

DAVID HICKS AND THE CHARADE OF GUANTÁNAMO BAY

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[Advocates of the desirability and efficacy of the United States military commissions as the preferred means to try detainees held in the global war on terror ought to have been disappointed by the inauguration of the trial process with David Hicks. Far from confirming the seniority (and concomitant dangerous character) of Guantánamo Bay detainees, Hicks entered a guilty plea to the single count of providing material support to a terrorist organisation and negotiated an extremely lenient sentence of seven years with all but nine months suspended. Although the entering of a guilty plea proved convenient for both the Bush Administration and the Howard Government on multiple levels, David Hicks also exposed the thorough politicisation of the military commissions — the first of three fundamental injustices inherent in the system. Intriguingly, the military commission continued against David Hicks as if no pre-trial agreement existed in an absurd pretence of proper judicial process. The two additional fundamental injustices involve flaws in the rules of evidence and procedure and the illegal creation of offences not known in the law of war. The think piece concludes with a discussion of implications from this case for future military commissions.]

CONTENTS

- I Inaugurating the Military Commissions
- II First Fundamental Injustice: Politicisation of the Process
- III Second Fundamental Injustice: Lack of Procedural Fairness
- IV Third Fundamental Injustice: Illegality of the Subject Matter Jurisdiction
 - A Murder of Protected Persons
 - B Murder in Violation of the Law of War
- V Conveniences of the Guilty Plea
- VI Implications for Future Military Commissions

CHARADE

1. A written or (now usually) acted clue from which a syllable of a word or a complete word is to be guessed. ... A game of guessing words from such clues.
2. An absurd pretence.¹

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¹ Lesley Brown (ed), *The New Shorter Oxford English Dictionary* (4th ed, 1993) vol 1, 374.

I INAUGURATING THE MILITARY COMMISSIONS

One of the most intriguing aspects of the proceedings against David Hicks before the United States military commission in Guantánamo Bay was the rationale for selecting this particular case as the inaugural trial. A common immediate reaction was that this selection seemed inexplicable.² Given the extent of the criticism of the military commission process, within the US domestically, within many foreign countries and by multiple international organisations, those with a vested interest in promoting the impression of a credible trial process would surely have pushed for a different case with which to commence proceedings. At its strongest, the US case against David Hicks was that he was an al Qaeda foot soldier — that he trained with al Qaeda and prepared himself to head off to the frontline in Afghanistan to wage war against the US-led coalition forces in response to the military intervention post-11 September 2001.³

Despite having detained David Hicks for more than five years in Guantánamo Bay, the US was unable to adduce any evidence that David Hicks fired a single shot in anger — let alone any suggestion that he actually committed a war crime or even hurt a single person. The relentless blustering by Australian politicians and US military prosecutors that David Hicks was one of the most dangerous people in the world,⁴ and the vitriol of the prosecutor in his address to the jury in Guantánamo — when he alleged that ‘today, gentlemen,’ (for all of them were men) ‘you are on the frontline of the global war on terror and you sit here face to face with the enemy’ thrusting his arm towards the accused while refusing to look in his general direction — proved to be utterly devoid of substance. In stark contrast, however, undoubtedly there are individuals detained by US authorities against whom there are extremely serious allegations with significantly more evidence to suggest that such individuals were real masterminds of major al Qaeda operations. The US has confirmed its detention of Khalid Sheikh Mohammed (the alleged principal architect of the 11 September 2001 attacks), Abu Zubeida (allegedly a senior al Qaeda operational planner and potential future leader of al Qaeda), Abdul Rahman Hussain al-Nashiri (the alleged chief of al Qaeda operations in the Persian Gulf and alleged mastermind of the attack on the *USS Cole*) and Waleed Muhammed bin Attash (an alleged top al Qaeda operational commander).⁵ Why not open the proceedings of the US military commissions with someone of real seniority in al Qaeda in order to make it more difficult for the critics of the process to argue against the rationale for a unique system to deal with an unprecedented situation?

The decision to start with David Hicks is, of course, explicable even if it was a strategic error. In my view, the explanation lies at the heart of the choice of title for this piece. David Hicks was selected because intense political pressure was

² See, eg, Kim Landers (Reporter), ‘Hicks a Test Case for Bush Administration’, *The World Today*, 2 March 2007.

³ *United States of America v David Matthew Hicks*, Military Commission Charge Sheet (2 February 2007) [28] <<http://www.defenselink.mil/news/d20070301hicks.pdf>> at 18 October 2007 (‘Charge Sheet’).

⁴ See, eg, ‘Guantanamo Chief Labels Hicks a Dangerous Terrorist’, *ABC News Online* (Australia) 8 February 2007 <<http://www.abc.net.au/news/stories/2007/02/08/1843445.htm>> at 18 October 2007.

⁵ See, eg, Human Rights Watch, *The United States’ ‘Disappeared’: The CIA’s Long-Term ‘Ghost Detainees’* <<http://www.hrw.org/backgrounder/usa/us1004/>> at 18 October 2007.

finally brought to bear by an Australian Government desperate to remove the Hicks case from the Australian political landscape well before the upcoming federal election.⁶ The fact that political influence resulted in a resolution of the case raised serious questions about the determination to proceed with the pretence of a proper process despite an obvious political fix. It is the second meaning of ‘charade’ as an absurd pretence that captures the essence of what occurred in Cuba in March 2007.

My intention here is to demonstrate the fundamental lack of justice inherent in the politicisation of the US military commission process. In a perverse irony, it is important to concede that David Hicks benefited from the lack of judicial independence of the commissions. The parents of John Walker Lindh, tried by US courts on the basis of his nationality, were right to query why their son is serving a 20 year prison sentence for offences similar to the offence to which David Hicks pleaded guilty while he is serving only nine months in prison.⁷ The benefits to David Hicks do not remove the stain of injustice on the commissions themselves and any doubts about the lack of judicial independence prior to March 2007 are no longer tenable following this first case. I will also briefly discuss two other manifestations of inherent fundamental injustice in the commission process — the lack of procedural fairness and the illegality of some of the charges included within the subject matter jurisdiction of the commissions. These two latter injustices were not manifest in the proceedings against David Hicks because the negotiation of a pre-trial agreement conveniently precluded any testing of the actual evidence against David Hicks, the manner in which that evidence was acquired, and the illegality of the sole remaining charge against him. I am of the view, however, that it is important to make some observations in relation to those additional levels of injustice inherent in the current system. I will conclude this piece with some reflections on the implications for future military commission proceedings flowing from the inauguration of the process with the case against David Hicks.

