mori indicated that David Hicks wished to join the Australian Army but was not permitted to do so. He then described his visit to Pakistan in 1999 and ultimately his placement in US custody at the end of 2001.

6.52. Major Mori indicated that David Hicks had provided information to the authorities and was still providing information. In addition to that he had worked on his high school year 11 mathematics and English and had tried to behave. He was described as having been cooperative. He said that David Hicks apologized to his family and to Australia and to the United States for his conduct. He said that the US Military had treated him professionally and in a humanitarian way. He asked that Australians exercise forgiveness in relation to David Hicks.

6.53. That was the defence case and no case was offered by way of rebuttal by the Prosecution.

6.54. The Judge then began to give the Panel sentencing instructions. He commenced by telling them that they were about to vote on a matter of grave responsibility. At this point, it suddenly dawned on the Judge that he had omitted to give Counsel in the case the opportunity to make final arguments and that he was getting ahead of himself and so he ceased his instructions and invited the Prosecutor to address the Military Commission Panel.

6E. Prosecution Submissions on Sentence

6.55. I have recorded the submissions the Prosecutor made to the members of the Commission almost verbatim. If there was ever any residual doubt about the total unfairness of the Military Commission process, it was surely dispensed with after the prosecution submissions on sentence. As recorded below, those submissions were in no way confined to assisting the members of the Panel to decide upon an appropriate punishment for Hicks with respect to the specific offence for which he was charged and convicted. The precise details of that offence, including what might be regarded as aggravating or mitigating circumstances, were rendered meaningless. Instead the prosecutor simply invited the members of the Commission to sentence David Hicks *for being a terrorist* and in that way, to hold him accountable for international terrorism in general. Further, the prosecutor encouraged the members of the Commission, when sentencing David Hicks *for being a terrorist*, to be particularly mindful of the types of crimes he might have committed if he was not captured and the types of crimes he would always be capable of committing *because he is a terrorist*.

6.56. Specifically, in his address the Prosecutor told the Panel that the court room was the front line in the war on terror and that they were face to face with the enemy who was sitting at Counsel's table. He said that the war on terror was real. He said it was a figurative battle

of ideologies with, on the one hand, life and freedom and, on the other, those who hate our freedoms. He said “*the enemy is before you*”. He said David Hicks had 24 years of freedom in Australia including freedom of religion and freedom to work. He said that at age 24 “*this enemy*” chose a life away from Australia and provided material support to terrorism. He said “*the enemy*” joined with Al Qaeda. Al Qaeda was about death and destruction to the United States and Australia. Al Qaeda had declared war on the United States and he referred to the stipulation of fact describing what Al Qaeda was about. He said Al Qaeda opposed the US support of Israel and referred to Jihad of 1996 and a Fatwa issued to Muslims to kill Americans. He referred to September 11, 2001, and said that “*this enemy*” saw first hand the people who were involved in that attack. He said that Hicks met Osama bin Laden and heard speeches. He referred to the fact that Hicks had embraced Osama bin Laden and told bin Laden that training manuals were needed in English. Hicks, he said, had attended four training courses and then at two battle fronts.

- 6.57. David Hicks, he told the members of the Commission, had become Muhammad Daewood. He said David Hicks had taken part in a Jihad or Holy War and concealed his true name to train with Al Qaeda. He was willing to do Al Qaeda’s deadly work. Hicks, said the prosecutor, was an invaluable asset. Al Qaeda placed no value on life as can be seen from the fact that they use suicide bombers. All that Hicks had become, the Prosecutor claimed, was a “*mere tool*” for terrorism.
- 6.58. The Prosecutor claimed that Hicks met Muhammad Atta. He also submitted that Al Qaeda was not a bona fide military organization. Hicks had been screened, travelled as a westerner who hated Israel and could still fool some by dressing up in western clothes. He could blend in to free western societies, the Prosecutor said. David Hicks had advanced training at Tarnak Farm and trained at a mock city. There he learned how to kidnap and assassinate people and the bombing of the USS Cole was cited as part of the training.
- 6.59. The Prosecutor also referred to paragraph 33 in the Stipulation of Fact and in particular, to the practical training exercises that Hicks participated in, in relation to the former American Embassy in Kabul. The Prosecutor said it was immaterial that the building was not occupied. It was teaching terrorism skills which were transferable.
- 6.60. The Prosecutor also referred to what Al Qaeda has done to US Embassies including in the bombings in Kenya. He repeated that Hicks was transferable and he knew what Al Qaeda wanted. He made the point that Hicks will also know what Al Qaeda wants and he is raw material and as such is a time bomb. The Prosecutor said that you can’t remove Al Qaeda training. He could always connect with Al Qaeda and he will always be a threat unless he changes.
- 6.61. The Prosecutor said that on September 11, 2001 Hicks was in Pakistan with his friend/s and expressed approval of that attack. After September 11, Hicks went back to Afghanistan and rejoined Al Qaeda. He could have stayed in Pakistan, the Prosecutor said, and could have gone to Australia but instead he went to Kandahar. Mr. Hicks traversed hundreds of miles for another battle and wanted to kill Americans. The retreat that Mr. Hicks made was not voluntary but necessary given the circumstances and he only stopped because he had been captured. He would have done it again and again.
- 6.62. The Prosecution then posed the question as to what was the appropriate punishment bearing in mind the elements of retribution, specific deterrents and general deterrence. The Prosecutor said Hicks was known throughout the whole world and he has done damage. He has to be punished for what he has done and be held in confinement so that he cannot do it again. The Prosecutor asked the Panel to impose the maximum penalty

they were permitted to, in the hope that Mr. Hicks would come to his senses and said that the Prosecution recommended that he be incarcerated for a period of 7 years.

6F. Defence Submission on Sentence

- 6.63. Major Mori then commenced his address. He told the members of the Panel that they were there to punish Hicks for what *he* had done. He said the Prosecution had used an analogy in relation to Hicks and the idea was that it would “*rile your emotions*”. He quoted the prosecutor as effectively saying that “David Hicks met Osama bin Laden therefore give him the maximum”.
- 6.64. Major Mori made the point that David Hicks did not provide support for a terrorist attack. He did not hurt anyone. He did not shoot at US Special Forces. He did not plant mines. In the sphere of combat he stood at a tank and never fired a shot at Kunduz for 2 hours. He actually never shot at anyone.
- 6.65. Major Mori then went through Mr. Hicks’ background referring to the fact that he had tried to join the Australian Military.
- 6.66. Major Mori then attempted to clear up a matter raised by the Prosecutor in his submissions. The Prosecutor had referred to Hicks involvement with the LET terrorist organization and Major Mori felt it was important to indicate that associating with that organization was not an offence at the time of Hicks’ association with that organization.
- 6.67. At that point the panel was asked to leave the courtroom and a debate occurred. The debate concerned the status of LET. After the debate the Judge drafted a direction to the Jury in which he told them that it was necessary to clarify the remarks in relation to David Hicks and his connection with LET. The Judge said it was agreed by the prosecution and defence that Al Qaeda was a proscribed foreign terrorist organization in October 1999 and that LET was proscribed as a foreign terrorist organization on 26 December 2001, which was after David Hicks had been captured. The Judge indicated that there may be a dispute as to whether David Hicks association with LET was an offence under the US law.
- 6.68. In my view, the debate and its resolution demonstrated the farcical nature of the proceedings. The prosecutor had already invited the members of the panel to sentence Hicks for a number of uncharged acts. When Major Mori took issue with this by suggesting that one of the matters the prosecutor had referred to in summarizing Hicks’ *reprehensible* behaviour did not amount to a crime at the time of its commission, the Judge intervened. However, he failed to explain that Hicks was not charged with providing support to the LET and could therefore not be punished for his involvement with that organization. On the contrary, he explained that it *may* not have been an offence to provide support to the LET at the relevant time, as though the issue of the exact nature of the charge against Hicks was a technicality which did not need to be resolved in precise detail.
- 6.69. Following this interruption, Major Mori then continued his address. Major Mori said that what drove David Hicks was that he was a “*wannabe soldier*” who began with the KLA. He said that in Afghanistan Hicks acted like a soldier. The US Government wanted to punish him for what might have happened but Mori pointed out that in reality Hicks provided support as a soldier. He noted that there were consequences for David Hicks in what he had done. He posed the rhetorical question as to whether he deserved the most severe punishment.

