The War on Terrorism: Is the Rule of Law at Risk?

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This paper focuses on the 'War on Terrorism', the war in Afghanistan, the rule of law and David Hicks (the Australian detained for five years at Guantanamo Bay, and the first detainee processed by the special US Military Commission system).

Firstly, some background. The al Qaeda organization, with Osama bin Ladin as its emir or leader, is said to have been formed in or about 1989. One of its stated goals is to support violent attacks against property and nationals (both military and civilian) of the United States of America and other countries for the purpose of, inter alia, forcing the US to withdraw its forces from the Arabian Peninsula, and to oppose US support of Israel. In August 1996 bin Ladin issued a public "Declaration of Jihad Against the Americans". This was followed in February 1998 by a fatwa (a purported religious ruling) to similar effect under the banner "International Islamic Front for Fighting Jews and Crusaders".

In furtherance of this declaration of holy war against America, and well before the infamous 9/11 attacks in New York and Washington, al Qaeda had targeted American interests by, for example, attacking the US Embassies in Kenya and Tanzania in August 1998 and attacking the USS Cole in October 2000. Thus the 9/11 attacks, horrendous as they were, need to be seen as an escalation rather than as the beginning of bin Ladin's holy war. President Bush responded, initially, by declaring a "crusade" against terrorism, quickly amended to a war on terrorism when the implications of a "crusade" became apparent.

However useful it may be to use the rhetoric of war in order to marshal public support for a particular cause, be it a war on poverty, a war on hunger, a war on drugs or, in the present case, a war on terrorism, it is of fundamental importance, in my view, to bear in mind that the imagery of war can be misleading. Rhetorical wars of this nature can never be won; they never end[1]. Thus, a war on terrorism is not a "war" in any conventional sense to which the Geneva Conventions apply, although it may lead to wars, properly so called, such as those in Afghanistan and Iraq.

This distinction between rhetoric and reality is, in my view, of vital importance when evaluating the status of individuals such as the Australian, David Hicks, captured during the Afghanistan war and held at Guantanamo Bay by the USA. From the outset, the Bush Administration has sought, by every means possible, to deny the detainees any rights under the American Constitution, under American domestic law

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[1] cf. *What Terrorists Want; Understanding the Enemy, Containing the Threat* by Louise Richardson, John Murray Press (2006)

or under the Geneva Conventions. So far as the Bush Administration was concerned, the Guantanamo detainees were in a legal no-man's land, to be held for as long as, and under such conditions as, the executive arm of government saw fit, without the detainees having access to, and without the Administration being answerable before, the courts of the USA. Such an assertion of absolute unreviewable executive authority challenges the very foundations on which the rule of law is built.

The mindset underpinning this doctrine of absolute executive power was clearly exposed in the argument presented by the Bush Administration in Re Guantanamo Detainees[2]. As the Court noted[3]:

> *"It is the Government's position that once someone has been properly designated as (an unlawful enemy combatant), that person can be held indefinitely until the end of America's war on terrorism, or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the US or its allies."*

Effectively, as it seems to me, the Bush Administration was arguing that the only relevant "war" was the rhetorical war on terrorism. The fact that the detainees may have been captured in the course of a real war to which the Geneva Conventions applied was seen as irrelevant. As a consequence, the Administration asserted, in effect, that the detainees had no legal rights. This is a classic example, in my view, of a government believing its own rhetoric. Fortunately, as we will see, the US Supreme Court brought the Administration back to some degree of reality

In another major assault upon the rule of law, the Bush Administration has done everything in its power to prevent detainees from availing themselves of the ancient writ of habeas corpus as a means of challenging before American federal courts the legality of their detention. The US Supreme Court has thus far resisted the Administration's attempts, but the battle between Congress and the Supreme Court is far from over.