II FIRST FUNDAMENTAL INJUSTICE: POLITICISATION OF THE PROCESS

A relentless refrain of Major Michael D Mori⁸ throughout the entire duration of his professional involvement with David Hicks was the fundamental lack of independence of the military commissions from the executive arm of the US Government.⁹ Major Mori repeatedly used a cricketing analogy to illustrate his criticism: political interference in the military commission process is the cricketing equivalent of dispensing with the umpire, leaving the bowler to make his or her own ruling on leg before wicket.¹⁰ The obvious absurdity in the

⁶ See Editorial, ‘Hicks Is Guilty, but Australia Failed Him’, *The Sydney Morning Herald* (Sydney, Australia) 2 April 2007, 12; Rod McGuirk, ‘Supporters of Australian at Guantanamo Bay Say He Won’t Receive Justice’, *Australian Associated Press Newsfeed*, 2 March 2007.

⁷ See Demian Bulwa, “‘The American Taliban’ Again Asks for Mercy’, *The San Francisco Chronicle* (San Francisco, US) 5 April 2007, B1.

⁸ Major Mori is a US Marine legal officer. In November 2003 he was assigned to defend David Hicks before the US military commissions.

⁹ Tim McCormack, ‘The David Hicks Trial Was a Political Fix by Two Governments’, *The Age* (Melbourne, Australia) 21 May 2007, 11.

¹⁰ *Ibid.*

analogy — at least to anyone familiar with the game — was a highly effective way of making the point. One possible response was to laugh off the analogy as hyperbole with a sceptical refusal to accept that any lack of independence from the Bush Administration could really be equivalent to a bowler's self-adjudication. Any antecedent doubts about Major Mori's characterisation of the inherently political character of the process evaporated in the heat of Guantánamo Bay in the final week of March 2007.

Throughout the week of the 'trial', we were repeatedly assured by US military authorities that we were witnessing a 'fair and transparent process'. The most transparent reality for me was the utter opacity of virtually all issues of substance — resolved as they were outside the courtroom and beyond public scrutiny (or else avoided altogether by the convenience of the guilty plea). The truth is that Major Mori was able to go over the heads of both the presiding judge and the chief prosecutor to negotiate a pre-trial agreement¹¹ with the Convening Authority, Judge Susan Crawford. Major Mori could do so because *The Manual for Military Commissions 2007*¹² allows an accused and the Convening Authority to enter into a pre-trial agreement.¹³ The Convening Authority negotiated and approved the pre-trial agreement because the Bush Administration advised her to do so and that happened because Australian Prime Minister Howard personally intervened to demand that President Bush bring the Hicks case to an expeditious conclusion.¹⁴

On the afternoon of Saturday 24 March 2007, a large Australian and international media contingent, the prosecutors, the defence team and the military commission administrative staff all boarded a C-130 US military aircraft at the Andrews Air Force Base in Maryland and endured the five hour trip to Cuba. All but a few of those on board, including myself, were blissfully unaware of what had been negotiated and we flew to Guantánamo Bay expecting only an Arraignment Hearing — a procedural confirmation of the charges against the accused, the nature of the accused's plea, the proposed trial schedule and any other procedural matters — on Monday 26 March. We were told to expect to fly back to Andrews Air Force Base on Tuesday 27 March.

Given the deal that had already been negotiated, much of what actually transpired before the military commission was utterly irrelevant and I have struggled to make sense of what I observed.¹⁵ Even after the existence of the pre-trial agreement was announced by the presiding judge, the proceedings continued as if the agreement did not exist. The single most spectacular example

¹¹ *United States v David Matthew Hicks*, 'Offer for a Pretrial Agreement' (26 March 2007). A copy of the Agreement is reproduced in Leigh Sales, *Detainee 002: The Case of David Hicks* (2007), appendix IV, 271.

¹² *Manual for Military Commissions*, r 705 (18 January 2007).

¹³ *Ibid.*

¹⁴ The Prime Minister readily confirmed in a television interview that he had made this demand publicly to President Bush and to Vice-President Cheney during the Vice-President's visit to Australia in February 2007: Kerry O'Brien (Reporter), 'PM Dismisses Criticism from Treasury Head', *The 7:30 Report*, Australia, 4 April 2007.

¹⁵ For a detailed account of each stage of the proceedings, including the farcical aspects, see Lex Lasry, *United States v David Matthew Hicks: Final Report of the Independent Observer for the Law Council of Australia, Guantanamo Bay, Cuba* (Law Council of Australia Report, 24 July 2007), available from <<http://www.lawcouncil.asn.au/hicksjustice.html>> at 18 October 2007.

of superfluity involved the role of the jury — empanelled to independently determine a sentence despite the existence of a pre-trial agreement with its maximum prison term. Ten full colonels drawn from across the US and from all four services of the US military — Air Force, Army, Navy and the Marines — were flown to Guantánamo Bay on the Secretary of Defense's aircraft. They were empanelled and then instructed as to their role and the process they were to follow to reach agreement on the sentence. They were not told that a term of nine months' imprisonment had already been negotiated but they were instructed that the agreed maximum sentence they could award was seven years.¹⁶ The colonels listened to the statements of the prosecution for the award of maximum sentence and statements from the defence for leniency in sentencing before retiring to deliberate. They returned after two hours of deliberation and informed the presiding judge that they had awarded the maximum sentence of seven years' imprisonment. The presiding judge thanked them for their important contribution to the proceedings and dismissed them from the court room. Perhaps 30 minutes later the members of the jury would have discovered that their decision on sentence was utterly irrelevant and that lawyers acting for David Hicks had already negotiated a term of just nine months. One can only begin to imagine how they would have felt about the effort involved in travelling to Cuba to participate in a procedure devoid of any relevance to the final outcome.