- 6.70. Major Mori noted that Hicks was shot at and bombed and when the “*the wannabe got a taste of it*” he said “*I’m out of here*” and left Kunduz. Mori referred to the fact that a shop keeper had taken pity on Hicks.
- 6.71. Major Mori also referred to the fact that Hicks would get no credit for the time served which was 5 years and 4 months at that stage.
- 6.72. Major Mori challenged the assertion that Hicks hates America by referring to the cooperation that Hicks had been providing from the very first time that he was taken into custody and even continuing after he was charged. He said Hicks had no personal animosity towards the United States. He noted that in the five years he had been in custody he had been compliant. Mori mocked the Prosecution by asking whether this compliance and cooperation was one of Al Qaeda’s secret tricks.
- 6.73. Major Mori conceded that Hicks should not have been in Afghanistan, but submitted that he was not there out of hate.
- 6.74. Major Mori explained that Hicks was not in any way responsible for the bombings on the US Embassies in Africa or the USS Cole or the attacks on the United States on September 11, 2001 and that he had not hurt any one person.
- 6.75. Major Mori said the objective facts were that Hicks was effectively a PFC (Private First Class) that the terrorists put in a trench at the airport. He was such a valuable tool, Major Mori said, that he was placed in a trench. He was merely a PFC and he abandoned his post.
- 6.76. Major Mori urged the Panel to sentence Hicks for what he alone had done. He referred to the importance of rehabilitation, Hicks’ plea of guilty and his cooperation. He said that Hicks was proving himself and was undertaking correspondence courses. He posed the question as to how much further punishment Hicks should receive. He noted that Hicks had already received 5 years and 4 months and if he served another 1 year and 8 months that would bring his total term of imprisonment up to 7 years. That, said Mori, was the period of imprisonment that the Prosecution had urged the panel to impose.
- 6.77. As to whether or not David Hicks was a threat, Major Mori said that Hicks would be watched back in Australia.
- 6.78. Major Mori said that Hicks accepted responsibility for what he had done and he wished to thank those who had assisted him. Mori said the sentencing process was not only about justice but also about mercy.

6G. The Judge’s instructions to the Panel

- 6.79. The judge then gave jury-like directions to the panel of military officers. They were told they were to sentence Hicks for the offence and that there would be no credit to be given to him for the time he had already spent in US custody. They were told the maximum sentence they could impose was seven years. They were informed of the elements of sentencing – rehabilitation; protection of the community and deterrence. The weight to be given to each of these elements was, they were told, a matter for them.
- 6.80. It was explained to them that there were only two types of punishment – confinement or no punishment at all. They were told they would consider the background matters including the fact that he was an Australian citizen. They were also told to give his unsworn statement such weight as they thought was appropriate.

- 6.81. The panel was told that the plea of guilty was a matter of mitigation bearing in mind that the cost of a trial has been saved. The panel was also advised that a plea of guilty may be the first step in the rehabilitation of the accused.
- 6.82. The Judge advised the panel that they were not bound by the arguments of counsel.
- 6.83. The panel was then told specifically how to go about their task. They were instructed to start with a full and fair discussion before everyone wrote down a sentence that should be imposed. The written sentences were then to be ranked and a vote taken on the sentence from lightest to heaviest. A particular officer was nominated as the senior officer who would announce the result. It was explained that for a result two thirds majority (6 out of 7) would be required. They were then given the worksheet which they were required to complete. They were told they had to balance the interests of Hicks with the welfare of society.
- 6.84. A member of the panel enquired as to what should be made of Hicks' co-operation with authorities. The panel was told that it was a matter for them – they were not told that it was a factor which mitigated the sentence.
- 6.85. At 5:55pm, the panel retired.

6H. The Sentence Imposed by the Commission

- 6.86. At 8:04pm, the panel returned with a result after two failed attempts by them to properly complete the *worksheet*. Apparently the panel had not understood how to make the choice they had to make for the sentence to be imposed but once that was finally achieved the senior officer handed the completed worksheet over to the judge.
- 6.87. The sentence they imposed was the maximum of seven years. The Panel evidently decided that no reduction from the maximum penalty available to them was warranted by any of the following:
- Hicks' guilty plea;
 - Hicks' cooperation with investigations;
 - Hicks' apparent good behaviour throughout the period of his imprisonment;
 - Hicks' statement of contrition; and
 - Hicks' relatively low level of involvement with al Qaeda which did not result in him participating in or providing assistance for any actual act of terrorism.
- 6.88. After the panel delivered their sentence, they were discharged. It was at this point that the Judge revealed paragraph 1(a) of the Pre Trial Agreement which required suspension of any sentence of confinement over 9 months.
- 6.89. It was agreed that Hicks would be transferred back to Australia to serve the remainder of the sentence imposed by 29 May 2007. That has now occurred.
- 6.90. Hicks officially waived his appellate rights pursuant to Rule 1110 (a) which provides for that to occur except where a sentence of death has been passed.
- 6.91. The hearing of *US v. David Hicks* finally ended at 8:15pm.

7. The Plea Agreement

- 7.1. A copy of the plea agreement is attached at Appendix “C”, so I will not recite its content in full. Several aspects of that agreement appear to be relatively standard and reflect the type of undertaking one would expect the State to demand of an accused in return for a reduced punishment. For example, in the agreement David Hicks undertakes to cooperate with any future investigations and provide testimony at trial if required.
- 7.2. However, in other respects, the agreement looks remarkably less like the product of plea negotiations and more like an attempt to protect the credibility and interests of the US Government. For example, the plea agreement purports to require Hicks to do the following:
- Agree that he will not communicate with the media in any way for a period of one year in any way regarding the illegal conduct alleged in the charge against him or about the circumstances surrounding his capture and detention. It should be noted that the attempt to impose the same condition on Hicks’ family was deleted by the Judge.
 - Assign to the Government of Australia any profits or proceeds which he may be entitled to receive in connection with any publication or dissemination of information relating to the illegal conduct alleged in the charge sheet;
 - Agree that he had not been illegally treated by any person or persons while in the custody and control of the United States, including during the period after his capture and transfer to US custody in Afghanistan in December 2001 and through the entire period of his detention at Guantanamo Bay, Cuba;
 - Agree that his entire period of detention as an *unlawful enemy combatant* was based upon his capture during armed conflict, was lawful pursuant to the law of armed conflict and was not associated with, or in anticipation of, any criminal proceedings against him; and
 - Agree not to sue, in any forum, the USA or any of its officials with regard to any aspect of his capture, treatment, detention, or prosecution.
- 7.3. The contents of the agreement coupled with the history of the Hicks matter generally serve to support the conclusion that his plea of guilty was the product of an inherently oppressive and coercive system. The agreement reflects a view on the part of the US authorities that liberty is not a right that may only be denied a person in accordance with strict procedure established by law, but rather liberty is a bargaining chip that the State may use to avoid accountability and buy impunity.
- 7.4. There is clearly an issue as to whether the agreement is enforceable in Australia. That issue will only arise if it is claimed Hicks has breached the agreement in some way and then it is a matter for his own legal advice. I do not propose to say anything further about the issue.

7A. Freedom of Expression

- 7.5. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of expression including freedom to seek, receive and impart information and ideas of all kinds. The US Government should not ask detainees to trade this fundamental right simply to be free from arbitrary detention, which is in itself a right enshrined in Article 9 of the ICCPR. In addition, freedom of speech is enshrined in the 1st Amendment to the US Constitution which prevents the Congress from passing laws which “abridge” freedom of speech.

7B. Arbitrary Detention

- 7.6. A final aspect of the plea agreement which warrants comment in this context is the declaration made by David Hicks that his entire period of detention as an unlawful enemy combatant was based upon his capture during armed conflict, was lawful pursuant to the law of armed conflict, and was not associated with, or in anticipation of, any criminal proceedings against him.
- 7.7. In my view, such a declaration is mere propaganda. As I have already observed, the lawfulness or otherwise of David Hicks’ detention under the law of armed conflict is not a question which can be resolved by plea negotiations. The fact that a detainee must acknowledge that his detention is lawful in order to be released, demonstrates the flaws in the process.

8. Public Debate

- 8.1. As I noted above, the proceedings at Guantanamo Bay were for the most part a contrived affair, played out for the benefit of the media and public. The outcome of the case was determined entirely outside the walls of the hearing room, dictated by circumstances unrelated to Hicks’ conduct or the evidence available against him. The proceedings themselves, and the press conferences and press releases which followed, were used as a platform for delivering carefully and strategically tailored messages.
- 8.2. For example, the press release issued by the US Department of Defense following Hicks’ conviction and sentencing contained the following claim which is simply nonsense:

Military commissions are regularly constituted courts, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples for purposes of common Article 3 of the Geneva Convention.

Trials by military commission demonstrate that the United States is committed to holding dangerous terror suspects accountable for their actions. Military commissions provide a mechanism to serve justice to those accused of law of war violations while keeping the United States, friends and allies safe from those bent on carrying out attacks on civilian populations and coalition forces.