In Rasul v. Bush[4] the Court held that, although the detainees may be held on Cuban soil, the court nevertheless retained jurisdiction over the Bush Administration as the custodian of the detainees. The Republican-dominated US Congress tried to negate this decision by passing the Detainee Treatment Act of 2005, which purported to strip away any jurisdiction of the courts to grant habeas corpus in respect of Guantanamo detainees. In Hamdan v. Rumsfeld[5], however, the Supreme Court held (amongst other things) that the relevant provisions of the Detainee Treatment Act were not effective to remove federal court jurisdiction over habeas applications that were pending at the date of commencement of the Act. The Congress, in its turn, then passed the Military

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2 355 F.Supp. 2d 443 (31 Jan 31 2005)
3 at 447
4 542 US 466 (2004)
5 126 Sup. Ct 2749 (29 June 2006)

Commissions Act of 2006, which the President signed into law on 17 October 2006, under which Congress again sought to negate both the Rasul and the Hamdan decisions by enacting that the exclusion of habeas jurisdiction applied to "all cases, without exception, pending on or after the date of the enactment".

In al Odah v USA, a decision handed down on 20 February 2007, the US Court of Appeals for the District of Columbia, by a 2 to 1 majority, held that the new provisions were clearly sufficient to exclude jurisdiction over pending habeas applications and that it was not in breach of the US Constitution for Congress to do so. Given the importance of the issue and that this was a split decision, it seems likely that the al Odah decision will be appealed to the Supreme Court. However, what emerges clearly from this brief history is the determination of the Bush Administration to deny Guantanamo detainees access to the American system of justice.

In parallel with the habeas cases, another major battle over the rule of law is being fought out in the US Supreme Court over the lawfulness, and ultimately the constitutionality, of the Military Commissions process. President Bush's first attempt to establish Military Commissions by presidential decree was held by the US Supreme Court in Hamdan v Rumsfeld to be in excess of any lawful authority granted to him by Congress. Contrary to the arguments advanced by the Bush Administration, the Court further held that the Military Commissions, as so established, were not in accordance with either the Uniform Code of Military Justice or with the applicable provisions of the Geneva Conventions.

In rejecting the Bush Administration's arguments that Guantanamo detainees had no enforceable rights under the Geneva Conventions, the Court held that, whilst the detainees may not be entitled to the full protection accorded to prisoners of war, they were nevertheless entitled, as a minimum, to the protection accorded under the Conventions against the passing of sentences without previous judgment "by a regularly constituted court affording all the judicial guarantees…recognised as indispensable by civilised peoples"[6].

In a ringing affirmation of the fundamental importance of the rule of law, even in times of national emergency, the Court held that:

"Even assuming that Hamdan is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal justice."

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[6] Common Article 3 of the Geneva Conventions

In response to the Hamdan decision, President Bush asked the Republican-dominated US Congress to enact the Military Commissions Act 2006 which gave Congressional approval to the establishment of slightly modified Military Commissions. Congress purported to declare that the new Commissions afforded all the judicial guarantees required under Common Article 3 of the Geneva Conventions. The new Commissions, however, suffer from many of the same defects that bedevilled the earlier Commissions that Bush attempted to establish by Presidential decree.

For example, the Bush Administration is still far too closely involved in the processes of the Commissions for them to have the appearance of independence from the Executive arm of government. In particular, the power conferred on the Secretary of Defence to determine the procedures of the Commissions, and the rules of evidence that are to apply, are clearly designed to make it easier than it would be before a regularly-constituted civil or military court to obtain a conviction

The Secretary of Defence, who was responsible for approving the rules that permitted the use of coercive interrogation techniques on prisoners at Guantanamo and elsewhere, was authorised by the Act, in effect, to tailor the rules of evidence in such a way as to facilitate the admission into evidence of statements obtained under the methods of coercion that he (or his predecessor in office) approved. The presiding Military Judge has to decide whether the coerced statement "is reliable and possessing sufficient probative value" and whether the interests of justice would be served by admitting the coerced statement into evidence.

In my view, however, this places the judge in an impossible position because the common law has long set its face against the admission into evidence of any statement that was not free and voluntary. The interests of justice unequivocally require that such statements be excluded. In addition, hearsay evidence may be admitted, except where the accused "demonstrates that the evidence is unreliable or lacking in probative value". Such rules, in my view, have no place in a court where the life or liberty of the accused is at stake.