I have earlier conceded that David Hicks benefited from the politicisation of the military commission process. The personal benefits could have been greater had the Australian Government insisted upon the repatriation of David Hicks as did, for example, the Blair Government in respect of British nationals in detention at Guantánamo Bay.¹⁷ However sub-optimal the benefits of belated Australian Government demands, there is no question that the intervention of the Bush Administration with the Convening Authority on behalf of the Howard Government resulted in a better deal for David Hicks than is likely to be the case for other nationals whose governments will either make no effort on their behalf to pressure the US Government, or even if they did seek to exert influence, have none with the Bush Administration. The susceptibility of the military commission process to political interference — whether helpful or prejudicial to the accused — is symptomatic of a fundamental lack of justice.

One critical issue here, though, is the explanation for the dogged persistence with a process rendered irrelevant by a pre-negotiated outcome. It seems to me that what transpired at Guantánamo Bay was an elaborate pretence of a proper judicial process. 'Charade' seems the most appropriate descriptor. The pretence

¹⁶ The statutory maximum sentence for the charge of 'Providing Material Support for Terrorism' in *The Manual for Military Commissions* is life imprisonment: s 950v(25)d. However, Major Mori negotiated an agreement with Judge Crawford that the maximum sentence for David Hicks would be nine months imprisonment with an additional six years and three months suspended sentence. This sentence is included in the 'Offer of Pretrial Agreement' in Sales, above n 11.

¹⁷ Jack Straw, Foreign Secretary of the UK, 'Foreign Secretary Statement on Return of British Detainees' (Press Release, 19 February 2004) <<http://www.number-10.gov.uk/output/Page5381.asp>> at 18 October 2007. The detainees were Ruhel Ahmed, Tarek Dergoul, Jamal Al Harith, Asif Iqbal and Shafiq Rasul.

was so obviously absurd because it was virtually devoid of substantive relevance.¹⁸

III SECOND FUNDAMENTAL INJUSTICE: LACK OF PROCEDURAL FAIRNESS

The plurality of the US Supreme Court in *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*¹⁹ decided that the armed conflict with al Qaeda was covered by Common Article 3 of all four *Geneva Conventions*,²⁰ despite the contrary view of the Bush Administration.²¹ One key implication of this finding for the military commissions is the provision of Common Article 3 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.

The Bush Administration's response to the US Supreme Court's decision on the application of Common Article 3 was not to challenge the authority of the Court to make the finding, but to circumvent it. The Administration influenced the then Republican-controlled Congress to enact the *Military Commissions Act of 2006*²² — a legislative regime which, like its predecessor, also falls short of the minimum fair trial standards of Common Article 3. This failure of compliance persists despite self-justificatory claims to the contrary. In s 3(a)(1), the *Military Commissions Act* adds a new chapter, ch 47A entitled 'Military Commissions', to the existing US Federal Criminal Code. The new s 948b(d)(2)(f) of the Code, which is included in the *Military Commissions Act*, boldly asserts that:

A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for the purposes of common Article 3 of the *Geneva Conventions*.

¹⁸ I do not argue that the process was totally devoid of substantive relevance. One aspect of the proceedings that was significant was the so-called providence hearing — where the presiding judge engaged in a question and answer exchange with the accused to satisfy the judge that the guilty plea was voluntary and informed. That particular procedure was both important and relevant to the judge's acceptance of the plea.

¹⁹ 548 US __ (2006) 1 ('*Hamdan*').

²⁰ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31, art 3 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85, art 3 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135, art 3 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287, art 3 (entered into force 21 October 1950) (collectively, '*Geneva Conventions*').

²¹ For an excellent analysis of the judgment, see Sarah Finnin, '*Salim Ahmed Hamdan, Petitioner v Donald H Rumsfeld, Secretary of Defense: Has the Bush Administration's Experiment with Military Commissions Come to an End?*' (2006) 7 *Melbourne Journal of International Law* 372.

²² 10 USC (2006) ('*Military Commissions Act*').

Whatever the precise effect in US domestic law of Congressional interpretation of treaty compliance,²³ the position at international law is clear: self-declared compliance with international law by the US Congress does not constitute compliance per se. The very next provision of the *Military Commissions Act* seems to anticipate a potential appeal to international law to challenge the self-declared pedigree of the military commissions and asserts non-justiciability. Section 948b(d)(2)(g) states that '[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the *Geneva Conventions* as a source of rights'.

Military Commissions Mark I and Mark II have been subjected to sustained criticism for their failure to meet accepted international standards of fair trial process — particularly in relation to the admissibility of evidence.²⁴ Of particular concern is the possibility of evidence obtained through coercion and/or hearsay evidence, producing a conviction that would never stand against the standard of 'judicial guarantees ... recognized as indispensable' in regularly constituted courts.²⁵ There is one single test for admissibility of evidence before US Military Commissions Mark II and that is whether the presiding judge is satisfied that 'the evidence would have probative value to a reasonable person'.²⁶ That particular test for admissibility establishes a very low threshold indeed.

In relation to evidence obtained through coercion, it is true that the *Military Commissions Act* explicitly precludes the admissibility of evidence obtained by torture²⁷ and also protects individuals in the physical custody of US authorities, irrespective of nationality or location, from cruel, inhuman or degrading treatment or punishment.²⁸ However, both provisions are subject to extensive qualification. Congress has affirmed the Bush Administration's significant narrowing of accepted international definitions of torture and cruel and inhuman treatment.²⁹ The definition of torture in the *Military Commissions Act* is, prima facie, unobjectionable because it replicates the definition in the *Convention against Torture*.³⁰ However, objections arise in relation to the requisite threshold

²³ For a fascinating critique of the issues for statutory interpretation of the *Military Commissions Act*, see Carlos Manuel Vázquez, 'The *Military Commissions Act*, The *Geneva Conventions*, and the Courts: A Critical Guide' (2007) 101 *American Journal of International Law* 73.

²⁴ See, eg, Amnesty International, 'United States of America: A Deepening Stain on US Justice' (Public Statement, 19 August 2004); Jack M Beard, 'The Geneva Boomerang: The *Military Commissions Act of 2006* and US Counterterrorism Operations' (2007) 101 *American Journal of International Law* 56.

