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USA: Another day in Guantánamo

David Hicks sentenced by military commission; UK resident and victim of rendition released; former CIA detainee alleges torture

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On 30 March 2007 in the US Naval Base at Guantánamo Bay, Cuba, Australian national David Hicks became the first person to be sentenced by a military commission convened under the Military Commissions Act of 2006 (MCA). Four days earlier he had pleaded guilty to one charge of "providing material support for terrorism". At a press conference after the sentencing, the chief prosecutor for the commissions, US Air Force Colonel Morris Davis, suggested that it had been a good start to the military commission process and expressed his hope that it would be reported that "we gave an *al-Qa'ida* terrorist a full and fair trial".[1] Amnesty International can file no such report.

Pursuant to a pre-trial agreement reportedly negotiated between the defence attorneys and the convening authority for military commissions – an appointee of the Secretary of Defense – without the knowledge of prosecutors, David Hicks was sentenced to nine months' imprisonment.[2] A panel of military officers had recommended seven years in prison, all but six years and three months of which is suspended under the terms of the agreement.

Under the agreement, David Hicks "puts to rest any claims of mistreatment by the United States", instead signing the statement that "I have never been illegally treated by any person or persons while in the custody and control of the United States" since being captured in Afghanistan in December 2001.[3] Transferred from Afghanistan to Guantánamo in January 2002 shackled and hooded, for his transfer out of the US base he will be "gagged": under the pre-trial agreement, David Hicks is prohibited from communicating "in any way" to the media about his capture and detention for a period of one year.

On the day that David Hicks was facing his sentencing, the Pentagon announced that United Kingdom resident Bisher al-Rawi, an Iraqi national, was being transferred to the UK after

[1] *Prosecutor: Hicks case good start for military commissions*, American Forces Press Service, 31 March 2007.
[2] See, *Australian's plea deal was negotiated without prosecutors*. Washington Post, 1 April 2007.
[3] This contrasts, for example, to allegations made in his case in the UK courts. In the 18 months to April 2003, it has been alleged that Hicks was "repeatedly beaten, restrained, blindfolded, threatened with bodily harm, forced to take unknown medication, and subjected to food and sleep deprivation and other forms of mental and physical coercion. He was interned incommunicado. *Hicks v. Secretary of State*. In the Special Immigration Appeals Commission. Notice of Appeal, 2 August 2006.

more than four years in unlawful detention. He had been arrested in early November 2002 in Gambia and two months later secretly transferred to the so-called “dark prison” in Kabul and thence to the US air base in Bagram in Afghanistan. In February 2003 he was transferred to Guantánamo. His lawyer has said that the US authorities insisted on blindfolding and shackling him before handing him over to the UK government at Guantánamo. The lawyer, Zachary Katznelson, stated that “The British have treated him with the utmost professionalism and respect. This was in sharp contrast to the US, who took him from his cell and put him on a plane shackled and blindfolded. They insisted on one last attempt to dehumanise him.”[4] Released in the UK, Bisher al-Rawi said: “After four years in Guantánamo Bay, my nightmare is finally at an end. The hopelessness you feel in Guantánamo can hardly be described. You are asked the same questions hundreds of times. Allegations are made against you that are laughably untrue, but you have no chance to prove them wrong. There is no trial, no fair legal process.”[5]

David Hicks will be transferred to Australian custody within 60 days of his sentencing (i.e., by 29 May), under the terms of his pre-trial agreement. Although he will thus soon be returned to his home country to serve a relatively short prison sentence after years of unlawful detention in Guantánamo, the military commission proceedings in his case have done nothing to dispel Amnesty International’s belief that defendants prosecuted under the MCA will face trials that fail to comply with international standards. As the organization emphasized in a report published shortly before David Hicks’ arraignment hearing on 26 March, the commission process has effectively been tailored to obtain convictions while whitewashing the unlawful government practices that have preceded them.

Unlike at his arraignment hearing, David Hicks was now clean-shaven with a fresh haircut, wearing a pinstripe grey suit. It is reported that he had grown his hair in order to be able to sleep in Camps 5 and 6 where he had been held. Since the lights in the individual cells are left on 24 hours a day and detainees are not allowed to sleep without their hands and face showing, David Hicks grew his hair in order to block out the light.

Under the pre-trial agreement, David Hicks signed the statement 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

[4] *Freed British resident talks of hopelessness at Guantánamo*. The Guardian, 2 April 2007.