The new Military Commissions have been condemned as unfair by leading lawyers and human rights groups in Australia and elsewhere in the western world. On 9 November 2006, a group of eminent lawyers headed by the Hon Alastair Nicholson, who was the former Chief Judge of the Family Court and the former Judge Advocate General of the Australian Defence Force, published an opinion in which they concluded that a trial before a Military Commission would contravene the standards for a fair trial required under both international and Australian law[7]. In particular, it

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[7] *Opinion: David Hicks – Military Commissions Act 2006 – Compliance with Common Article 3 of the Geneva Conventions, the Hamdan decision and Australian law*, signed by The Hon Alastair Nicholson AO RFD QC, Former Judge Advocate General of the Australian Defence Force, Honorary Professorial Fellow, Department of Criminology, University of Melbourne; Peter Vickery QC, Special Rapporteur, International Commission of Jurists, Victoria,; Professor Hilary Charlesworth, Professor of International Law and Human Rights, Australian National University; Professor Andrew Byrnes, Professor of International Law, University of New South Wales. Gavan

was their view that the Commissions would fail to afford all the judicial guarantees required under Common Article 3 of the Geneva Conventions. The Law Council of Australia, representing lawyers throughout Australia, joined in the condemnation of the revised Commission process as unfair.

From the outset, the Howard Government substantially ignored these criticisms and gave its full support to the Bush Administration in its determination to bring Hicks to trial before a military commission. Its only response was to seek, and to accept without question, the predictable assurances from the Bush Administration that Hicks would receive a fair trial.

Unlike the United Kingdom Government, it never protested over the Bush Administration's actions. In particular, it chose to ignore the condemnation by one of Britain's most senior judges of the original military commission process as a "monstrous failure of justice"[8]. At no stage did the Howard Government engage seriously with the opinions expressed by eminent lawyers in Australia and the United Kingdom about the unfairness of the trial process as such.

In similar fashion, in the face of repeated claims that Hicks has been subjected to torture or, at the least, to cruel, inhuman and degrading treatment, with prolonged periods of solitary confinement that have allegedly affected his mental health and well-being, the Australian Government has remained largely unmoved and has been happy to accept the Bush Administration's assurances that Hicks is not being ill-treated. The only issue on which it showed any serious concern was over the inordinate delays in having Hicks brought to trial – delays that, in an election year, were causing the Government some embarrassment[9].

Although the Military Commissions Act acknowledges that, in a trial before the Commission, an accused person is entitled to the presumption of innocence, both the Bush Administration and the Howard Government repeatedly abused this fundamental principle underpinning the rule of law. Donald Rumsfeld, the former US Secretary of Defence, often described the Guantanamo detainees as "the worst of the worst" and as far too dangerous to be released, even if found not guilty of any offence. President Bush has referred to them as "ideologically ruthless fanatics who would kill Australians and Americans without blinking an eye".

This claim was repeated in 2007 by the current US Ambassador to Australia, Robert McCallum, in a speech to the National Press Club. The camp commandant of the Guantanamo Base[10] also in early 2007 described Hicks as a "terrorist", a highly pejorative term intended to arouse fear and loathing in the minds of the public. In my

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Griffith QC; and Professor Tim McCormack, Australian Red Cross Professor of International Humanitarian Law, University of Melbourne. www.criminology.unimelb.edu.au/staff/alastair_nicholson/

[8] Lord Steyn, BBC News, 26 November 2003 – *'Top UK Judge slams Camp Delta'*

[9] See later for recent developments on these issues.

[10] Navy Rear Adm. Harry B. Harris, commander of Joint Task Force Guantanamo

view, such descriptions, which presumed Hicks' guilt of despicable crimes, could not have failed to prejudice a fair trial. They were calculated to undermine the rule of law and the presumption of innocence.

The Australian Government never once made any public protest over, or repudiation of, these highly prejudicial accusations. On the contrary, Government Ministers were quite happy, as usual, to follow the Bush Administration's lead in demonising Hicks.

The three charges that were laid against Hicks before the original Military Commission (conspiracy, aiding the enemy, and attempted murder) all lapsed after the Supreme Court, in Hamdan, declared that the Commissions were unlawful. Not one of these charges was viable.

