

David Hicks: Prisoner of War or Prisoner of the War on Terrorism?

LIONEL NICHOLS*

Abstract

Despite being incarcerated at Guantanamo Bay for over five years, David Hicks never had his true legal status determined by a competent tribunal. This paper seeks to determine the true status of David Hicks under international law. It argues that attempts by the United States to classify Hicks as an 'unlawful combatant' are contrary to the Geneva Conventions. When captured, Hicks was either a member of the Taliban or a member of al-Qaeda. If Hicks was a member of the Taliban his true status was that of a prisoner of war. If Hicks was a member of al-Qaeda, he was a civilian who was no longer taking an active part in hostilities. Given the uncertainty over his membership and the fact that Hicks claimed to be a prisoner of war Hicks was entitled to presumptive prisoner of war status. During his detention at Guantanamo Bay and in the course of his trial before the Military Commission Hicks was not afforded many of the fundamental guarantees he was entitled to, thereby placing the United States in breach of the Geneva Conventions and international human rights law.

Introduction

Despite being incarcerated at Guantanamo Bay for over five years until his release in May 2007, David Hicks never had his true legal status determined by a competent tribunal. This article seeks to determine the true status of David Hicks under international law. In the process it will consider a number of questions at the forefront of international humanitarian law. First, does international humanitarian law apply to the 'war on terrorism'? Second, is the category of 'unlawful combatant' recognised by international humanitarian law and, if so, what protections are such persons entitled to? Third, can international humanitarian law apply to a conflict involving a non-State actor? Fourth, what is meant by the terms 'international armed conflict' and 'non-international armed conflict' as they apply in the context of the 'war on terrorism'? Finally, how should a detainee be treated should any doubt arise as to his or her status? This article argues that when Hicks was captured he was either a member of the Taliban or a member of al-Qaeda. If Hicks was a member of the Taliban, his true status was that of a prisoner of war. If Hicks was a member of al-Qaeda he was a civilian who was not taking an active

* MIP, LLB (Hons) (Tasmania); 2008 Rhodes Scholar. The author wishes to thank Rev Prof Michael Tate AO for his supervision on an earlier version of this article.

part in hostilities and so was entitled to the fundamental protections provided in Common Article 3 of the Geneva Conventions. Given the uncertainty over his membership and the fact that Hicks claimed to be a prisoner of war, Hicks was entitled to presumptive prisoner of war status and the protections of the Third Geneva Convention until his true legal status was determined by a competent tribunal.

The argument is presented in four parts. Following this introduction, Part 1 attempts to explain the circumstances that led an Australian citizen to convert to Islam, join the Taliban and train with al-Qaeda. Relying upon both official sources and leaked documents, Part 1 seeks to summarise the capture, detention and trial of David Hicks.

Part 2 considers Hicks' status as a member of the Taliban. It argues that Hicks was captured during the course of an international armed conflict between the Coalition States and the de facto government of Afghanistan, the Taliban. As a member of the armed forces of a party to the conflict, Hicks' true status was that of a prisoner of war and his failure to wear a uniform did not deprive him of that status. As a prisoner of war, Hicks was entitled to fundamental protections contained in the Third Geneva Convention, including the right not to be subjected to any physical or mental torture and the right to be released at the end of hostilities.

Part 3 considers Hicks' status as a member of al-Qaeda. It considers the attempts by the United States to classify the conflict in Afghanistan as two separate armed conflicts. It demonstrates that even if Hicks was captured during the course of a non-international conflict between the Coalition States and al-Qaeda, as the detaining power, the United States was obliged to treat Hicks in a manner consistent with Common Article 3.

Part 4 argues that even if it cannot be concluded with certainty that Hicks was a member of the Taliban, there was at the very least doubt as to his status and hence he was entitled to presumptive prisoner of war status until his true status was determined by a competent tribunal. It concludes that as the Presidential Order, the Combatant Status Review Tribunal and the Administrative Review Board were not competent tribunals, Hicks' entitlement to presumptive prisoner of war status remained throughout his period of detention.

I. The Capture, Detention and Trial of David Hicks

In 1999 David Hicks was an Australian father of two working in Japan. Three years later he was captured fighting in Afghanistan, transported to a United States naval base in Cuba and charged with aiding the world's most infamous terrorist organisation. Prior to any discussion on the applicability of international law to Hicks' situation, it is necessary to explain and summarise the events leading up to his capture, how his case was brought to trial and his conditions of detention at Guantanamo Bay. Given the secrecy which surrounds Hicks' case, obtaining accurate and reliable sources is extremely difficult. As part of his plea bargain to secure his release from Guantanamo Bay, Hicks agreed not to speak to the media for one year.¹ Hence, what follows is not intended to be an historical account of Hicks' movements and experiences. Rather, it is a plausible explanation of Hicks' capture and subsequent detention so that discussion of his status may proceed.

¹ 'Hicks' pre-trial agreement (full transcript)' *The Australian* (2 April 2007).