[5] In his statement, Bisher al-Rawi drew attention to his friend Jamil El Banna. “Jamil was arrested with me in the Gambia on exactly the same unfounded allegations, yet he is still a prisoner. He is the father of five young children, the eldest of whom is ten. He has never seen his youngest daughter who is nearly five years old. He too should be released and reunited with his family. I also feel great sorrow for the other nine British residents who remain prisoners in Guantánamo Bay. Some are now on hunger strike protesting against their extended solitary confinement. The extreme isolation they are going through is one of the most profoundly difficult things to endure. I know that all too well.” As well as thanking his lawyers and others, Bisher al-Rawi expressed his gratitude to “Amnesty International and all those there whose good work through out the world is a blooming flower of hope. I sincerely believe that without Amnesty’s immediate intervention in our case during those extremely difficult first days after our arrest in The Gambia, we probably would have been goners”.

best interest…" On the morning of 30 March, when the commission reconvened, the military judge, Marine Colonel Ralph Kohlmann, read through the stipulation of 35 alleged facts which supported the charge. While David Hicks conceded each point, his assent was similar to what is known as an *Alford* plea in the USA, pursuant to the US Supreme Court ruling in 1970 in *North Carolina v. Alford*. In that case, the defendant had maintained his innocence of the murder in question, but in the face of a strong prosecution case, said that he was pleading guilty in order to avoid the possibility of the death penalty.[6] Three US Supreme Court Justices dissented from the majority's finding that the trial judge had not acted unconstitutionally in accepting the guilty plea. The dissenters suggested that Alford had been "so gripped by fear of the death penalty that his decision to plead guilty was not voluntary".

Several times during the proceedings on 30 March, Colonel Kohlmann asked David Hicks to affirm that he had not been pressured or coerced in any way into making his plea. Each time, Hicks answered that he had not. Nevertheless, Amnesty International questions whether a guilty plea made by a detainee held for more than five years in indefinite and virtual incommunicado military detention, thousands of miles from home, without judicial review, and facing the possibility of a life sentence after an unfair trial by military commission, can be considered to have been made voluntarily. As the US Supreme Court has said, the voluntariness of a plea "can be determined only by considering all of the relevant circumstances surrounding it".[7] The military judge in this case clearly did not consider all of the relevant facts. Indeed, as argued in Amnesty International's 22 March report, *USA: Justice Delayed and Justice Denied?*, the military judge is a part of a system which lacks independence from the very branch of government whose detention policies and practices should be the subject of searching judicial inquiry in these prosecutions.

After each factual allegation was read out by Colonel Kohlmann, David Hicks had to agree either that he believed and admitted that the elements accurately described what he had done or that the allegation could be proven by the prosecution beyond a reasonable doubt. Later, when the judge asked David Hicks if he had seen the evidence that the prosecution intended to offer against him, Hicks replied that he had. When asked what that evidence was, Hicks answered it was notes from his interrogations in US custody and notes from interrogations of other detainees. This highlights a critical flaw in the military commission system. Under the MCA, information can be admitted as evidence that was obtained through cruel, inhuman or degrading treatment or other coercion, and through hearsay without stringent safeguards. At the same time, the government may introduce information while keeping secret the methods used to obtain it, if those methods are classified.

David Hicks' plea meant that he was agreeing that the government's evidence, regardless of the means used to obtain it, could prove the allegations against him. At the same time, the pre-

[6] *North Carolina v. Alford*, 400 U.S. 25 (1970). ("An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime… Whether [Alford] realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading".)

[7] *Brady v. United States*, 397 U.S.742 (1970).

trial agreement meant that the government was able to avoid facing questions as to how it had obtained its evidence. To look at this a different way, while David Hicks, in order to return home, was pleading guilty to what the US characterizes as war crimes, the government was preventing information about possible war crimes or human rights violations committed by its own agents from being made public at a trial. After the sentencing, military officials reportedly "quickly began to refer to Mr Hicks as the 'convicted war criminal'."[8]

The agreement also made it clear that the five years and four months that David Hicks has spent in untried military detention would not count towards any sentence recommended by the military commission panel. Colonel Kohlmann stated that the time that Hicks had spent in US custody was not time served in anticipation of criminal prosecution, but detention pursuant to an armed conflict under the laws of war. This distinction was critical to support the US government's position that it can detain people in Guantánamo indefinitely as potential sources of information or threats to security until the end of the global "war on terror." Any admission that the years in detention could be counted as time served would destroy the legal fiction created by the US policy that applies the law of war based on the person and not the circumstances in which they are detained.[9]

However, David Hicks' plea agreement, under which he agreed that he was "an alien unlawful enemy combatant, as defined by the Military Commissions Act", included a provision for a portion of the sentence to be suspended. The amount of time to be suspended was not disclosed during the morning session on 30 March. The commission was adjourned to await the arrival at Guantánamo of the military officers who would be selected to sit as "jurors" on the military commission panel and decide the sentence.