The original charge of conspiracy was abandoned, doubtless because four of the Judges in Hamdan made it clear that, in their opinion, such a charge could not be prosecuted before a Military Commission. Conspiracy, they said, "is not a recognised violation of the law of war".

The charge of aiding the enemy was dropped because it is an offence that can only be committed by a person who "in breach of an allegiance or duty to the United States knowingly and intentionally aids an enemy of the United States." Plainly, this offence could not have been committed by Hicks, an Australian.

As to the charge of attempted murder, the Chief Prosecutor of the Office for Military Commissions at Guantanamo, Colonel Moe Davis, sought to reactivate this charge before the new Military Commission. However, on 2 March 2007, the day after I presented the original version of this paper, the convening authority, Judge Susan Crawford, refused to allow the charge to proceed to trial.

The following is a summary of the main points that I made on that occasion, prior to Judge Crawford's decision, explaining why, in my view, the attempted murder charge was unsustainable.

- As drafted, the charge was little more than an "ambit" claim alleging that, in Afghanistan (no places specified), between 12 September 2001 and December of that year, when Hicks was captured by Northern Alliance forces, Hicks was attempting to murder US, Northern Alliance and other Coalition forces by "directing small arms fire, explosives, or other means or methods with intent to kill".

- However, during the period from 12 September until 7 October 2001, when President Bush ordered the invasion of Afghanistan, there were no US/ Coalition forces in the Taliban-controlled regions of Afghanistan for Hicks to shoot at.

- Between 7 October 2007 and early November of that year, it is clear from the allegations made by the prosecution that there was no ground fighting between Taliban and US/Coalition forces in either Khandahar or Kabul, where Hicks was based.

- The only occasion on which Hicks is alleged to have been in contact with US, Coalition or Northern Alliance troops was in mid-November 2001, near the city of Konduz. It was alleged that he joined a group of Taliban/al Qaeda fighters and spent two hours on the front line before it collapsed and he was forced to flee for his life. Even then, however, the prosecution conceded that there was no evidence to prove that Hicks ever hurt or injured US or Coalition forces, or that he even pulled the trigger of his AK 47 rifle[11].

- It was some weeks later, after Hicks had allegedly sold his rifle to raise enough money to get to Pakistan by taxi, that he was captured by Northern Alliance fighters and handed over to the Americans.

- Colonel Davis nevertheless asserted his belief "that the evidence will show that he (Hicks) did everything humanly possible to engage against US forces and to kill US forces and it was lack of opportunity that kept him from achieving his objective".

- In my view, however, hypothetical speculation as to what an accused person might or might not have done had the opportunity presented itself, has no place in a criminal trial where the prosecution carries the onus of proving beyond reasonable doubt each and every element of the offence as charged. One of those elements requires proof of the doing of some act in furtherance of the alleged intention to kill.

- In the absence of such evidence, it was my view that the charge, as framed could not be substantiated. This was an opinion that Judge Crawford obviously shared.

In the result, the original Military Commission process should be seen, in my view, for what it in truth was, namely an attempt by the Bush Administration to perpetrate a gross miscarriage of justice. Everything about the original process was wrong: The President exceeded his lawful authority by attempting to set up the commission process by presidential decree; the trial process failed to provide all the judicial guarantees of a fair trial required under the Geneva Conventions; and not one of the charges was sufficiently viable to be able to go to trial. Fortunately, this attempt was frustrated by the principled intervention of the US Supreme Court in Hamdan.

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[11] See interview with Colonel Davis reported in *The Age* newspaper on 3 February 2007

Yet, this was the deeply flawed process to which the Howard Government gave its enthusiastic support. The Prime Minister even went so far as to suggest that if Hicks' lawyers had not taken up so much time in legal challenges, his case could have been heard long ago. This mindset of blaming an accused person for attempting, successfully as it turned out, to prevent a gross miscarriage of justice should be deeply disturbing to all Australians.

The only charge that Judge Crawford approved to proceed to trial before the new Commission was the "new" charge under s.950v (b) (25) of the Military Commissions Act of 2006 (MCA) of "providing material support for terrorism". In my view, however, there is no justification in law for the charge.