- 8.3. Office of Military Commissions spokesperson Major Beth Kubala declared that what had occurred was a *good example* of how the system can work. US Air Force Colonel Morris Davis said he hoped it would be reported that “*we gave an Al Qaeda terrorist a full and fair trial*”. Colonel Davis also thanked Australian Prime Minister John Howard and Attorney General Philip Ruddock. He said they were promised a fair trial and he hoped they had delivered it. Colonel Davis noted that sometimes doing what is right is not

always popular, and that's reflected in the polls. While Colonel Davis agreed that the case was not a real test of the full Military Commission process, he hoped it showed it was a fair and orderly process – it didn't. Col. Davis also expressed the hope that Hicks's admission that he had not been subject to any illegal treatment would make the media more sceptical in the face of future claims. It should not have that effect.

- 8.4. While US officials touted the outcome as a victory for the military commissions system, the Australian Government heralded the result as proof that David Hicks was, as consistently claimed by the Government, a terrorist. As the Prime Minister, John Howard predictably stated:

He pleaded guilty to knowingly assisting a terrorist organisation – namely al-Qaeda," He's not a hero in my eyes and he ought not to be a hero in the eyes of any people in the Australian community. The bottom line will always be that he pleaded guilty to knowingly assisting a terrorist organisation.

- 8.5. Neither the victory claimed for the system nor the vindication claimed by the Australian Government for its position is supported by the actual conduct or outcome of the case. However, it is simply not possible to dissect and debate the flood of misleading commentary which followed its resolution. Therefore, there are just two matters, arising in the broad context of the public debate that I will deal with below.
- 8.6. The first is the claim made by the Chief Prosecutor that the Military Commissions process compares favourably with other international criminal tribunals. The second is simply my factual recounting of a "tour" I was taken on of the detention facilities at Guantanamo.

8A. Comparisons with The Hague Tribunals

- 8.7. On the afternoon of Thursday 29 March 2007, a media conference was held at which the Office of Military Commissions and the Chief Prosecutor Colonel Davis spoke.
- 8.8. Colonel Davis spent much of his time attempting to persuade the media of the quality of *justice* which would be dispensed by the Military Commission process. In the course of that argument he asserted that when the processes of the International Criminal Tribunal for the Former Yugoslavia (ICTY); the similar tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) are *lined up* against the Military Commission process in Guantanamo Bay, the latter is at least as fair as the former, if not more so. No-one, he said, had ever challenged his opinion in this respect.
- 8.9. It is necessary to challenge such an assertion because it is simply wrong and there are several areas where the challenge can easily be made.
- 8.10. The first issue is, of course, a comparison of the independence of the various tribunals. In The Hague there are two criminal tribunals dealing with crimes arising from the former Yugoslavia (the ICTY) and in Rwanda (the ICTR). As well, pursuant to the Rome Statute there is now a permanent International Criminal Court (ICC). These international criminal tribunals were established through the United Nations Security Council acting under its Chapter VII authority in the case of the *ad hoc* tribunals, and valid treaty-making process in the case of the ICC.
- 8.11. As opposed to the judicial composition of the Military Commissions, the judges that constitute these bodies are independent civilian judges selected from various countries, usually with an extensive background in international law or the criminal justice aspects of the domestic courts in the countries of their origin.

- 8.12. Consistent with the second optional protocol to the International Covenant on Civil and Political Rights (ICCPR), the tribunals and the ICC do not have the jurisdiction to impose the death penalty for any offence. In contrast, in the MCA provision is made for a sentence of death to be imposed on a person where his actions have resulted in death or where he is alleged to have been part of a conspiracy which resulted in death.
- 8.13. Three other areas where the military commissions compare unfavourably to other international tribunals are in relation to: the admissibility of evidence obtained by torture; the accused right to silence and the use of hearsay evidence.
- 8.14. So far as *evidence obtained by torture* is concerned, Article 69(7) of the Rome Statute of the International Criminal Court provides that:

[e]vidence obtained by means of a violation of ... internationally

recognized human rights shall not be admissible if:

- (a) *The violation casts substantial doubt on the reliability of the evidence; or*
- (b) *The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. (Emphasis added)*

- 8.15. This is similar to the provisions of the Rules of Procedure and Evidence in the ICTY and ICTR. Rule 95 of the ICTY Rules provides that ‘No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings’.
- 8.16. It is noteworthy that the Rules of ICC and ICTY do not distinguish between evidence obtained by torture, evidence obtained by cruel, inhuman or degrading treatment, or evidence simply obtained in violation of the right against self incrimination. There is an inherent acknowledgement that a question mark lies over the reliability of evidence obtained in such manner. As a result, the threshold at which such evidence is excluded is not manifest unreliability but substantial doubt as to reliability.
- 8.17. Moreover, and this is quite at odds with the Military Commission’s approach, with both ICC and ICTY Rules there is an acknowledgement that procedural justice is as important as substantive justice. Quite simply, the ends in an individual case cannot justify the means. Thus, in trials before the ICC and ICTY, ostensibly reliable evidence may be excluded if to admit that evidence would endorse investigative or interrogation methods which seriously undermine the administration of justice or which mirror the types of illegal conduct (like torture) that those tribunals were established to try.
- 8.18. As to rules against *compulsory self-incrimination*, Rule 42(A) of the ICTY Rules expressly sets out the right to silence. It provides that:

[A] suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:... (iii) the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

Rule 42(A) of the ICTR Rules is identical.

- 8.19. Article 55(2)(b) of the ICC Statute provides that where a suspect is about to be questioned by the ICC Prosecutor or by national authorities, the suspect must be informed of the right to “remain silent, without such silence being a consideration in the determination of guilt or innocence.”
- 8.20. Further, Article 21(4)(g) of the ICTY Statute and Article 20(4)(g) of the ICTR Statute both guarantee the right of an accused not to be compelled to testify or to confess guilt and to remain silent. The ICC expressly guarantees this right during the investigation and trial stage (Article 55(1) (a) and 67(1)(g)).
- 8.21. While the MCA ensures that an accused person cannot be compelled to testify against himself before a military commission, there is no prohibition on the admission of confessions obtained from the accused prior to hearing, including in circumstances where he had no access to a lawyer and was not apprised of or afforded his right to silence.
- 8.22. In fact, it appeared from Hicks’ plea hearing that the bulk of the evidence on which the case against him was based, was likely to be evidence of this kind.
- 8.23. As to the use of hearsay evidence, it is correct that in principle the ICC, ICTY and ICTR do not exclude evidence the purely on basis that it is hearsay evidence. However, such evidence is not automatically admitted either but must first be shown to be reliable. The ICTY has indicated that in undertaking an assessment of reliability, the Court may be guided by, but not bound to, hearsay exceptions generally recognized by some national legal systems, and will also place particular emphasis on the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. In admitting hearsay evidence in the past, the Judges of the ICTY have also pointed out that, unlike inexperienced juries, they are well qualified to apportion appropriate weight to such evidence.
- 8.24. This stands in stark contrast to the rules of evidence before the military commissions where hearsay is admissible unless the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking probative value.
- 8.25. For a fuller comparison between the rules and procedures of the military commissions established by the MCA and other international criminal tribunals see for example:
- Guenael Mettraux, G, *Comparing the Comparable: 2006 Military Commissions v the ICTY*, Journal of International Criminal Justice, 1 March 2007; and
 - Eun Young Choi, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism*, Harvard Civil Rights-Civil Liberties Law Review, Winter, 2007

8B. Tour of the Detention Centres

- 8.26. On 28 March 2007 it was arranged for the *Australian Delegation* (of which I was apparently a member) to be shown various aspects of the Detention Centres at Guantanamo Bay.
- 8.27. The tour commenced at 2:00pm and began with a visit to what is described as Camp 1 (also known as Camp Delta). This area is a semi enclosed series of cages the dimensions of which are something of the order of 8 feet by 6 feet. The area that was shown to us was described as the *show block* because it was unoccupied. The various categories of detainee were explained ranging from compliant to non-compliant. Their level of compliance obviously dictates the level of *comfort items* that they are provided with.