²⁵ *Military Commissions Act*, 10 USC § 949a(b)(2)(A) (2006).

²⁶ *Military Commissions Act*, 10 USC § 949a(b)(2)(A) (2006).

²⁷ *Military Commissions Act*, 10 USC § 3(a)(1) (2006) adds a new 'Chapter 47A — Military Commissions' to the US Code. Section 948r(b) of that new ch 47A entitled 'Exclusion of Statements Obtained by Torture' states, apparently categorically, that:

A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

²⁸ *Military Commissions Act*, 10 USC § 6(c) (2006) amends 18 USC § 2441(d) of the US Federal Criminal Code by adding this additional prohibition.

²⁹ See, eg, *Military Commissions Act*, 10 USC § 6(d)(2) (2006).

³⁰ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, art 1 (entered into force 26 June 1987) ('*Convention against Torture*').

levels of pain or the perpetrator's specific intent in relation to particular component terminology in the definition. The *Military Commissions Act* refers to other existing legislative definitions rendering the task of definitional clarification complex and cumbersome. Michael Matheson has helped to unravel the details as follows:

'Cruel or inhuman treatment' is limited to acts 'intended to inflict severe or serious physical or mental pain or suffering.' 'Serious physical pain or suffering,' in turn, is limited to bodily injury involving a substantial risk of death, 'extreme' physical pain, physical disfigurement of a 'serious' nature (other than cuts, abrasions, or bruises), or a 'significant loss or impairment' of the function of a bodily member, organ or mental faculty. 'Serious mental pain or suffering' is limited to the intentional or threatened infliction of severe physical pain or suffering, the administration of mind-altering substances or procedures, the threat of imminent death, or the threat that another person will be subject to the same. 'Serious bodily injury' is similarly limited.³¹

Matheson queries whether these provisions would proscribe various techniques that have been the subject of so much controversy:

Do they apply to waterboarding, beatings that do not cause permanent injury, exposure to cold or heat that does not cause permanent impairment, or deprivation of food, water, or medical treatment? It is difficult to tell from an examination of the text. Even more problematically, does the text apply to forcing a detainee to be naked or to commit sexual acts, or to the threatening use of dogs?³²

These are important questions to ask because the *Military Commissions Act* incorporates a discretion for military judges to determine whether to admit evidence obtained in circumstances where the degree of coercion short of torture is disputed. For any such statements obtained before 30 December 2005 (the date of enactment of the *Detainee Treatment Act of 2005*³³) a judge need only find that 'the totality of the circumstances renders the statement reliable and possessing sufficient probative value' and that 'the interests of justice would best be served by admission of the statement into evidence'.³⁴ For any such statements obtained after 30 December 2005, the only additional requirement for military judges is to find that the 'interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment prohibited ... by the *Detainee Treatment Act of 2005*'.³⁵ The admissibility of evidence obtained before 30 December 2005 which may have been obtained by interrogation methods amounting to cruel, inhuman or degrading treatment is

³¹ Michael J Matheson, 'The Amendment of the *War Crimes Act*' (2007) 101 *American Journal of International Law* 48, 51–2. Section 6(b)(1)(B) of the *Military Commissions Act* adds a new s 2441(d) to the US Federal Criminal Code. Subparagraph 2 of the new subsection (d) is a definitional section. As Matheson observes, the definitions of the terms he refers to here are actually included in other provisions of the Federal Criminal Code such as 18 USC § 2340(2), 18 USC § 113(b) and 18 USC § 1365(h).

³² Matheson, above n 31, 52. For a detailed account of the development and use of torture techniques by US authorities as well as the Bush Administration's redefinition of torture, see Michael Otterman, *American Torture: From the Cold War to Abu Ghraib and Beyond* (2007).

³³ 42 USC (2000).

³⁴ *Military Commissions Act*, 10 USC § 946r(c) (2006). This provision follows immediately after the above purported exclusion of any evidence obtained by torture: see above n 27.

³⁵ *Military Commissions Act*, 10 USC § 948r(d)(3) (2006).

clearly disconcerting. However, given the nature of the US definitions of proscribed treatment, even for evidence obtained post-30 December 2005, the potential for admissibility is broad.

Any sense of discomfort about the combined effect of relaxed definitional standards for permissible interrogation techniques and judicial discretion for the admissibility of evidence obtained by questionable means is exacerbated by the extent of presidential authority. According to s 6(a)(3) of the *Military Commissions Act*, the President has the authority to interpret and apply the *Geneva Conventions* and his interpretations are 'authoritative ... as a matter of United States law'. This authority presumably extends to the 'power to approve some problematic interrogation methods based on [the President's] own interpretation of *Geneva Convention* obligations'.³⁶

In relation to the admissibility of hearsay evidence, the Military Commissions Bill of 2006 explicitly stated that a key rationale for the trial of unlawful enemy combatants by military commission was to avoid the prohibition on the admissibility of such evidence in the US military court-martial system.³⁷ Section 2 of the draft Bill enumerated a number of Congressional findings in relation to the establishment and operation of military commissions. In s 2(7)(B) of the Bill, for example, Congress found that court-martial proceedings

would in certain circumstances exclude the use of hearsay evidence even though such evidence will often be the best and most reliable evidence that the accused has committed a war crime. For example, many witnesses in military commission trials are likely to be foreign nationals who are not amenable to process or may be precluded for national security reasons from entering the United States or Guantanamo Bay to testify. Other witnesses may be unavailable because of military necessity, incarceration, injury or death. In short, applying the hearsay rules from the Manual for Courts-Martial or from the Federal Rules of Evidence would make it virtually impossible to bring terrorists to justice for their violations of the law of war.

It is hard to imagine a more succinct statement of rationale for the abandonment of a previously cherished rule on admissibility of evidence. The Bush Administration was able to convince a majority of Congressional members that any commitment to application of the hearsay rule would guarantee a failure to secure convictions against those accused of involvement in, or support for, terrorism. The *Military Commissions Act* does allow for the inadmissibility of 'hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial' but only by reversing the onus of proof.³⁸ Rather than requiring the party desiring the admission of the evidence to establish grounds for an exception to the general prohibition on admissibility of hearsay, the *Military Commissions Act* obliges the party objecting to the admission to show that the evidence is either 'unreliable or lacking probative value'.³⁹

An additional concern, compounding the combined effect of the admissibility of evidence obtained by coercion and the admissibility of hearsay evidence, is

³⁶ Beard, above n 24, 58.