Section 950v (b) of the MCA, in which the offence charged against Hicks appears, lists the offences triable by military commissions established under the Act. In s.950p of the Act, Congress explained that its purpose in listing these offences was not to create any new crimes that did not exist before the enactment of the MCA. Rather, its intention was to codify (that is, to bring together in a restatement of pre-existing law) "the offences that have traditionally been triable by military commissions" and which, therefore, may be tried before the commissions established under the MCA. Congress went on to say that, "because the provisions of this subchapter… are declarative of existing law, they do not preclude trial for crimes that occurred before the date of enactment of the chapter."

In s.950p, Congress was asserting that each of the offences "codified" in s.950v (b) is an offence that (i) existed prior to the enactment of the MCA and (ii) has "traditionally been triable by military commissions". An offence that does not satisfy both these criteria is not, on the face of it, an offence that Congress intended to codify under this section. Moreover, the requirement that the offence must have "traditionally been triable by military commissions", clearly necessitated that the offence in question should have its roots deep in the customary or convention-based Law of War, with a long history of trial by military commissions.

Hicks' lawyers claimed that the offence of providing material support for terrorism with which Hicks was charged (s.950v (b) (25)) is not the codification of an offence that existed prior to the enactment of the MCA, but rather is an attempt by Congress to create a new offence retrospectively. Major Mori, Hicks' US military lawyer, said in an interview on ABC News Online on 2 March 2007 that the offence "never existed in the Law of War, in any US law of war manuals, or in any Australian law of war manuals."

These arguments received strong support from leading Australian lawyers. On 8 March 2007, the Law Council of Australia published an Advice written by the Nicholson group earlier referred to, in which they expressed the opinion that the alleged offence of providing material support to terrorism did not constitute a war

crime contrary to the Law of War prior to the enactment of the Military Commissions Act in October 2006. In their view, "the offence as charged is wholly unknown in the Law of War", not least because there is simply no international consensus as to the definition of "terrorism"[12].

Accordingly, in their opinion, s.950v (b) (25) was not a codification of any pre-existing Law of War; it was "a recently invented and new war crime" created with the passing of the MCA, which was "clearly retrospective in its application to David Hicks". As the creation of retrospective (ex post facto) criminal laws is in breach of the US Constitution, it was their opinion that s.950v (b) (25) is "unconstitutional and invalid on its face".

In an interview on ABC-AM on 5 February 2007, Colonel Davis, the Chief Prosecutor at Guantanamo, had rejected the argument that this was a "new" offence, claiming on the contrary that s.2339 of the US Criminal Code (USC, Title 18) had created an offence of providing material support for terrorism a decade ago.

It appears that the section that Colonel Davis actually had in mind was either s.2339A or s.2339B of the US Criminal Code. The former section, which was introduced into the Code in 1994, created an offence of "providing material support to terrorists", whilst the latter section, which was added in 1996, created an offence of "providing material support to a designated terrorist organization".

However, for the reasons given in the Nicholson group Advice dated 8 March 2007, neither of these sections of the US Criminal Code was capable of applying to anything done by Hicks in Afghanistan in 2001. Moreover, as they pointed out, neither of these offences is the "mirror image" of the "new" offence of providing material support to terrorism set out in s.950v (b) (25) of the MCA. The differences between the Criminal Code offences and the "new" offence triable before a military commission "are not superficial, they are substantive." In other words, the offence that Congress purported to "codify" in s.950v (b)(25) is, in fact, a new offence that was previously unknown either in US domestic law or under the Law of War.

Even if the "new" offence in the MCA had been expressed in identical language to that of either of the Criminal Code offences, it would still have been fatally flawed, because offences under ss.2339A and 2339B of the US Criminal Code are domestic offences triable by US civil courts; they are not offences that have traditionally been triable by military commissions as stipulated in s.950p of the MCA.