- 8.28. The detainees inhabit these cages for 22 hours in each day, completely lacking in any privacy or room to do other than read. The toilet comprises effectively a hole in the floor and they are of course under constant supervision by the guards. However, some communication with other prisoners is obviously possible. The exercise area is effectively a small concrete yard enclosed by wire in which substantial exercise seems to me to be impossible, although the yard was decorated with one rather rudimentary tread mill, a basketball and an arrow painted on the ground pointing to Mecca. Indeed, in each of the cells there are similar arrows.
- 8.29. The next visit was to Camp 4 which is the portion of the detention centre which houses the most compliant prisoners. These prisoners do seem to have a more humane kind of existence with the ability to fraternize with each other and move about in a common area which is not available to those in Camp Delta.
- 8.30. We were then shown the medical, dental and psychiatric support services which are in the vicinity of Camp 4 for the detainees. The point was made during the course of the presentation that the medical care for detainees, at least on a ratio of practitioners per head of consumers, well exceeds American standards and is probably superior to the health care available to the average American citizen. Certainly the facilities are impressive, including the number of medical staff and the hospital which exists to provide medical assistance to those who need it. None of these services were in use at the time we were shown the facilities. If this level of service is available to the detainees on a regular basis then obviously that is a desirable situation.
- 8.31. Following from this, we were taken to see Camps 5 and 6. As part of the joint task force arrangements these are run by different branches of the service. Camp 5, which is the area where David Hicks was held prior to the resolution of his case, holds 100 detainees who are described as high value inmates and who are needed for interrogation. Camp 6 holds 200 detainees. The use of the word *camp* is a misnomer. Camps 5 and 6 are new high security prisons which would normally contain individuals who had been found guilty by the Criminal Justice System for serious offences. In each case the prisons have an obvious desensitizing disorientating effect.
- 8.32. At one stage during the tour of Camp 5 we were shown the interrogation room which contained a reclining rocking chair where the detainee sits albeit restrained to the floor with a video player nearby. We were told that this was an extremely popular room where detainees could come and sit in comfort and have a conversation with their interrogators. There was a significantly *Orwellian* overtone to the presentations which were given throughout this tour.
- 8.33. David Hicks' history as I understand it was that he began his incarceration at Guantanamo Bay in Camp X-Ray. Camp X-Ray is an outdoor set of cages with no protection from the weather at all, which is now no longer used. It can be viewed and is overgrown and unoccupied. He then moved to Camp Delta which was the first camp that we were shown and then moved to Camp 5 and Camp 6 at the end of 2006. As I understand it he was then housed in Camp Echo (which we were not shown) pending his return to Australia.

9. Conclusions

9.1. In my first report written in August 2004, I concluded:

...that as a matter of fundamental principle of criminal justice, these proceedings are (and will continue to be) flawed and that a fair trial of David Hicks in the military commission is virtually impossible. That is brought about both by matters of structure in the commission process involving the role of the executive leading, in turn, to lack of independence and impartiality.

9.2. In my second report in July 2005, I expressed the view that his circumstances had deteriorated since 2004 because of the delay caused by litigation and the absence of any improvement in the level of fairness in the process from the litigation. In addition I raised particular faults in the Military Commission process as it then was structured. Little has changed.

9.3. I have already expressed agreement with the criticism made of the Military Commission process under the MCA in the legal opinions published on the charge laid against Hicks and to which he pleaded guilty and the structure and processes of the Military Commissions and their lack of compliance with the notion of a regularly constituted court under the Geneva Conventions.

9.4. Ultimately, it seems to me that what occurred was along the following lines. For reasons that I do not need to express an opinion about, commencing in January 2001 David Hicks went to Afghanistan and engaged in training at camps which were either Al Qaeda sponsored or Al Qaeda operated. At the time of the attacks on 11 September 2001, he was in Pakistan and returned to Afghanistan the next day. He positioned himself with Al Qaeda and Taliban fighters near Kandahar airport. At the time he was not committing an offence against Australian law. Also, he was not committing any offence for which he could have been prosecuted under US law. During the course of the American response to the attacks of 11 September 2001, Hicks was apprehended and placed in US custody. He remained in that custody at Guantanamo Bay, Cuba, until his transfer to Australia in May 2007. Regardless of the content of his Pre Trial Agreement, there is some evidence to suggest that during that time Hicks was tortured within the conventional meaning of that word or, alternatively, within the meaning of the United Nations Convention Against Torture (UNCAT), Article 1(1) of which provides:

For the purposes of this Convention, torture means any 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

9.5. Under a Military Commission process established by the President of the United States and the Department of Defense, Hicks was charged with three offences which, in short form, were conspiracy, attempted murder and aiding the enemy. Despite assertions to the contrary, none of them represented offences under the Laws of War. Lawyers in the US, the UK and Australia (including the Law Council of Australia) examined the then Military Commission process. Almost unanimously, we concluded that the process was

unfair and contrary to international law. The Australian Government ignored the criticism and usually personalized the debate by speaking only about the allegations of Hicks' conduct. Notwithstanding the optimism of the Australian Government based on US "assurances", the US Government failed to hold the Military Commission process in the US Supreme Court in *Hamdan*. The Australian Government barely acknowledged the severe judicial criticism and the identification of important matters of principle in that judgment.

- 9.6. By way of response to the *Hamdan* judgment, the Republican controlled US Congress enacted the MCA within which there are provisions which enable the admission of evidence obtained by "coercion" and findings of guilt based on untested hearsay evidence, with an onus for exclusion on the accused. Still no complaint from the Australian Government.
- 9.7. Hicks was then again nominated for trial and two charges were laid. One charge of attempted murder can only be described as an absurd potential abuse of the process. The other charge, to which he pleaded guilty, was clearly retrospective.
- 9.8. In March 2007 a "trial" was held which was a farce. A pre-trial agreement had been signed and the balance of the legal proceedings was entirely surplus to requirements although designed to lay a veneer of due process over a political and pragmatic bargain. The veneer cracked immediately.
- 9.9. The five years and four months Hicks had spent at Guantanamo was not to be considered in the imposition of the sentence. There was to be a "jury" – senior officers of the US Military who would claim to be able to be impartial in dealing with someone who was presented to them as their enemy. The very use of the word "jury" in the context of this process is an insult to the principle at the heart of trial by jury – trial by one's peers.
- 9.10. Nonetheless, those members of the panel who solemnly travelled from their postings in the US to Guantanamo Bay to impose the maximum sentence they could on a man who pleaded guilty, appeared thoroughly regretful of his situation, and had demonstrated his remorse by way co-operation with his interrogators and captors, must have wondered why they had bothered. The worst result for Hicks was a further 9 months confinement and the rest of the sentence was "suspended". Hicks has now returned to Australia to complete his sentence in a South Australian prison.
- 9.11. Ultimately, there has been no benefit from this process; only a corrosion of the Rule of Law. No ground can be claimed to have been made in the so-called *War on Terror*. The Military Commission process at Guantanamo likewise has neither gained from it, nor shown any prospect of improvement. With respect, the situation was perfectly summarized by former Secretary of State Colin Powell on 11 June 2007 when he is reported as follows:²¹

"Guantanamo has become a major, major problem ... in the way the world perceives America and if it were up to me I would close Guantanamo not tomorrow but this afternoon ... and I would not let any of those people go. I would simply move them to the United States and put them into our federal legal system,"

"Essentially, we have shaken the belief the world had in America's justice system by keeping a place like Guantanamo open and creating things like

²¹ NBC's Meet the Press.

the military commission. We don't need it and it is causing us far more damage than any good we get for it," he added.

"I would get rid of Guantanamo and the military commission system and use established procedures in federal law," Powell said, saying some leaders around the world were using Guantanamo to hide their own misdeeds.

"It's a more equitable way, and more understandable in constitutional terms," he added.


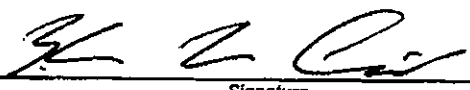
9.12. It is a shame that Col. Kohlmann did not adhere to his earlier 2002 opinion – it was right.

9.13. Predictably, there has been no response from the Australian Government to these propositions and their support for this process has been shameful. They have never put an argument to the Australian public as to why the Military Commission process is “*full and fair*” and now that the Hicks case is over, no doubt the hope is that the issue will disappear – and, regrettably, perhaps it will. However, it remains my strong view that Australia’s international standing and moral authority has been diminished by its support of a process so obviously at odds with the Rule of Law. Those with a concern for the protection of due process should be very concerned about the future of this process, particularly given its jurisdiction to impose death penalties.

LEX LASRY QC

Latham Chambers
MELBOURNE, AUSTRALIA

20 June 2007

CHARGE SHEET		
I. PERSONAL DATA		
1. NAME OF ACCUSED: DAVID MATTHEW HICKS		
2. ALIASES OF ACCUSED: a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood"		
3. ISN NUMBER OF ACCUSED (LAST FOUR): 0002		
II. CHARGES AND SPECIFICATIONS		
4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.		
SPECIFICATION: See Attached Charges and Specifications.		
APPENDIX "A"		
III. SWEARING OF CHARGES		
5a. NAME OF ACCUSER (LAST, FIRST, MI) Tubbs, II, Marvin, W.	5b. GRADE O-4	5c. ORGANIZATION OF ACCUSER Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER 		5e. DATE (YYYYMMDD) 20070202
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the <u>2nd</u> day of <u>February</u> , <u>2007</u> , and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.		
<u>Kevin M. Chenail</u> <i>Typed Name of Officer</i>	<u>Office of the Chief Prosecutor, OMC</u> <i>Organization of Officer</i>	
<u>O-5</u> <i>Grade</i>	<u>Commissioned Officer, U.S. Marine Corps</u> <i>Official Capacity to Administer Oath</i> (See R.M.C. 307(b) must be commissioned officer)	
 <i>Signature</i>		

MC FORM 458 JAN 2007

Blocks I through IV of this MC Form 458, including the continuation sheets for Block II, are duplicate originals, replacing misplaced originals.