³⁷ Military Commissions Bill of 2006, s 2 (7)(B).

³⁸ *Military Commissions Act*, 10 USC § 949a(b)(2)(E)(ii) (2006).

³⁹ *Military Commissions Act*, 10 USC § 949a(b)(2)(E)(ii) (2006).

the protection for US authorities from any obligation to disclose details of evidence tendered for admission. Section 949d(f)(2)(B) of the *Military Commissions Act* is entitled ‘Protection of Sources, Methods or Activities’. This provision allows a military judge to admit evidence:

While protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable.

Pursuant to these rules of evidence, an accused appearing before a military commission could face accusatory written evidence extracted from witnesses by coercive interrogation techniques in circumstances where:

- 1 The accused is not informed of the identity of the witnesses or the circumstances in which the evidence was obtained;
- 2 The witnesses are not physically present in the trial proceedings; and
- 3 The accused is unable to test any of the evidence against him/her.

Despite these realities, supporters of the military commission process still boldly assert that the commissions afford ‘all the judicial guarantees which are recognized as indispensable by civilized peoples’.⁴⁰ I do not envy those whose professional responsibility it is to publicly defend the process as fully consistent with US treaty obligations — particularly Common Article 3 of all four *Geneva Conventions*.

IV THIRD FUNDAMENTAL INJUSTICE: ILLEGALITY OF THE SUBJECT MATTER JURISDICTION

The military commissions were ostensibly created to try violations of the law of war and the Secretary of Defense’s Instruction establishing the subject matter jurisdiction of Military Commissions Mark I explicitly reflected this rationale.⁴¹ Many of the substantive offences in this Instruction reflected existing violations of the law of war but, unfortunately, the substantive offences also included a number of newly created crimes unknown in the law of war. The Defense Instruction did not constitute a source of international humanitarian law and the implication that these new ‘offences’ also constituted war crimes simply because the Secretary of Defense proclaimed them as such constituted a fundamental illegality.

This particular flaw in Military Commissions Mark I was not rectified in the subject matter jurisdiction for Military Commissions Mark II. Instead, the *Military Commissions Act* includes several purported violations of the law of war

⁴⁰ Morris Davis, ‘The Guantánamo I Know’, *International Herald Tribune* (Arlington, US) 27 June 2007, 8. Davis was quoting Common Article 3(1)(d) of the *Geneva Conventions*.

⁴¹ See US Department of Defense, *Military Commission Instruction No 2: Crimes and Elements for Trials by Military Commission* (30 April 2003). Part 3A of the Instruction states that:

these crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

which are unknown in that body of law.⁴² Again, the claim by the US Congress that these unknown offences are in fact violations of the law of war does not make them so. One glaring example of this illegality arises in relation to the offences of murder. The *Military Commissions Act* and the *Manual for Military Commissions*, which provide the detailed elements of each of the offences in the Act itself, include two offences of murder. The first (s 950v(1) of the *Manual for Military Commissions*) is entitled ‘Murder of Protected Persons’ and the second (s 950v(15) of the *Manual for Military Commissions*) is entitled ‘Murder in Violation of the Law of War’. I will consider each of these two offences in turn.

A Murder of Protected Persons

Section 950v(1) of the *Manual for Military Commissions* defines the offence as follows:

Any person ... who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.

The *Manual for Military Commissions* goes on to list the elements of the offence as follows:

- (1) The accused, without justification or excuse, intentionally and unlawfully kills a protected person;
- (2) The accused knew or should have known of the factual circumstances that established that person’s protected status; and
- (3) The killing took place in the context of and was associated with armed conflict.⁴³

In relation to the first of these three elements, s 950v(a)(2) of the *Manual for Military Commissions* includes certain definitions relevant to the section including a definition of the term ‘protected persons’ as

any person entitled to protection under one or more of the *Geneva Conventions* including —

- (A) civilians not taking an active part in hostilities;
- (B) military personnel placed *hors de combat* by sickness, wounds, or detention; and
- (C) military medical or religious personnel.

It is incontrovertible that the war crime of murder of protected persons exists in the law of war. One of the most authoritative sources of the definitions of war crimes is art 8 of the *Rome Statute*.⁴⁴ There are at least two war crimes of murder in the *Rome Statute*. The first is art 8(2)(a)(i) — the grave breach of the *Geneva Conventions* of unlawful killing in the context of an international armed conflict. The second is in art 8(2)(c) — the serious violation of Common Article 3 of all

⁴² See Beard, above n 24, 60–1.

⁴³ *Manual for Military Commissions*, above n 12, s 950v(1).

⁴⁴ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (‘*Rome Statute*’).

four *Geneva Conventions* of murder. The *Elements of War Crimes*⁴⁵ was drafted pursuant to art 9 of the *Rome Statute* to assist the International Criminal Court in the interpretation and application of the substantive crimes in arts 6, 7 and 8 of the *Rome Statute*. The US actively participated in the drafting of *Elements of War Crimes* and supported the final text of the document even though the US is not a party to the *Rome Statute*. The specific elements for the war crime of unlawful killing in art 8(2)(a)(i) include the requirements that '[t]he perpetrator killed one or more persons'⁴⁶ and also that '[s]uch person or persons were protected under one or more of the *Geneva Conventions*'.⁴⁷ Similarly, the specific elements for the war crime of murder in art 8(2)(c)(i) include the requirements that '[t]he perpetrator killed one or more persons'⁴⁸ and also that '[s]uch person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities'.⁴⁹ The inclusion of this particular offence in the subject matter jurisdiction of the military commissions is wholly consistent with the law of war.