The commission reconvened at 2.30pm on 30 March and the panel selection process was conducted. The prosecution and defense each exercised one preemptory challenge. With two officers thus dismissed, a panel of eight commission members was seated to hear arguments on sentencing. Although the charge to which David Hicks pleaded guilty to could carry a sentence of up to life in prison, the plea agreement negotiated with the convening authority dictated a maximum sentence of seven years. However, since the Rules for Military Commission state that the panel must decide the sentence, the panel was informed of the maximum but were also told they could sentence him to a lesser sentence or no sentence at all.

The prosecution and defense proceeded to make their sentencing arguments. The prosecutor, while insisting on using David Hicks' Muslim alias listed in the charge sheet, calling him "Muhammad Dawood", invoked the 9/11 attacks, the bombing of the *USS Cole* in Yemen in October 2000, and the bombing of the US embassies in Kenya and Tanzania in August 1998, none of which David Hicks was accused of having participated in. The irony of the

[8] *Some bumps at start of war tribunals at Guantánamo*. New York Times, 1 April 2007.

[9] The USA's view of the world as the "battlefield" is reflected in the fact that detainees in Guantánamo have included people taken into custody in, for example, Bosnia, Mauritania, Thailand, Gambia, and Indonesia. It is also reflected in the broad definition that the MCA gives for who qualifies as an "unlawful enemy combatant". To earn such a label, an individual need not have been engaged directly in armed hostilities, or to have committed a terrorist act, or to have been near a zone of international or non-international conflict.

prosecutor's comments is that the USA is holding individuals in Guantánamo who it has long accused of involvement in these crimes, but has failed to bring to trial. Instead, it subjected them to years of secret incommunicado detention, in circumstances that amount to enforced disappearance, itself a crime under international law.

Indeed, on the same day that David Hicks was sentenced, the Pentagon revealed that Saudi national Abd al-Rahim al-Nashiri, held in secret custody for nearly four years before being transferred to Guantánamo in September 2006 with 13 other "high-value" detainees, has alleged that he had only admitted to involvement in the attack on the *USS Cole* and other crimes under torture in US custody. According to the Pentagon's transcript, Abd al-Nashiri told a Combatant Status Review Tribunal (CSRT) – a panel of military officers convened behind closed doors to review his "enemy combatant" status – that he had "made up stories during the torture in order to get it to stop", and that "once he made a confession, his captors were happy and they stopped torturing him". At his CSRT hearing on 14 March 2007, Abd al-Nashiri, through an interpreter, said: "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way." The alleged torture methods apparently described by Abd al-Nashiri have been redacted (censored) from the transcript. The CSRT President told Abd al-Nashiri, who is still being denied access to legal counsel, that his allegations "will be included in the record of these proceedings" and "will be reported for investigation that may be appropriate".[10] Meanwhile, the CSRT can rely on coerced and secret evidence in making its determinations about a detainee's "enemy combatant" status.

Amnesty International reiterates that all allegations of torture must be subjected to full independent investigations. Information obtained under torture or other cruel, inhuman or degrading treatment must not be admitted in any proceedings, except against those responsible for such treatment. All detainees must have full *habeas corpus* rights in order to be able to challenge the lawfulness and conditions of their detention.

In the military commission proceedings against David Hicks, when the commission panel returned with a verdict less than two hours after they were given the information, they sentenced Hicks to the maximum of seven years. The prosecutor has since reportedly said that he was pleased with this outcome, because the panel had agreed to the maximum sentence available with little evidence brought before them.[11] The judge thanked the panel for their service and dismissed them from the commission room. After the panel left, the judge revealed the terms of the agreement that had been withheld previously – that all but nine months of any sentence would be suspended.

On 1 April, the Australian Minister for Foreign Affairs, Alexander Downer, said: "[W]e've said to the Americans all along we want the time served to be taken into account. Technically they haven't been able to do that, because the Military Commissions Act doesn't allow for

[10] Unclassified verbatim transcript of Combatant Status Review Tribunal Hearing for ISN 10015, http://www.defenselink.mil/news/transcript_ISN10015.pdf.
[11] Opinion of Marine Lieutenant Colonel Kevin Chenail reported in *Australian's plea deal was negotiated without prosecutors*. Washington Post, 1 April 2007.

that, but nevertheless the nine months sentence, which is in effect what he has, it's a seven year sentence, the fact that the prosecutions and the Americans came to the conclusion that a further nine months was appropriate obviously takes into account the fact that he's already served five years."[12] The pre-trial agreement also included a provision that would allow David Hicks to serve his sentence in Australia.