3-1-06
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CONTINUATION SHEET – MC FORM 458 JAN 2007, Block VI Referral

In the case of UNITED STATES OF AMERICA v. DAVID MATTHEW HICKS

a/k/a "David Michael Hicks"

a/k/a, "Abu Muslim Australia"

a/k/a "Abu Muslim Austraili"

a/k/a "Abu Muslim Philippine"

a/k/a "Muhammad Dawood"

The following charge and specifications are referred to trial by military commission:

Specifications 1 and 2 of Charge I, as amended, and Charge I.

Other matters incorporated by reference in Block 4 of MC Form 458 pertaining to the accused, including those sections entitled "INTRODUCTION", "JURISDICTION", and "BACKGROUND" are in the nature of a bill of particulars and are not referred to trial.

The following charge and specification are dismissed and are not referred to trial:

The Specification of Charge II and Charge II.

This case is referred non-capital.

Date

3-1-07

Susan J. Crawford
Hon. Susan J. Crawford
Convening Authority
for Military Commissions

UNITED STATES OF AMERICA

v.

DAVID MATTHEW HICKS
a/k/a "David Michael Hicks"
a/k/a "Abu Muslim Australia"
a/k/a "Abu Muslim Australi"
a/k/a "Abu Muslim Philippine"
a/k/a "Muhammad Dawood"

CHARGES:

Providing Material Support for Terrorism;
and,
Attempted Murder in Violation of the Law of War

INTRODUCTION

1. The accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Australi," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

JURISDICTION

2. Jurisdiction for this military commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA;" its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and, the final determination of September 30, 2004 by the Combatant Status Review Tribunal (CSRT) that Hicks is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.
3. The charged conduct of the accused is triable by military commission.

BACKGROUND

4. Hicks was born on August 7, 1975 in Adelaide, Australia.
5. In or about May 1999, Hicks traveled to Tirana, Albania and joined the Kosovo Liberation Army (KLA), a paramilitary organization fighting on behalf of Albanian Muslims. Hicks completed basic military training at a KLA camp and engaged in hostile action before returning to Australia.
6. While in Australia, Hicks converted to Islam. In or about November 1999, he traveled to Pakistan where, in early 2000, he joined a terrorist organization known as Lashkar-e Tayyiba (LET), meaning "Army of the Righteous" or "Army of the Pure."

W

- a. The LET is the armed wing of Markaz-ud-Daawa-wal-Irshad (MDI), (a/k/a Markaz Jamat al Dawa), a group formed by Hafiz Mohammed Saeed and others.
 - b. The LET's known goals include violent attacks against property and nationals (both military and civilian) of India and other countries in order to occupy Indian-controlled Kashmir and violent opposition of Hindus, Jews, Americans, and other Westerners.
 - c. Starting around 1990, LET established training camps and guest houses, schools, and other operations primarily in Pakistan and Afghanistan for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of India and other countries.
 - d. Since 1990, members and associates of LET have conducted numerous attacks on military and civilian personnel and property in Indian-controlled Kashmir and India, itself.
 - e. In 1998, Saeed called for holy war against the United States after LET members were killed by United States missile attacks against terrorist training facilities in Afghanistan.
 - f. On or about April 23, 2000, in a bulletin posted on the internet, LET claimed that it had recently killed Indian soldiers and destroyed an Indian government building, both located in Indian-controlled Kashmir.
 - g. On or about December 26, 2001, the United States designated LET a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act.
7. After joining LET, Hicks trained for two months at LET's Mosqua Aqsa camp in Pakistan. His training included weapons familiarization and firing, map reading and land navigation, and troop movement.
 8. Following training at Mosqua Aqsa, Hicks, along with LET associates, traveled to a border region between Pakistani-controlled Kashmir and Indian-controlled Kashmir, where he engaged in hostile action against Indian forces.
 9. In or about January 2001, Hicks, with assistance from LET, traveled to Afghanistan and attended al Qaeda training camps.

GENERAL ALLEGATIONS

10. Al Qaeda ("The Base") was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
11. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.
12. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the

United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

13. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
14. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
15. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
16. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
17. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
18. In or about 2001, al Qaeda's media committee which created As Sahab ("The Clouds") Media Foundation which has orchestrated and distributed multi-media propaganda detailing al Qaeda's training efforts and its reasons for its declared war against the United States.
19. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.
20. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.
21. On or about October 8, 1999, the United States designated al Qaeda ("al Qa'ida") a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

SAC
3-1-07

CHARGE I: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.
SECTION 950v(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM

22. SPECIFICATION 1: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from in or about December 2000 through in or about December 2001, intentionally provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such an organization that engaged, or engages, in terrorism, and, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.
23. That Paragraphs (10) through (21) of the General Allegations are realleged and incorporated by reference for Specification 1 of Charge I.
24. That the material support or resources provided by the accused, included, but were not limited to, the following:
- a. That in or about January 2001, Hicks traveled to Afghanistan, with the assistance of Lashkar-e Tayyiba (LET), to include LET's recommendation, funding, and transportation, in order to attend al Qaeda terrorist training camps.
 - b. That upon entering Afghanistan, Hicks traveled to Kandahar where he stayed at an al Qaeda guest house and met Richard Reid ("Abdul Jabal"), Feroz Abbasi ("Abu Abbas al-Britani"), and other associates or members of al Qaeda. While attending al Qaeda's training, Hicks would use the *kunya*, or alias, "Abu Muslim Austraili," among others.
 - c. That Hicks then traveled to and trained at al Qaeda's al Farouq camp located outside Kandahar, Afghanistan. In al Qaeda's eight-week basic training course, Hicks trained in weapons familiarization and firing, land mines, tactics, topography, field movements, basic explosives, and other areas.
 - d. That in or about April 2001, Hicks returned to al Farouq and trained in al Qaeda's guerilla warfare and mountain tactics training course. This seven-week course included: marksmanship; small team tactics; ambush; camouflage; rendezvous techniques; and techniques to pass intelligence to al Qaeda operatives.
 - e. That while Hicks was training at al Farouq, Usama bin Laden visited the camp on several occasions. During one visit, Hicks expressed to bin Laden his concern over the lack of english al Qaeda training material.
 - f. That after Hicks completed his first two al Qaeda training courses, Muhammad Atef (a/k/a Abu Hafs al Masri), then the military commander of al Qaeda, summoned and

individually interviewed certain attendees. Hicks was interviewed about: his background; knowledge of Usama bin Laden; al Qaeda; his ability to travel around the world, to include Israel; and his willingness to go on a martyr mission. After this interview, Muhammed Atef recommended Hicks for attendance at al Qaeda's urban tactics training course at Tarnak Farm.

- g. That in or about June 2001, Hicks traveled to Tarnak Farm and participated in this course. A mock city was located inside the camp, where trainees were taught how to fight in an urban environment. This city tactics training included: marksmanship; use of assault and sniper rifles; rappelling; kidnapping techniques; and assassination methods.
- h. That in or about August 2001, Hicks participated in an advanced al Qaeda course on information collection and surveillance at an apartment in Kabul, Afghanistan. This course included practical application where Hicks and other student operatives conducted surveillance of various targets in Kabul, including the American and British Embassies. This surveillance training included weeks of: covert photography; use of dead drops; use of disguises; drawing diagrams depicting embassy windows and doors; documenting persons coming and going to the embassy; and, submitting reports to the al Qaeda instructor who cited the al Qaeda bombing of the USS Cole as a positive example of the uses for their training. During this training, Hicks personally collected intelligence on the American Embassy.
- i. That during the surveillance course, Richard Reid ("Abdul Jabal") visited on two separate occasions. After the course, Hicks returned to Kandahar airport, where Abdul Jabal taught a class on the meaning of *jihad*. Hicks also received instruction from other al Qaeda members or associates on their interpretation of Islam, the meaning and obligations of *jihad*, and related topics, at other al Qaeda training camps in Afghanistan.
- j. That on or about September 9, 2001, Hicks traveled to Pakistan to visit a friend. While at this friend's house, Hicks watched television footage of the September 11, 2001 attacks on the United States, and expressed his approval of the attacks.
- k. That on or about September 12, 2001, Hicks returned to Afghanistan and, again, joined with al Qaeda. Hicks had heard reports that the attacks were conducted by al Qaeda and that America was blaming Usama bin Laden.
- l. That upon arriving in Kandahar, Afghanistan, Hicks reported to Saif al Adel, then al Qaeda's deputy military commander and head of the security committee for al Qaeda's shura council, who was organizing al Qaeda forces at locations where it was expected there would be fighting against the United States, Northern Alliance, or other Coalition forces. Hicks was given a choice of three different locations (city, mountain, or airport), and he chose to join a group of al Qaeda fighters near the Kandahar Airport.
- m. That Hicks traveled to the Kandahar Airport and was issued an Avtomat Kalashnikova 1947 (AK-47) automatic rifle. On his own, however, Hicks armed himself with six (6)

ammunition magazines, 300 rounds of ammunition, and three (3) grenades to use in fighting the United States, Northern Alliance, and other Coalition forces.