B *Murder in Violation of the Law of War*

Section 950v(15) of the *Manual for Military Commissions* defines this particular offence as follows:

Any person ... who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

The *Manual for Military Commissions* goes on to list the elements of the offence as follows:

- (1) One or more persons are dead;
- (2) The death of the persons resulted from the act or omission of the accused;
- (3) The killing was unlawful;
- (4) The accused intended to kill the person or persons;
- (5) The killing was in violation of the law of war; and
- (6) The killing took place in the context of and was associated with an armed conflict.⁵⁰

In relation to the fifth element outlined above, the *Manual for Military Commissions* refers to the comment at s 950v(13)(d) in relation to the offence of 'Intentionally Causing Bodily Injury'. That comment states that:

For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy. It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed

⁴⁵ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003) ('*Elements of War Crimes*').

⁴⁶ *Ibid* 38.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* 394.

⁴⁹ *Ibid* (citations omitted).

⁵⁰ *Manual for Military Commissions*, above n 12, s 950v(15).

conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war.

Neither the *Military Commissions Act* nor the *Manual for Military Commissions* creates international humanitarian law. Like all other branches of international law, legal obligations under the law of war accrue to states pursuant to the treaties to which they become party and through customary international law. However, s 950v(13)(d), which also purports to apply to the fifth element of the offence of ‘Murder in Violation of the Law of War’, amounts to an attempt by the US to create a convenient new rule of the law of war. The purported offence of ‘Murder in Violation of the Law of War’ is, in fact, predicated on a thoroughly flawed premise and is wholly unknown in the law of war. That flawed premise is that the loss of privileged combatant status, such that the individual is an unlawful combatant, renders every act of belligerency a violation of the law of war.

There is no international law of war rule criminalising the shooting (or attempted shooting) of combatants on one side of a conflict by combatants on the other (even if such combatants are ‘unlawful’). The most that can be argued here is that belligerent acts of unlawful combatants may be prosecutable under the domestic law either of the state on whose territory the alleged conduct took place or of the captor state (in this case the US). This position is confirmed by the US Army’s *Operational Law Handbook*.⁵¹ As the defence team representing David Hicks consistently argued, there would have been no objections from David Hicks if he had been subject to trial before the civilian courts of the US for alleged perpetration of US domestic offences.

David Hicks was never alleged to have attempted to: kill coalition combatants trying to surrender; kill wounded coalition combatants no longer participating in the fighting; kill coalition prisoners of war; or kill civilians not participating in the conflict. Instead, he was simply alleged to have attempted to engage in hostilities against coalition forces themselves actively engaged in the conflict.⁵² Such conduct does not constitute a violation of the law of war.

The legal status of an individual under the law of war is only relevant to determining two things: (1) the protection from attack to which that individual is entitled in the course of armed conflict; and (2) the protections that individual is entitled to in detention if they are captured in the course of armed hostilities. The legal status of an individual under the law of war has no impact on a determination of whether that person has committed a violation of the law of war. The critical issue for the military commission when assessing whether David Hicks violated the law of war, ought to have been whether his belligerent

⁵¹ The relevant section states:

Unprivileged belligerents may include spies, saboteurs, or civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may be prosecuted under the domestic law of the captor.

US Army, Judge Advocate General’s Legal Center and School, *Operational Law Handbook* (2006) 17. See also George H Aldrich, ‘The Taliban, Al Qaeda, and the Determination of Illegal Combatants’ (2002) 96 *American Journal of International Law* 891, 893–4.

⁵² Charge Sheet, above n 3, [28].

acts were undertaken consistently with the law of war, and not his legal status under the law of war.

For this reason, the status of an individual as an ‘unlawful combatant’ cannot be an element of an offence under the law of war — despite the attempt of s 950v(13)(d) of the *Manual for Military Commissions* to do precisely that. Although the proposed charge against David Hicks, alleging attempted murder simply by reference to his unprivileged belligerent status rather than to substantive acts in violation of the law of war, was not approved by the Convening Authority, the fact that the offence exists is indicative of a fundamental flaw in the military commission process. Professor Jinks succinctly identifies important implications of the rule of combatant immunity for unlawful combatants:

There is a non-trivial core of unlawful combatants for whom the rule [of combatant immunity] has important protective consequences: unlawful combatants who otherwise complied with the law of war. For these fighters, the combatant immunity issue is crucial because, if denied this protection, they may be prosecuted upon capture for the very participation in the hostilities (even if they otherwise scrupulously observed the rules of war). For this group, the denial of POW status means that they face the prospect of criminal prosecution and life imprisonment at the hands of the enemy (and perhaps the death penalty). ... [T]here are, however, sound policy reasons to accord all captured combatants immunity for their otherwise lawful warlike acts. If all captured combatants failing to satisfy the requirements for POW status are subject to prosecution for any warlike acts, the law provides irregular fighters with no incentive to comply with its dictates.⁵³

This argument is surely correct. If, as the prosecution alleged, all specific acts of belligerency committed by an unlawful combatant are rendered unlawful by the legal status of the individual — even if those acts otherwise conform to the law of war — there is absolutely no incentive for the individual combatant to conduct military operations consistently with the law.

The 1942 decision of the US Supreme Court in *Ex parte Quirin*⁵⁴ is correctly cited in support of the proposition that the US President has the authority to try unlawful combatants held in the US by military commission. However, each of the eight German co-defendants in the case were deemed to be unlawful combatants by virtue of their penetration of US sovereign territory in disguise as civilians to engage in acts of espionage and sabotage on behalf of the German Government in the course of World War II. Such acts were in clear violation of the law of war and the accused were prosecuted accordingly. The case includes a long list of similar cases of trial by military commission but in all of them the specific conduct alleged was in clear violation of the law of war. In the case of David Hicks, neither of the charge sheets (for Military Commissions Mark I or Mark II) contained a similar allegation of conduct in violation of the law of war. Furthermore, the US Supreme Court in *Quirin* stated its view that ‘constitutional safeguards for the protection of all who are charged with offences are not to be

⁵³ Derek Jinks, ‘The Declining Significance of POW Status’ (2004) 45 *Harvard International Law Journal* 367, 437–8.

⁵⁴ 317 US 1 (1942) (*‘Quirin’*).

disregarded in order to inflict merited punishment on some who are guilty'.⁵⁵ That principle was sadly overlooked in the present approach to trial by US military commission.