Moreover, one is entitled to ask why, if the offence of providing material support for terrorism is an offence that has traditionally been triable by military commission, Hicks was not charged with this offence at the outset. The reason, in my view, is that,

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[12] *Advice; In the Matter of the Legality of the Charge against David Hicks.* www.lawcouncil.asn.au/shared/2435666621.pdf

under the guise of "codifying" a pre-existing offence said to have been so triable, Congress attempted to convert a differently expressed offence under the US Criminal Code, that was only triable by US domestic courts, into an offence triable by military commissions, with indeterminate retrospective operation. As earlier noted, the creation of retrospective (ex post facto) criminal laws is in breach of the US Constitution.

The only doubtful issue, in the view of the Nicholson group, was "whether Hicks, as a non-citizen held outside the sovereign territory of the United States" had the standing to seek a remedy before the US federal courts for the violation of the principle of non-retrospectivity". Even if the Supreme Court had decided that he did, it is obvious that the resolution of these issues would be likely to have taken years rather than months, during which time Hicks would have remained in detention at Guantanamo.

It was scarcely surprising, therefore, that faced with the prospect of further indefinite detention if he were to continue his fight for justice, Hicks decided to enter into a plea bargain under which he would plead guilty to the charge of providing material support to a terrorist organization. This decision was publicly announced at a preliminary hearing of the military commission appointed to hear his case on 30 March 2007. The Stipulation of Facts dated 29 March 2007[13], recited the facts that Hicks was said to have "knowingly and voluntarily" agreed were true, including the fact that he had trained at al Qaeda camps in Afghanistan in the period of some nine months prior to the 11 September 2001 aircraft attacks, and that he had joined with Taliban forces in Afghanistan immediately following those attacks.

Despite having earlier made serious allegations of mistreatment at the hands of his captors, Hicks acknowledged in the Statement that he had not been the victim of any "illegal" treatment at Guantanamo. What this actually means is far from clear. In my view, there is simply too much credible evidence of prisoner abuse at Guantanamo for this acknowledgement to be taken at face value[14]. Moreover, if prisoners held at Guantanamo were not subjected to human rights abuses, the question may reasonably be asked as to why Congress deemed it necessary, when enacting the MCA, to exclude from evidence statements obtained by "torture", and to allow statements obtained under lesser forms of coercion, including cruel, inhuman or degrading treatment, to be admitted into evidence in some circumstances.

Hicks is also gagged from making any public comment on his ordeal until March 2008. How such a condition can be justified is far from clear. The Australian Government claims that it was not imposed at its behest. Nevertheless, if it is enforceable, it seems to serve the interests of the Howard Government very nicely,

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[12] www.humanrightsfirst.info/pdf/07331-usls-hicks-sof-signed-070329.pdf

[14] See *Guantanamo and the abuse of presidential power* by Joseph Margulies; Simon & Schuster, 2006; cf. *Bad Men* by Clive Stafford Smith and the article *'US lawyer tells of abuse'*, Canberra Times, 7 April 2007

given that it prevents Hicks from revealing how he was treated at Guantanamo until after the Australian federal election in late-2007.

In the result, although Hicks was sentenced to seven years in gaol, without any official credit for the time spent at Guantanamo awaiting trial, the plea bargain ensures that he will spend only nine months in an Australian gaol before being released, under conditions that are not yet known. Doubtless the question will arise as to whether he should be subjected to a control order, assuming that the legislation[15] authorising such orders survives the constitutional challenge by Joseph (Jack) Thomas presently before the Australian High Court.

In an interview by Kerry O'Brien on the 7.30 Report on 4 April 2007, Mr Howard expressed his satisfaction that the right outcome had been reached, because it had been his view from the outset that Hicks was "guilty of aiding a terrorist organization". He pointed out that he had defended the process in the face of a lot of criticism "because I took the view that the interests of justice were better served by him facing a military commission than coming back to Australia where we couldn't charge him with anything".

If Hicks had been charged and convicted, within a reasonable time following his capture, before a properly constituted court of law affording "all the judicial guarantees which are recognised as indispensable by civilised peoples" for an offence that was indisputably in force and applicable to an Australian citizen in Afghanistan in 2001, Mr Howard would be justified in expressing his satisfaction with the result of the military commissions proceedings. However, having ignored the well-founded criticisms of both the trial process itself, and the charge to which Hicks ultimately pleaded guilty, he is not entitled, in my view, to treat the outcome of this deeply flawed military commission process as if it were the verdict of a properly constituted court.

