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USA: David Hicks pleads guilty on one count. AI observer attends arraignment at Guantánamo

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At a hearing in Guantánamo on 26 March 2007, in his sixth year of detention and at the start of the US administration's second attempt in the last three years to try him before a military commission, Australian national David Hicks pleaded guilty to one specification under the charge of "providing material support for terrorism".

This plea was made after years of indefinite detention, isolation and allegations of torture and ill-treatment, and after a day in which Hicks' legal representation was reduced by the military judge overseeing the commission. After the plea, proceedings were adjourned and were expected to be reconvened later in the week after the details of the plea had been worked out.

David Hicks was one of 10 detainees to be charged under military commissions established under President George W. Bush's Military Order of 13 November 2001. Those proceedings were halted in November 2004 by a US District Court judge, and ruled unlawful by the US Supreme Court in *Hamdan v. Rumsfeld* in late June 2006. In early March 2007, David Hicks was the first person to be charged under the Military Commissions Act, legislation signed into law by President Bush on 17 October 2006 in response to the *Hamdan* ruling.

On 26 March 2007, David Hicks was arraigned on charges that he had never previously faced, in a system whose rules were issued two months ago. He came into the commission room in tan prison uniform and flip-flops with his hair hanging half way down his back. At his table was Major Dan Mori, his military defense counsel, Joshua Dratel, his civilian defense counsel, and Rebecca Snyder, his assistant military defense counsel.

When the military judge, Marine Colonel Ralph Kohlmann, asked David Hicks if he wanted to keep his current legal representation, Hicks answered that he did, and that he wanted them provided with more assistance. What followed was a direct result of attempting to create a system of justice based on a roughly 200-page manual and which will operate in something approaching a legal vacuum.

Although the afternoon started with David Hicks asking for more support for his legal team, the result was the exact opposite. First, the military judge raised a challenge to the participation of Rebecca Snyder. While insisting that he was not issuing a ruling at this time, Colonel Kohlmann asserted that under his interpretation of the rules she could not represent David Hicks as military defense counsel since she was a civilian in the reserves. He gave David Hicks a choice – Rebecca Snyder could stay and consult but not advocate on his behalf, or she could leave. David Hicks told the judge he did not want her at the table if she could not represent him.

Next, the judge raised an issue with David Hicks' civilian defense counsel of three years, Joshua Dratel. He stated that Dratel had not complied with the commission rules because he had not signed the necessary certification. Joshua Dratel argued that the qualification of a civilian defense counsel under the Rules for Military Commissions requires that in order to appear before a commission, civilian counsel shall "Have signed the agreement prescribed by

the Secretary [of Defense] pursuant to 10 U.S.C. § 949c(b)(3)(E)." The issue at hand was that the Secretary of Defense had failed to issue such an agreement. Colonel Kohlmann had issued an order that could be signed in its place, but Joshua Dratel argued that, not only was this order invalid since the judge did not have the authority to issue it, but also that it would violate Dratel's ethical obligations to sign an agreement that had not been created. Colonel Kohlmann, as he had previously with Rebecca Snyder, decided that Joshua Dratel did not meet the criteria necessary to practice before the military commission. Dratel was offered the opportunity to stay on as a consultant, to which he replied "I am not a potted plant." When asked if he wanted Joshua Dratel to stay on as a consultant, David Hicks replied "I am shocked because I just lost another lawyer", adding that he was left only with "poor Mr. Mori."

An afternoon that started with a request for increased resources for the defense thus resulted in the reduction of David Hicks' legal team by two-thirds due to regulations that had not been promulgated and rules that had not been tested.

These exchanges were observed by a room that included journalists, NGO delegates, Australian attorneys, Australian government and diplomatic officials, as well as David Hicks' father and sister. David Hicks is the only detainee at Guantánamo to have had visits from family.

At the hearing, Major Mori challenged the military judge's fitness to preside over the proceedings, arguing both bias and the appearance of bias. The judge ruled himself fit to serve, dealt with scheduling matters, and adjourned the proceedings.

Approximately three hours later, the commission was reconvened and David Hicks entered a guilty plea to one of two specifications of his charge of "providing material support for terrorism". The specification alleges that between December 2000 and December 2001, Hicks intentionally provided material support for *al Qa'ida*, and that this conduct took place in the context of an armed conflict. Yet the international armed conflict in Afghanistan only began in October 2001. The Military Commissions Act effectively backdates the "war on terror" to make offences committed even before 11 September 2001 triable by military commission.

David Hicks pleaded not guilty to a second specification, namely that during the same time period, he provided material support or resources for an act of terrorism.

The military judge questioned David Hicks as to whether his plea had been influenced by the removal of two of his three attorneys earlier in the day. Hicks replied that it had not. However, after more than five years of virtually incommunicado military detention, and facing unfair trial procedures, serious questions must be asked about whether such a guilty plea can have been a purely volitional act.

The maximum penalty that David Hicks faces is life imprisonment, but the prosecution has said that it does not intend to argue for a life sentence. Under the terms of a reported arrangement, Hicks would serve any prison sentence in Australia. The guilty plea thus begins a process which will end in his return to his home country, some predict before the end of the year. In this regard, what transpired yesterday can also be seen as part of an exit strategy from a source of diplomatic tension rather than of judicial proceedings at which justice would either be done or be seen to be done.

Yesterday's proceedings do not bode well for the 60 to 80 people that the government claims it will prosecute under the military commission system. The proceedings reaffirm the need to close the Guantánamo detention camp as a matter of urgency and to end the lawlessness that it has come to symbolize.

The military commissions should be scrapped. Guantánamo detainees should be charged with recognizable criminal offences and brought to fair trial before a competent, independent and impartial tribunal, such as a US District Court, or else released with full protections against further abuse.

Jumana Musa observed David Hicks' arraignment for Amnesty International. She is a lawyer and a staff member of Amnesty International's US section. She is a fluent Arabic speaker.

For further information, see *USA: Justice delayed and justice denied? Trials under the Military Commissions Act*, AI Index: AMR 51/044/2007, March 2007, http://web.amnesty.org/library/Index/ENGAMR510442007.

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