V CONVENIENCES OF THE GUILTY PLEA

The termination of proceedings against David Hicks as a consequence of his entering a guilty plea proved convenient for both the Bush Administration and the Howard Government on a number of levels. That none of the evidence against David Hicks had to be presented in open court was helpful for Washington and Canberra. I have already explained that the *Military Commissions Act* protects the prosecution from any obligation to disclose the circumstances in which evidence was obtained. However, even with this relaxation of accepted international fair trial standards, the prosecution would still have been required to tender its evidence in court. The process of tendering would have exposed the nature of the evidence against David Hicks and would also have fuelled speculation about the identity of those prepared to speak against him as well as about the circumstances in which the evidence may have been obtained. The voluntary confession by David Hicks to training with al Qaeda and to preparing himself to go to the frontline in Afghanistan to fight against coalition forces resulted in a conviction without any requirement to adduce evidence in open session.

It is also the case that the entering of a guilty plea precluded judicial consideration of the illegality of the sole remaining charge against David Hicks. A significant amount of effort had been expended on preparing arguments that the charge of 'Providing Material Support to a Terrorist Organisation' is unknown in the law of war and violates the prohibition on retrospective application of a US domestic offence.⁵⁶ These arguments were never heard and the presiding judge, Colonel Ralph Kohlmann, was not required to decide upon them.

David Hicks had also made allegations of mistreatment and torture — particularly while he was interrogated on board the *USS Peleliu* prior to his transfer to Guantánamo Bay.⁵⁷ It is true that no evidence has yet been offered by the defence legal team to support these allegations but, had the case gone to trial, it is possible that these allegations may have been raised and evidence offered in support of them. Again, any such discussion in the course of the trial process would inevitably have sparked a wave of media speculation and comment — a prospect both governments would have been relieved to avoid.

One final issue of potential embarrassment for the Bush Administration was also conveniently obviated by the entering of the guilty plea. In March 2007, the chief prosecutor for the military commissions, Colonel Morris Davis, alleged that Major Mori was acting improperly in his outspoken criticism of the military commissions and that his criticisms constituted language contemptuous of the

⁵⁵ *Ibid* 25.

⁵⁶ *Advice: In the Matter of the Legality of the Charge against David Hicks*, 8 March 2007 <www.lawcouncil.asn.au/shared/2435666621.pdf> at 18 October 2007. This document was co-signed by a number of Australian lawyers and submitted by the Law Council of Australia to the Commonwealth Attorney-General.

⁵⁷ Sales, above n 11, 51.

President, Vice-President, Secretary of Defense and Congress in violation of art 88 of the *Uniform Code of Military Justice*.⁵⁸ Colonel Davis first raised these allegations in an interview with *The Australian* newspaper on 3 March 2007⁵⁹ and followed them up in an email to Judge Crawford, the Convening Authority for the military commissions.⁶⁰ When pressed, Colonel Davis claimed that he had never intended to actually seek a court-martial of Major Mori in respect of these allegations.⁶¹ However, the public raising of an allegation of illegal conduct on the part of Major Mori seemed to constitute prosecutorial interference in the running of the defence case. Colonel Davis revealed something of his motivations in his email to Judge Crawford when he stated that:

Major Mori's campaign is having a direct impact on the elected government of one of our closest allies in an election year and while they are supporting us in a war. An article in today's *Sydney Morning Herald* notes that Prime Minister Howard is trailing in the polls and that David Hicks is a factor.⁶²

Irrespective of Colonel Davis' precise motivations, the defence team certainly interpreted his actions as improper prosecutorial interference in an attempt to 'chill' Major Mori's public campaign on behalf of David Hicks in Australia. Consequently, on 19 March 2007, the defence team filed a Motion on Prosecutorial Misconduct requesting the military commission to disqualify Colonel Davis 'from exercising any prosecutorial or supervisory responsibilities' in the case.⁶³ Judge Kohlmann had made no decision in respect of that Motion prior to the proceedings in Guantánamo Bay at the end of March and it was expected that he would need to do so in the course of the proceedings that week. The entering of a guilty plea obviated the need for the presentation of any oral submissions on the issue and for any decision from Judge Kohlmann in relation to it.

In regards to the Howard Government much has already been made, in the course of the public debate in this country, of the fact that the guilty plea has resulted in David Hicks returning to Australia with a conviction, incarcerated until just after the federal election this year and subject to a gag order until well into the new year and long after the forthcoming election.⁶⁴ Perhaps most significantly for the Prime Minister and his Government, the issue of David Hicks seems to have effectively disappeared as an electoral issue. These outcomes are all extremely convenient for the Australian Government, leading

⁵⁸ 10 USC §§ 888 (art 88) (2006).

⁵⁹ David Nason, 'Mori Charges Could Be Laid after Trial', *The Australian* (Sydney, Australia) 3 March 2007, 3.

⁶⁰ *United States of America v David Matthew Hicks*, Defense Motion for Appropriate Relief: Prosecutorial Misconduct (19 March 2007) (copy on file with author) ('Defense Motion for Appropriate Relief').

⁶¹ Peter Mitchell, 'US: Davis Not Aware of Any Potential Charges against Mori', *Australian Associated Press Newsfeed*, 6 March 2007.

⁶² Defense Motion for Appropriate Relief, above n 60, attachment E, 2-3.

⁶³ *Ibid* 1.

⁶⁴ See Letter to the Editor, 'David Hicks', *The Australian* (Sydney, Australia) 5 April 2007, 11; Peta Donald (Reporter), 'Government Denies 'Fixing' Hicks Plea', *PM* (Sydney, Australia) 2 April 2007.

many to speculate on the extent of the Government's interference in the case to bring proceedings to an expeditious conclusion.⁶⁵

However, the removal of the Hicks case from the political agenda is not the only convenience for the Howard Government emanating from the guilty plea. Only a few weeks before the proceedings in Guantánamo Bay in the final week of March 2007, Tamberlin J of the Federal Court handed down an important decision with potentially profound implications for the Howard Government. In *Hicks v Ruddock, Downer and the Commonwealth*,⁶⁶ Tamberlin J rejected the Government's application to summarily dismiss the case and, instead, determined that the case would proceed.⁶⁷ The claim against the Government alleged a failure of obligation to request the repatriation of David Hicks from Guantánamo Bay.⁶⁸ Perhaps the Government genuinely believed that the case would be summarily dismissed on the basis that David Hicks had no reasonable prospect of success. The decision by Tamberlin J that the case could not be said to have no reasonable chance of success ensured that, in the absence of any fundamental change in circumstances involving David Hicks, argument would be heard on the substantive issues in the case. Whether or not David Hicks would, or even could, have won the case, the mere fact of the airing of submissions on the substantive issues would have guaranteed extensive media coverage of the case and intense scrutiny of the Howard Government's handling of the entire Hicks affair. The entering of a guilty plea only weeks after the handing down of Tamberlin J's decision rendered the litigation nugatory and resulted in the termination of proceedings. That result was thoroughly convenient for the Howard Government.