- n. That on or about October 7, 2001, when the Coalition Forces, Operation Enduring Freedom, bombing campaign began, Hicks had been at the Kandahar airport for about two weeks and entrenched in the area where the initial military strikes occurred. At this site, other al Qaeda forces were in battle positions based a couple of hundred meters in all directions, and were under the direction of another al Qaeda leader.
- o. That on or about October 10, 2001, after two nights of bombing, Hicks was reassigned and joined an armed group outside the airport where he guarded a tank. For about the next week Hicks guarded the tank, and every day received food, drink, and updates on what was happening from the al Qaeda leader in charge.
- p. That Hicks heard fighting was heavy at Mazar-e Sharif, that Kabul would be next, and that western countries, including the United States, had joined with the Northern Alliance.
- q. That Hicks implemented the tactics he had learned with al Qaeda and trained some of the others positioned with him at Kandahar. After apparent resistance to his training, and no enemy in sight at the time in Kandahar, Hicks decided to look for another opportunity to fight in Kabul.
- r. That on or about October 17, 2001, Hicks told the al Qaeda leader in charge of his plans, and then traveled to Kabul. Hicks also took his weapon and all his ammunition.
- s. That Hicks arrived in Kabul and met a friend from LET, who requested Hicks go to the front lines in Konduz with him, and Hicks agreed.
- t. That on or about November 9, 2001, Hicks and his LET friend arrived at Konduz, the day before Mazar-e Sharif was captured by the Northern Alliance and U.S. Special Forces. Sometime after Hicks arrived at Konduz, he went to the frontline outside the city for two hours where he joined a group of al Qaeda, Taliban, or other associated fighters, including John Walker Lindh, engaged in combat against Coalition forces. Hicks spent two hours on the frontline before it collapsed and was forced to flee. During the retreat, Hicks saw bullets flying and Northern Alliance tanks coming over the trenches.
- u. That Hicks spent two to three days making his way back to Konduz while being chased and fired upon by the Northern Alliance.
- v. That Hicks made it safely back to the city of Konduz, where he approached some of the Arab fighters and asked about their plans. The Arabs fighters said they were going back into Konduz in order to fight to the death. Hicks, instead, decided to use his Australian passport and flee to Pakistan.

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- w. That Hicks then moved secretly within Konduz to a *madafah*, an Arab safe house. Hicks wrote the Arabs a letter that said not to come look for him because he was okay, and left the safe house. At this time Hicks still had his weapon, and moved again, secretly, to another house where he stayed for about three weeks. Later, a man who spoke some english helped Hicks sell his weapon so he could flee to Pakistan.
- x. That in or about December 2001, one week after the control of Konduz changed from the Taliban to the Northern Alliance, Hicks took a taxi and fled towards Pakistan. However, Hicks was captured by the Northern Alliance in Baghlan, Afghanistan.

25. SPECIFICATION 2: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from in or about December 2000 through in or about December 2001, provide material support or resources to be used in preparation for, or in carrying out, an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

26. That paragraphs (10) through (21) of the General Allegations are realleged and incorporated by reference for Specification 2 of Charge I.

27. That paragraph 24 and its subparagraphs (a) through (x) of Specification 1 are realleged and incorporated by reference for Specification 2 of Charge I.

~~CHARGE II. VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.
SECTION 950t ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR~~

~~28. SPECIFICATION: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from on or about September 11, 2001, through in or about December 2001, attempt to commit murder in violation of the law of war, by directing small arms fire, explosives, or other means and methods, with the intent to kill divers persons of the United States, Northern Alliance, or other Coalition forces, while the accused was without combatant immunity as an unlawful enemy combatant who was part of, or supporting, al Qaeda, Taliban, or associated forces engaged in hostilities against the United States or its Coalition partners, and that the conduct of the accused took place in the context of and was associated with an armed conflict.~~

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3-1-07

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APPENDIX "B"

UNITED STATES OF AMERICA

v.

DAVID MATTHEW HICKS
a/k/a "David Michael Hicks"
a/k/a/ "Abu Muslim Australia"
a/k/a "Abu Muslim Austraili"
a/k/a "Abu Muslim Philippine"
a/k/a "Muhammad Dawood"

Stipulation of Fact

29 March 2007

1. This stipulation of fact is entered into by the Prosecution and Defense knowingly and voluntarily in the case of *United States v. David Hicks* (hereinafter "the accused"). It is hereby stipulated and agreed, by and between the Prosecution and Defense, with the express consent of the accused, that the following facts are true.
2. The accused acknowledges and agrees that he is an alien unlawful enemy combatant, as defined by the Military Commissions Act of 2006 (MCA), Title 10, United States Code, Section 948a(1) and (3). The accused is and has been at all times relevant to these proceedings, a person subject to trial by military commission, pursuant to Section 948c of the MCA.
3. On 30 September 2004, the Combatant Status Review Tribunal (CSRT) made the determination that the accused is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda; as defined by Rule for Military Commission (RMC) 202.
4. The accused was born on August 7, 1975 in Adelaide, Australia.
5. In or about the middle of May 1999, the accused traveled to Tirana, Albania from Japan and joined the Kosovo Liberation Army (KLA), a paramilitary organization fighting on behalf of Albanians. The accused completed a four-week basic military training course at a KLA camp before returning to Australia on or about 27 June 1999.
6. After returning to Australia, the accused converted to Islam in September of 1999. In or about November 1999, he traveled to Pakistan where, in the middle of 2000, he joined a terrorist organization known as Lashkar-e Tayyiba (LET), meaning "Army of the Righteous" or "Army of the Pure;" designated a Foreign Terrorist Organization (FTO), on 26 December 2001, pursuant to Section 219 of the Immigration and Nationality Act.
7. The LET is the armed wing of Markaz-ud-Daawa-wal-Irshad (MDI), (a/k/a Markaz Jamat al Dawa), a group formed by Hafiz Mohammed Saeed and others.
8. The LET's known goals include violent attacks against property and nationals (both military and civilian) of India and other countries in order to occupy Indian-controlled Kashmir and violent opposition of Hindus, Jews, Americans, and other westerners.

UNITED STATES OF AMERICA V. DAVID MATTHEW HICKS
Stipulation of Fact

9. Starting around 1990, LET established training camps and guest houses, schools, and other operations primarily in Pakistan and Afghanistan for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of India and other countries.

10. Since 1990, members and associates of LET have conducted numerous attacks on military and civilian personnel and property in Indian-controlled Kashmir and in India, itself.

11. On or about April 23, 2000, in a bulletin posted on the internet, LET claimed that it had recently killed Indian soldiers and destroyed an Indian government building, both located in Indian-controlled Kashmir.

12. After joining LET, the accused trained for two months at LET's Mosqua Aqsa camp in Pakistan. His training included weapons familiarization and firing, map reading, land navigation, and troop movement.

13. Following the training at Mosqua Aqsa, the accused, along with LET associates, traveled to a border region between Pakistani-controlled Kashmir and Indian-controlled Kashmir where he engaged in hostile action against Indian forces by firing a machine gun at an Indian Army bunker.

14. In or about January 2001, the accused, with assistance from LET, traveled to Afghanistan and attended al Qaeda training camps.

15. Al Qaeda ("The Base") was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

16. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

17. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

18. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

19. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

UNITED STATES OF AMERICA V. DAVID MATTHEW HICKS
Stipulation of Fact

20. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans,*" in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

21. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

22. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

23. In or about 2001, al Qaeda's media committee, which created the Media Foundation As Sahab ("The Clouds"), orchestrated and distributed multi-media propaganda detailing al Qaeda's training efforts and its reasons for declaring war against the United States.

24. Since 1989, members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

25. On or about October 8, 1999, the United States designated al Qaeda ("al Qa'ida") a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

26. In or about January 2001, the accused traveled to Afghanistan, with the assistance of Lashkar-e Tayyiba (LET), to include LET's recommendation, funding, and transportation, in order to attend al Qaeda terrorist training camps.

27. Upon entering Afghanistan, the accused traveled to Kandahar where he stayed at an al Qaeda guest house and met associates or members of al Qaeda. While attending al Qaeda's training courses, the accused would use the *kunya*, or alias, "Abu Muslim Australia," "Abu Muslim Australi," "Abu Muslim Philippine," or "Muhammad Dawood;" and later was referred to as "David Michael Hicks."

28. The accused then traveled to and trained at al Qaeda's al Farouq camp located outside Kandahar, Afghanistan. In al Qaeda's eight-week basic training course, the accused trained in weapons familiarization and firing, land mines, tactics, topography, small unit fire, maneuver tactics, field movements, and other areas.