Following the sentencing, a spokesperson for the Office of Military Commissions was quoted as saying, "Like it or not, the detainees at Guantánamo are from different countries, and that sometimes is a factor".[13] It is certainly difficult to ignore the possibility that all of this has been more about politics and diplomatic relations than about justice and accountability. Why was David Hicks brought to trial by military commission first? Will other nationalities benefit from the same types of pre-trial agreement? Australian Prime Minister John Howard indicated on 20 February 2007 that in a telephone call that day, President Bush had given a "very direct assurance" that Hicks' prosecution would be expedited. Amnesty International is not aware of any other government having been given such assurances. On 1 March 2007, the Pentagon announced that David Hicks was the first detainee to be charged under the MCA. The following day, Alexander Downer, asserted:

> "It's a tribute to the degree of influence that the Australian Government has in Washington, and the strength of the relationship that, of all the people held in Guantánamo Bay, the one Australian there is the first person to be tried…I can't believe that an Australian Government which was anti-American would have any hope of achieving that. Our Government has got Hicks to be the first person to be tried… We've got an Australian citizen here… [of] the 300 to 400 people I believe [are] in Guantánamo Bay, there's one Australian. And we've got this Australian to the head of the queue in terms of trial. And that's a good achievement."[14]

In a detention and military commission system already marked by arbitrariness, discrimination, and lack of independent judicial involvement, any disparate treatment among detainees based on their nationality suggests another dimension to such flaws. Amnesty International reiterates that whether a defendant is brought to trial and whether that trial is fair should not depend on the state of diplomatic relations between his government and the government that is detaining him. In full equality, regardless of national origin, all detainees facing criminal charges have the right to a fair trial within a reasonable time conducted in accordance with international law and standards.

The military commission process does not meet these standards, and should be abandoned in favour of trials in the US federal courts. Any detainee who is not to be charged should be released with full protections against further abuses.

[12] Interview - Weekend Sunrise, Channel 7, 1 April 2007.
[13] US Army Major Beth Kubala, quoted in *Australian's plea deal was negotiated without prosecutors*. Washington Post, 1 April 2007.
[14] Doorstep interview, Adelaide, 2 March 2007, transcript available at http://www.foreignminister.gov.au/transcripts/2007/070302_ds.html.

On 31 March, Australian Minister for Foreign Affairs Alexander Downer emphasized that his government would not entertain the notion of commutation for David Hicks: "We would not commute the sentence. The sentence would be carried out fully and I say that with a bit of passion because we take a very strong stand against terrorism."[15]

As a part of his pre-trial agreement, David Hicks agreed to "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." As already noted, he agreed that he has "never been illegally treated by any person or persons while in the custody and control of the United States". In addition, he agreed not to sue the USA or any of its officials "with regard to my capture, treatment, detention, or prosecution."

Nevertheless, Amnesty International questions whether David Hicks' conviction and sentence are lawful given the process that led to them, and has doubts about the competence and independence of the military commission, as well as concern about the circumstances in which David Hicks' plea was made. The organization believes that as such the plea agreement may itself be incompatible with international standards of fairness. When returned to Australia, he should be given full rights to be able to challenge the lawfulness of his imprisonment there in an independent and impartial court, something that has been denied him for more than five years in US custody.[16] If that court determines that his imprisonment is unlawful, it should order his immediate release. Whether or not his recantation of his allegations of torture or other ill-treatment was voluntary, all such allegations should be investigated. If found true, those suspected of perpetrating acts of torture or other ill-treatment should be prosecuted and Hicks be awarded reparations, regardless of the pre-trial agreement.

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For further information, see

- *USA: All allegations of torture must be investigated*, AI Index: AMR 51/045/2007, 15 March 2007, http://web.amnesty.org/library/Index/ENGAMR510452007.
- *USA: Justice delayed and justice denied? Trials under the Military Commissions Act,* AI Index: AMR 51/044/2007, 22 March 2007, http://web.amnesty.org/library/Index/ENGAMR510442007.
- *USA: Military commissions, like CSRTs, threaten to whitewash detainee abuse,* AI Index: AMR 51/046/2007, 23 March 2007, http://web.amnesty.org/library/Index/ENGAMR510462007.

[15] Interview with AM Program, 31 March 2007.
[16] On 2 April 2007, the US Supreme Court refused to take the consolidated cases of *Boumediene v. Bush* and *al Odah v. USA*, which are challenging the MCA's stripping of the US federal court jurisdiction over *habeas corpus* petitions filed by foreign nationals held as "enemy combatants" in Guantánamo.

- *USA: David Hicks pleads guilty on one count. AI observer attends arraignment at Guantánamo.* AI Index: AMR 51/052/2007, 27 March 2007, http://web.amnesty.org/library/Index/ENGAMR510522007.

Note: Jumana Musa observed David Hicks' sentencing for Amnesty International. She is a lawyer and a staff member of Amnesty International's US section.

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