Mr Howard's unquestioning faith in the fairness of the military commissions process stands in marked contrast to that of Robert Gates, the US Secretary of Defence. Mr Gates has publicly acknowledged the unpalatable truth that the military commission process is seen as tainted by reason of "things that happened earlier at Guantanamo" and "as lacking legitimacy in the eyes of the world".[16]

In my view, this lack of legitimacy is the inescapable consequence of the Bush Administration's determination to do everything possible to place Guantanamo, and the second-rate system of so-called justice established there, beyond the reach of the US Constitution and the American system of justice. The establishment of the military commissions in the legal "black hole" of Guantanamo, in the same military base as the detention centre where abuse of prisoners is widely believed to have occurred,

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[15] See s.104 of the Criminal Code in the Schedule to the Criminal Code Act 1995 (C'wlth)
[16] Canberra Times, 31 March 2007.

together with the weakening of the rules of evidence so as to accommodate the coercive practices employed by US interrogators in seeking to elicit counter-terrorism intelligence, leaves an indelible stain on the military commissions process.

Mr Howard has never explained how the "interests of justice" could possibly be served by Hicks being tried by a military commission under a process that offends some of the most basic principles upon which our system of criminal justice is founded and on a charge that did not exist under the Law of War when Hicks was in Afghanistan in 2001. At no stage has the Government produced any reasoned arguments refuting those advanced by leading Australian lawyers as to the unfairness of the process and the unlawfulness of the charge to which Hicks has ultimately pleaded guilty. Rather it has consistently adopted the Bush Administration's arguments in defending the military commissions process against the interests of an Australian citizen.

Thus, because of their unwillingness to seriously engage with these fundamentally important issues:

- Mr Howard and his senior ministers gave their unqualified support to the military commissions established by President Bush under Military Order dated 13 November 2001 (MC1). They ignored the widespread condemnation of the commissions by eminent Australian and British lawyers, preferring instead to accept the self-serving assurances of the Bush Administration and its lawyers that Hicks would receive a "fair" trial.

- Their confidence in the Bush Administration and its lawyers was in no way diminished by the decision of the US Supreme Court, on 29 June 2006, in Hamdan declaring the Military Order to be in excess of the President's powers and in breach of America's international obligations under the Geneva Conventions.

- They gave unqualified support to the original charges of conspiracy, aiding the enemy and attempted murder laid against Hicks before MC1 on 14 June 2004, insisting, as did the Bush Administration, that these were all serious charges whereas, in fact, not one of them was viable.

- They gave unqualified support to the revised military commission process, established under the MCA of 2006 (MC2), notwithstanding the compelling arguments by the Nicholson group and others that the new trial process was still deeply flawed because it failed to afford "all the judicial guarantees which are recognised as indispensable by civilised peoples". Once again, the Howard Government preferred to accept the assurances of the Bush Administration and its, by now, thoroughly discredited lawyers that Hicks would get a fair trial.

- They gave unqualified support to the "new" charge of providing material support to terrorism, notwithstanding the compelling legal opinion by the Nicholson group that this is a recently invented war crime created with the passing of the MCA which, because of its retrospective operation, was "unconstitutional and invalid on its face". Mr Howard rejected these arguments, preferring instead to rely on the patently flawed contention advanced by Colonel Davis that the offence was not new because it had existed in the US Criminal Code for at least a decade.

The failure of the Howard Government to take any real interest in the fairness of the military commissions process and the legitimacy of the charges against Hicks makes it complicit, in my view, in the injustice perpetrated by the Bush Administration against an Australian citizen. Indeed, the Nicholson group, in their Opinion dated 9 November 2006, warned that Mr Howard and his senior ministers were at serious risk of committing a war crime under the Australian Criminal Code by "urging" or "counselling" a trial that contravenes the standards for a fair trial under Australian law[17].