29. In or about April 2001, the accused returned to al Farouq and trained in al Qaeda's guerilla warfare and mountain tactics training course. This seven-week course included: marksmanship;

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small team tactics; ambush; camouflage; rendezvous techniques; and techniques to pass intelligence and supplies to al Qaeda operatives.

30. While the accused trained at al Farouq, Usama bin Laden visited the camp on several occasions. During such visits, any weapons the trainees had were removed from them and they were seated as a group to hear bin Laden speak in Arabic. During one visit, the accused asked bin Laden why there were no training materials provided in the English language.

31. After the accused completed his first two al Qaeda training courses, Muhammad Atef (a/k/a Abu Hafs al Masri), then the military commander of al Qaeda, summoned and individually interviewed certain attendees. The accused was interviewed about: his background; knowledge of Usama bin Laden; al Qaeda; his ability to travel around the world, to include Israel. After this interview with Muhammed Atef, the accused attended al Qaeda's urban tactics training course at Tarnak Farm.

32. In or about June 2001, the accused traveled to Tarnak Farm and participated in the training in a mock city located inside the camp, where trainees were taught how to fight in an urban environment. This city tactics training included: marksmanship; use of assault and sniper rifles; rappelling; kidnapping techniques; and assassination methods.

33. In or about August 2001, the accused participated in a four-week al Qaeda course on information collection and surveillance at an apartment in Kabul, Afghanistan. This surveillance training included weeks of: covert photography; use of dead drops; use of disguises; drawing diagrams depicting windows and doors; documenting persons coming and going to and from certain structures; and, submitting reports to the al Qaeda instructor, who cited the al Qaeda bombing of the USS Cole as a positive example of the uses for their training. The course also included practical application where the accused and other student operatives conducted surveillance of various locations in Kabul, including the former American and British Embassy buildings. During this training, the accused personally conducted intelligence on the former American Embassy building.

34. After the surveillance course, the accused returned to Kandahar, where he received instruction from members of al Qaeda on the meaning of *jihad*. The accused also received instruction from other al Qaeda members or associates on their interpretation of Islam, the meaning and obligations of *jihad*, and related topics, at other al Qaeda training camps in Afghanistan.

35. On or about September 9, 2001, the accused traveled to Pakistan to visit a Pakistani friend. While at this friend's house, the accused watched television footage of the September 11, 2001 attacks on the United States, and the friend has said he interpreted the accused's gestures as approval of the attacks. The accused had no specific knowledge of the attacks in advance.

36. On or about September 12, 2001, the accused returned to Afghanistan to join with al Qaeda. The accused had heard reports that the attacks were conducted by al Qaeda and that America was blaming Usama bin Laden.

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37. On or about the first of October, Saif al Adel--then al Qaeda's deputy military commander and head of the security committee for al Qaeda's *shura* council, who was organizing al Qaeda forces at locations where it was expected there would be fighting against the United States, Northern Alliance, or other Coalition forces--informed Mr. Hicks that he could go to three different locations to position himself with combat forces (city, mountain, or airport). Mr. Hicks chose to join a group of al Qaeda and Taliban fighters near the Kandahar Airport.

38. The accused traveled to the Kandahar Airport and was issued an Avtomat Kalashnikova 1947 (AK-47) automatic rifle. On his own, however, the accused armed himself with six (6) ammunition magazines, approximately 300 rounds of ammunition, and three (3) grenades to use in fighting the United States, Northern Alliance, and other Coalition forces.

39. On or about October 7, 2001, when the Coalition Forces initiated a bombing campaign at the start of Operation Enduring Freedom, the accused had been at the Kandahar airport for about two weeks and entrenched in the area where the initial military strikes occurred. At this site, other al Qaeda forces were in battle positions based a couple of hundred meters in all directions, and were under the direction of another al Qaeda leader.

40. On or about October 10, 2001, after two nights of bombing, the accused was reassigned and joined an armed group outside the airport where he guarded a Taliban tank. For about the next week the accused guarded the Taliban tank, and every day received food, drink, and updates on what was happening from the fat al Qaeda leader in charge who was on a bicycle.

41. The accused heard radio reports that fighting was heavy at Mazar-e Sharif, that Kabul would be the next target, and that western countries, including the United States, had joined with the Northern Alliance.

42. The accused implemented the tactics that he had learned with al Qaeda and attempted to train some of the others positioned with him at Kandahar. After apparent resistance to his training, and no enemy in sight at the time in Kandahar, the accused decided to look for another opportunity to fight in Kabul.

43. On or about October 17, 2001, the accused told the fat al Qaeda leader of his plans, and then traveled to Kabul. The accused also took his weapon and all his ammunition.

44. The accused arrived in Kabul and met a friend from LET, who told the accused he was headed to the front lines in Konduz. The accused asked to travel with his LET friend.

45. On or about November 9, 2001, the accused and his LET friend arrived at Konduz, the day before Mazar-e Sharif was captured by the Northern Alliance and U.S. Special Forces. Sometime after the accused arrived at Konduz, he went to the frontline outside the city for two hours where he joined a group of al Qaeda, Taliban, or other associated fighters, engaged in combat against Coalition forces. The accused spent two hours on the frontline before it collapsed and was forced to flee. During the retreat, the accused saw bullets flying and Northern Alliance tanks coming over the trenches.

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46. The accused spent two to three days walking back to Konduz while being chased and fired upon by the Northern Alliance.

47. The accused made it safely back to the city of Konduz, where he approached some of the Arab fighters and asked about their plans. The Arabs fighters said they were going to stay in Konduz in order to fight to the death. The accused, instead, decided to use his Australian passport to flee to Pakistan.

48. The accused then moved within Konduz to a *madafah*, an Arab safe house. The accused wrote a note for his LET associates that said not to come look for him because he was okay, and then ran away from the safe house. At this time the accused still had his weapon, and went to find a shopkeeper that he had met a few days earlier in the city market area. The shopkeeper took the accused to his home where he stayed for about three weeks. Later, the shopkeeper gave the accused some clothes and helped the accused sell his weapon so he could pay for a taxi to Pakistan.

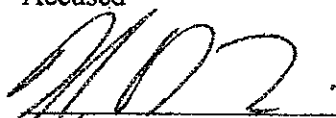
49. In or about December 2001, one week after the control of Konduz changed from the Taliban to the Northern Alliance, the accused took a taxi and fled towards Pakistan. However, the accused was captured without any weapons by the Northern Alliance in Baghlan, Afghanistan.

50. The accused acknowledges that he has never been the victim of any illegal treatment at the hands of any personnel while in the custody or control of the United States. This acknowledgement includes the entire period after the accused was captured and transferred to U.S. custody in Afghanistan on or about 15 December 2001. The acknowledgment also includes the entire period for which the accused was detained by the United States at Guantanamo Bay, Cuba. The term "illegal treatment" means any treatment in violation or contravention of Common Article III of the Geneva Conventions, the Convention Against Torture, the Detainee Treatment Act, and Title 18 of the U.S. Code.



DAVID M. HICKS
Accused

29/3/07
DATE



MICHAEL D. MORI
Major, U.S. Marine Corps
Detailed Military Defense Counsel

29 MAR 07
DATE



KEVIN M. CHENAIL
Lieutenant Colonel, U.S. Marine Corps
Prosecutor

07 03 29
DATE

APPENDIX "C"

UNITED STATES)
)
 v.) OFFER FOR A PRETRIAL
) AGREEMENT
 DAVID MATTHEW HICKS) Date: 26 March 2007

1. I, David Matthew Hicks, am presently the accused under a military commissions charge that was sworn on February 2, 2007, and referred to trial on March 1, 2007. I have read the charge and specifications alleged against me, and they have been explained to me by my detailed military defense counsel, Major Michael D. Mori, and my civilian defense counsel, Mr. Joshua L. Dratel. I understand the charge and specifications, and am aware that I have a legal right to plead not guilty and to leave upon the United States the burden of proving my guilt beyond a reasonable doubt by legal and competent evidence. Understanding the above and under the conditions set forth below, and in consideration of the Convening Authority's agreement to approve a sentence in accordance with the limitations set forth in Appendix A, I offer to plead as follows:

To Specification 1 of the Charge and the Charge: Guilty

I understand that this offer, when accepted by the Convening Authority, will constitute a binding agreement. I assert that I am, in fact guilty of the offense to which I am offering to plead guilty, and I understand that this agreement absolves the United States of its obligation to present any evidence in court to prove my guilt. I offer to plead guilty, freely and voluntarily, because I am guilty, and because it will be in my best interest that the Convening Authority grant me the relief set forth in Appendix A. I understand that I waive my right to avoid self-incrimination insofar as a plea of guilty will incriminate me.