VI IMPLICATIONS FOR FUTURE MILITARY COMMISSIONS

Reactions to the Hicks Case reverberated throughout the US and around the world. The relative leniency of the sentence confirmed the low-ranking status of David Hicks and, presumably, at least some others like him in detention in Guantánamo Bay. Furthermore, the negotiation of a pre-trial agreement without the involvement of either the presiding judge or the prosecution exposed the lack of independence of the commission process from the Bush Administration. Both of these realities seriously undermined the credibility of the military commission process. 'Kicking off' the military commissions with proceedings against David Hicks seemed to me to constitute the political equivalent of an 'own goal' in a championship football match.

Intriguingly, the next commission proceedings have even further eroded credibility in the commission process. It seems reasonable to have expected that US Military authorities would seek to use the arraignment hearings against Omar Khadr and Salim Ahmed Hamdan on 4 June 2007 to restore some credibility in the commission process. Instead, the outcome was antithetical to any such expectation. The Combatant Status Review Tribunal had determined that both Khadr and Hamdan were 'enemy combatants' in September and October 2004

⁶⁵ See McCormack, above n 9, 11.

⁶⁶ (2007) 156 FCR 574.

⁶⁷ *Ibid* 34, 56, 77.

⁶⁸ *Ibid* 9.

respectively. However, the *Military Commissions Act* now specifies that ‘unlawful enemy combatants’ are subject to the jurisdiction of military commissions.⁶⁹ First Colonel Peter Brownback as the presiding judge in the Khadr proceedings, then Captain Keith Allred as the presiding judge in the Hamdan proceedings, terminated the proceedings for lack of jurisdiction over their respective accused because neither had yet been designated ‘unlawful enemy combatants’.⁷⁰ These seemingly technical decisions (which presumably could be reversed on the basis of a straightforward procedural remedy) suggest some independence from the executive arm of US Government. Perhaps that was precisely the intention — to create an impression of independence as some sort of military/judicial reaction to the allegations of a lack of independence in the proceedings against David Hicks. Whatever the precise motivation for terminating the proceedings against Khadr and Hamdan at the moment of their commencement, a common thread has emerged through all the military commission proceedings to date — including those involving Hicks. A key lesson I draw from the conduct of Military Commissions Mark I and Mark II is that making up the system ‘as you go’ is abject folly.

While I was at Guantánamo Bay, plans had already been drawn up for the construction of a US\$150 million state-of-the-art military commissions building. I said publicly on my return to Australia that ‘if the building project goes ahead, the edifice will stand as a monument to a perversion of the long and admirable tradition in the US of commitment to justice and the rule of law’.⁷¹ I have been fascinated by the press speculation at the time of writing this piece that the Bush Administration now accepts that Guantánamo Bay has so tarnished the international reputation of the US that the facility needs to be closed.⁷² I have never opposed the establishment of military commissions as a potential modality for the trial of those allegedly involved in terrorism. For me the critical issue is and always has been whether the trial process is consistent with established international standards of fair trial. I have also never been opposed to the locale of Guantánamo Bay for trials provided the trials were fair and transparent and detainees in Cuba had the right of habeas corpus for legal review of the basis of their detention. However, the determination of the Bush Administration to subject detainees to coercive treatment, to place them on Cuban territory in the hope of avoiding the jurisdiction of US courts and to establish a trial process which manifestly fails to reach acceptable standards of fair trial has fatally tainted Guantánamo Bay. That south-east pocket of US controlled Cuban territory will now be synonymous with a strategic policy failure of the Bush Administration. Democrat Senator Christopher Dodd, following the military commission decisions in the proceedings against Khadr and Hamdan,

⁶⁹ *Military Commissions Act*, 10 USC § 948c (2006).

⁷⁰ *United States of America v Omar Ahmed Khadr*, Order on Jurisdiction (4 June 2007); *United States of America v Salim Ahmed Hamdan*, Decision and Order — Motion to Dismiss for Lack of Jurisdiction (4 June 2007).

⁷¹ McCormack, above n 9, 13.

⁷² See, eg, Helene Cooper and William Glaberson, ‘At White House, Renewed Debate on Guantanamo’, *The New York Times* (New York City, US) 23 June 2007, 1.

encapsulates the critique as follows:

The current system of prosecuting enemy combatants is not only inefficient and ineffective, it is also hurting America's moral standing in the world and corroding the foundation of freedom upon which our nation was built. ... I hope my colleagues in Congress will join me now in the fight to restore America's moral authority in developing a tough but fair system of bringing terrorists to justice.⁷³

Regrettably, it is not only the reputation of the US that has suffered from the determined pursuit of a flawed trial process. The Howard Government's unqualified support for the process and its blind faith in the assurances of the Bush Administration that the process would be fair, transparent and expeditious have also eroded Australia's moral standing in the world. No other government has been so willing to enthusiastically endorse the legitimacy of the military commissions. Our ability to challenge other states — including those in our own geographic region — in their commitment to human rights standards generally and to fair trial processes specifically has suffered accordingly. I am wholeheartedly in agreement with Lex Lasry's conclusion that 'Australia's international standing and moral authority have been diminished by its support of a process so obviously at odds with the Rule of Law'.⁷⁴

⁷³ Chris Dodd, Senator, 'Statement of Senator Dodd on Dismissal of Khadr Case' (Press Release, 4 June 2007) <<http://dodd.senate.gov/index.php?q=node/3924>> at 18 October 2007.

⁷⁴ Lasry, above n 15, 48.