The uncritical support given by the Howard Government to the US military commission process makes it clear, in my view, that from the outset, Mr Howard and his senior ministers wanted to see Hicks punished, even though he had committed no offence against Australian law by supporting al Qaeda as he did. They were content to leave Hicks at the mercy of his American gaolers, and were not concerned as to either the process by which, or the charge on which, the Bush Administration achieved the desired result. Now that Hicks has pleaded guilty, Mr Howard has focused, predictably, on the "result" of the process, whilst continuing to ignore the compelling arguments as to the flaws in the process itself. In my view, such conduct by the Howard Government strikes at the heart of the rule of law and should be of the deepest concern to every Australian.

Upholding the rule of law is fundamental to the maintenance of a free and democratic society in which every individual is entitled to equality before the law, and in which no one should be deprived arbitrarily of his or her freedom without being accorded due process before a properly constituted court of law. This is especially important in times such as the present, when there is a dramatically heightened public concern over terrorism and possible terrorist attacks.

To insist on the observance of due process and the rule of law is not to condone what David Hicks did. Most Australians, I feel sure, are appalled that any Australian citizen could support a terrorist organization like al Qaeda, particularly after the horrifying attacks of 11 September 2001. But if Hicks committed no offence under Australian law, American law or the Law of War by so doing, it is, in my view, a fundamental breach of the rule of law for the Howard Government to stand by and allow him to be

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[17] See also *'War crime risk for MPs in "retro" case against Hicks'*, the Melbourne Age, 10 February 2007

punished by a foreign government for a non-existent offence under a tainted military commissions process, when, by timely intervention, it could have prevented that injustice from happening.

That is why, in my view, this affair is, ultimately, not just about what Hicks did in Afghanistan; it is about who we are, as an independent freedom loving people, and whether we place respect for the rule of law at the centre of our national ethos. In its handling of the Hicks case, the Howard Government, in my view, has failed to uphold this fundamental principle of the Australian way of life.

Canberra, ACT, April 2007

Note 1. The basis of this paper was originally presented at a Rotary meeting on 1 March 2007. On 2 March 2007, Judge Crawford announced that the charge of attempted murder would not be proceeding, but that the charge of providing material support for terrorism would proceed. The comments regarding the charge of attempted murder were written prior to the Judge's announcement, and have been retained in order to explain why the charge, as framed, was not sustainable.

Note 2. The decision by David Hicks, at the end of March 2007, to plead guilty to the charge of providing material support to terrorism required further modifications to the original paper in order to bring it as up to date as possible.

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* **Allan Hall** graduated in Law at Sydney University in 1953. He was admitted to practice initially as a Barrister of the Supreme Court of NSW and later transferred to the Roll of Solicitors. In 1960 he was also admitted as a Barrister and Solicitor of the Supreme Court of the Australian Capital Territory. He began his legal career as a Legal Clerk and then as a Legal Officer in the Commonwealth Attorney-General's Department in Sydney and later in Canberra (1949-1960).

In 1960 he resigned from the Public Service to establish Snedden and Hall (later Snedden, Hall and Gallop), Solicitors, in Canberra. In 1973, he retired from that firm to become the founding Principal Lecturer in Law at the then Canberra College of Advanced Education, CCAE (now the University of Canberra).
In 1977, he was appointed as a part-time Commissioner of the Australian Law Reform Commission (1977-1979).

He resigned from the CCAE at the end of 1977 in order to take up appointment as the first full-time Senior Member of the newly-established Administrative Appeals Tribunal (Commonwealth), and in 1982 became one of the first two Deputy Presidents of the Tribunal.

Following his retirement from the AAT in 1987, he lectured part-time in Advanced Administrative Law at the ANU and later was appointed as a Visiting Fellow. He has published articles on aspects of administrative law and related constitutional issues and has also been involved in presenting numerous courses and occasional lectures on legal issues for the University of the Third Age in Canberra.

This is Allan Hall's fourth article for Civil Liberties Australia. The others were:

- *The Queen v. Joseph Terrence (Jack) Thomas (a commentary on the Victorian Court of Appeal decision of 18 August 2006);*
- *'Are our rights under threat?' and*
- *David Hicks and The Military Commissions Act of 2006.*

They are available on the same web page from which you accessed this document. If you would like to join or donate to CLA please go to the Home page and click the relevant button, then follow the prompts.