2. Furthermore, upon acceptance of this offer by the Convening Authority:
 - a. I agree that I will enter into a reasonable stipulation of fact with the United States to support the elements of the offenses to which I am pleading guilty.
 - b. I agree that I will not communicate with the media in any way regarding the illegal conduct alleged in the charge and the specifications or about the circumstances surrounding my capture and detention as an unlawful enemy combatant for a period of one (1) year. I agree that this includes any direct or indirect communication made by me, my family members, my assigns, or any other third party made on my behalf.

- c. I agree that as a material term of this agreement I will cooperate fully, completely and truthfully in post-trial briefings and interviews as directed by competent United States or Australian law enforcement and intelligence authorities. I agree to provide truthful, complete and accurate information and, if necessary, truthful, complete and accurate testimony under oath at any grand juries, trials or other proceedings, including military commissions and international tribunals. I understand that if I testify untruthfully in any material way I can be prosecuted for perjury. I further agree to provide all information concerning my knowledge of, and participation in al Qaeda, Lashkar-e Tayyiba (LET), or any other similar organizations. I agree that I will not falsely implicate any person or entity, and I will not protect any person or entity through false information or omission.
- d. I hereby assign to the Government of Australia any profits or proceeds which I may be entitled to receive in connection with any publication or dissemination of information relating to the illegal conduct alleged in the charge sheet. This assignment shall include any profits and proceeds for my benefit, regardless of whether such profits and proceeds are payable to me or to others, directly or indirectly, for my benefit or for the benefit of my associates or a current or future member of my family. I hereby represent that I have not previously assigned, and I agree that I will not circumvent this assignment to the Government of Australia by assigning, the rights to my story to an associate or to a current or future member of my family, or to another person or entity that would provide some financial benefit to me, to my associates, or to a current or future member of my family. Moreover, I will not circumvent this assignment by communicating with an associate or a family member for the purpose of assisting or facilitating his or her profiting from a public dissemination, whether or not such an associate or other family member is personally or directly involved in such dissemination. I agree that this assignment is enforceable through the Australian Proceeds Act of 2002, and any other applicable provision of law that would further the purpose of this paragraph's prohibition of personal enrichment for myself, my family, or my heirs and assigns, through any publication or dissemination of qualifying information, and I acknowledge that my representations herein are material terms of this agreement.

3. In making this offer, I state that:

- a. I am satisfied with my detailed military defense counsel, Major Michael D. Mori, and my civilian defense counsel, Mr. Joshua L. Dratel, who have advised me with respect to this offer, and I consider them competent to represent me in this military commission and agree that they have provided me effective assistance of counsel.

- b. No person or persons have made any attempt to force or coerce me into making this offer or to plead guilty. This is a free and voluntary decision on my part made with full knowledge of its meaning and effect.
- c. My counsel have fully advised me of the nature of the charge and specifications against me, the possibility of my defending against them, any defense that might apply, and the effect of the guilty plea that I am offering to make. I fully understand the advice of my defense counsel and the meaning, effect, and consequences of this plea.
- d. I understand that the signature of the Convening Authority to this offer and to Appendix A, or to any modified version of Appendix A which I also sign, will transform this offer into an agreement binding upon me and the United States.
- e. I understand and agree that the Convening Authority can withdraw from this agreement and this agreement will become null and void, in the event that:
 - 1. I fail to plead guilty as required by this agreement;
 - 2. The commission refuses to accept my plea of guilty to any charge;
 - 3. The commission sets aside my plea of guilty for whatever reason, including upon my request, before sentence is announced; or
 - 4. I fail to satisfy any material obligation or term of this agreement, or I have misrepresented any material term of this agreement.
 - 5. I fail to agree to a satisfactory stipulation of fact with the prosecution related to the charge and specification to which I plead guilty.
- f. I understand and agree that, if this agreement becomes null and void for any reason, my offer for this plea agreement cannot be used against me in any way at any time to establish my guilt of the charge alleged against me, the United States may prosecute the charge and specifications alleged against me, and the limitations upon the disposition of my case set forth in Appendix A will have no effect.
- g. I understand and agree that my failure to fully cooperate with Australian or United States authorities may delay my release from confinement or custody under applicable provisions of Australian law.
- h. I acknowledge and agree that I am an alien unlawful enemy combatant, as defined by the Military Commissions Act of 2006, Title 10, United States Code, Section 948 (c).
- i. I have never been illegally treated by any person or persons while in the custody and control of the United States. This includes the period after my capture and transfer to U.S. custody in Afghanistan in December 2001, through the entire period of my detention by the

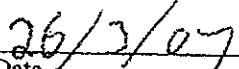
United States at Guantanamo Bay, Cuba. I agree that this agreement puts to rest any claims of mistreatment by the United States.

j. I further understand and agree that the entire period of detention as an unlawful enemy combatant is based upon my capture during armed conflict, has been lawful pursuant to the law of armed conflict and is not associated with, or in anticipation of, any criminal proceedings against me.

4. In exchange for the undertakings made by the United States in entering this Pretrial Agreement, I voluntarily and expressly waive all rights to appeal or collaterally attack my conviction, sentence, or any other matter relating to this prosecution whether such a right to appeal or collateral attack arises under the Military Commissions Act of 2006, or any other provision of United States or Australian law. In addition, I voluntarily and expressly agree not to make, participate in, or support any claim, and not to undertake, participate in, or support any litigation, in any forum against the United States or any of its officials, whether uniformed or civilian, in their personal or official capacities with regard to my capture, treatment, detention, or prosecution.
5. I agree that for the remainder of my natural life, should the Government of the United States determine that I have engaged in conduct proscribed by Sections 950q. through w. of Chapter 47A of title 10, United States Code, after the date of the signing of this Pretrial Agreement, the Government of the United States may immediately invoke any right it has at that time to capture and detain me, outside the nation of Australia and its territories, as an unlawful enemy combatant. If I engage in conduct proscribed by Sections 950q. through w. of Chapter 47A of title 10, United States Code, after the date of the signing of this Pretrial Agreement and during the period in which any part of my sentence is suspended, the Convening Authority may vacate any period of suspension agreed to in this Pretrial Agreement or as otherwise approved by the Convening Authority and the previously suspended portion of my sentence could be imposed on me. This pretrial agreement resolves all charges against me under the Military Commissions Act of 2006 and United States law that may have occurred before the signing of this agreement.
6. This document and Appendix A include all of the terms of this Pretrial Agreement and no other promises or inducements have been made by the Convening Authority or any other person which affect my offer to plead guilty or enter into this Pretrial Agreement.




DAVID MATTHEW HICKS
Accused



Date

We certify that we provided David Matthew Hicks the advice referred to above and explained to him the elements of the offenses to which he is pleading guilty, and that he has voluntarily signed this offer for pretrial agreement.

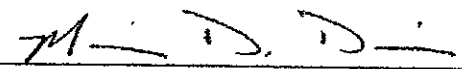

MICHAEL D. MORI, Major, USMC
Detailed Military Defense Counsel

26 MAR 07
Date


JOSHUA L. DRATEL
Civilian Defense Counsel


26 Mar 07
Date

I recommend (acceptance) (~~rejection~~) of this offer.


MORRIS D. DAVIS, Colonel, USAF
Chief Prosecutor

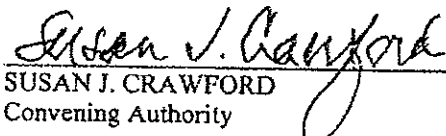
26 MAR 07
Date

I recommend (acceptance) (~~rejection~~) of this offer.


THOMAS L. HEMINGWAY, Brig. Gen., USAF
Legal Advisor to the Convening Authority


26 March 2007
Date

The foregoing instrument, including Appendix A., concerning David Matthew Hicks, dated March 26, 2007 is (approved and accepted) (~~disapproved~~). SJC


SUSAN J. CRAWFORD
Convening Authority

26 March 2007
Date

We certify that we gave David Matthew Hicks the advice referred to above and explained to him the meaning and effect of the foregoing, and he has voluntarily signed this Appendix A.



MICHAEL D. MORI, Major, USMC
Detained Military Defense Counsel

26 MAR 07
Date


JOSHUA L. DRATEL
Civilian Defense Counsel


26 Mar 07
Date

I recommend (acceptance) (~~rejection~~) of this Appendix A.


MORRIS D. DAVIS, Colonel, USAF
Chief Prosecutor

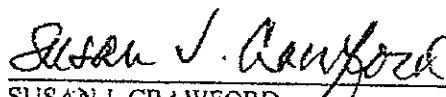
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Date

I recommend (acceptance) (~~rejection~~) of this Appendix A.


THOMAS L. HEMINGWAY, Brig. Gen., USAF
Legal Advisor to the Convening Authority

26 March 2007
Date

The foregoing Appendix A is ^{SIC} (approved) (~~disapproved~~) ^{SIC} in conjunction with the pretrial agreement dated March 26, 2007.


SUSAN J. CRAWFORD
Convening Authority

26 March 2007
Date