A. Conversion to Islam and Membership of the Taliban

In 1997 Hicks left behind his failed marriage and travelled to Japan to train racehorses.² Whilst watching television in Japan, Hicks became interested in the conflict between Serbia and Albania in Kosovo.³ Hicks travelled to Albania and trained with the Kosovo Liberation Army (KLA), a paramilitary organisation fighting on behalf of the Albanian Muslims.⁴ In an interview with the Australian Federal Police (AFP), Hicks stated that he joined the KLA to help the Albanian people.⁵ By the time that Hicks arrived in Albania, however, the conflict was almost over. The United States Department of Defence alleges that whilst in Albania, Hicks engaged in 'hostile action', but this is disputed by his father, Terry Hicks, and his military lawyer, Major Michael Mori.⁶

Soon after the cessation of hostilities, Hicks returned to Australia. He became further interested in Islam and so attended an Islamic college in Adelaide to learn more about the faith. By November 1999, Hicks had converted to Islam and travelled to a Pakistani *madrassa* to learn Arabic and study the *Koran*.⁷ It appears that Hicks became one of the thousands of people to receive education from such institutions before being recruited by the Taliban, a Sunni fundamentalist movement that at the time was also the de facto government of Afghanistan.⁸ At around the same time, Hicks joined *Laskkar e Tayyiba* (LET), an anti-Western missionary organisation fighting on behalf of Pakistan in Kashmir. Following the September 11 attacks, the United States declared LET to be a terrorist organisation, thereby allowing it to take action against the organisation under its *Immigration and Nationality Act*.⁹ Hicks spent at least two months training with LET before travelling to the Kashmir border to fight for Pakistan. Hicks told his family that he fired 'hundreds of rounds' during his two weeks on the front line before returning to Pakistan to continue his studies.¹⁰

B. Training with al-Qaeda and the September 11 Attacks

Whilst studying in Pakistan, Hicks became aware of the war in Afghanistan between the Taliban and the Northern Alliance. In August 2000 Hicks wrote to his family to say that it was his intention to fight for the Taliban for a short period of time but that he wanted to return to Pakistan by January 2001 to 'fulfil his other obligations as a Muslim' including *hajj* and marriage.¹¹ However, for reasons that are not entirely clear, Hicks became one of the 20,000 men who attended training camps run by al-Qaeda. It is alleged that for eight months, beginning in January 2001, Hicks undertook a number of

2 Terry Hicks, 'Human Rights Issues in the War on Terror', University of Tasmania, Hobart, 19 May 2006.

3 Major Michael Mori, 'An Update on the Proposed Trial of David Hicks', University of Tasmania, Hobart, 18 August 2006.

4 *United States v David Matthew Hicks*, Charge Sheet, Department of Defence Military Commission, 10 June 2004, <<http://www.defenselink.mil/news/Jun2004/d20040610.pdf>>.

5 Debbie Whitmont, 'The Case of David Hicks', *Four Corners*, ABC Television, 31 October 2005.

6 *United States v David Matthew Hicks*, above n4; Hicks, above n2; Mori, above n3.

7 Ibid.

8 Peter Bergen & Swati Pandey, 'The Madrassa Scapegoat' (2006) 29(2) *The Washington Quarterly* 117.

9 18 USC § 2339B.

10 Curtis Levy & Bentley Dean, *The President versus David Hicks* (2004) SBS Television and FFC Australia.

11 Ibid.

training courses including basic training, guerrilla warfare, intelligence gathering and urban warfare.¹² In his interview with the AFP, Hicks admitted to having undergone this training and also to having met Osama bin Laden.¹³ According to United States and Australian authorities, Hicks joined and trained with al-Qaeda with the intention of assisting the organisation to engage in terrorist activities. However, according to his former lawyer, Stephen Kenny, Hicks had no intention of engaging in terrorist activity on behalf of al-Qaeda. Rather, he was a member of the Taliban being trained by al-Qaeda in order to fight for the Taliban in its war against the Northern Alliance.¹⁴ In early September 2001, Hicks returned to Pakistan where he remained until the terrorist attacks on the United States.

President Bush attributed responsibility for the terrorist attacks to al-Qaeda.¹⁵ The United Nations General Assembly and Security Council condemned the attacks and the Security Council passed a unanimous resolution affirming the United States' right to self-defence.¹⁶ The United States declared a 'global war on terrorism' and demanded that the Taliban regime close all al-Qaeda training camps in Afghanistan and surrender all al-Qaeda members. The Taliban defied this demand and in October 2001 the United States led a coalition of States and the Northern Alliance in *Operation Enduring Freedom*, attacking the armed forces of both the Taliban and al-Qaeda.

C. *The Capture and Detention of David Hicks*

The accounts of David Hicks' movements and motivations following the September 11 attacks differ. According to the United States Department of Defence, Hicks approved of the attacks and returned to Afghanistan to rejoin his al-Qaeda associates.¹⁷ Conversely, Hicks has told the AFP that he disapproved of the attacks and that he returned to Afghanistan to retrieve some personal belongings and that he intended to travel back to Australia.¹⁸ According to Hicks' account, after he returned to Afghanistan the border closed and he spent several weeks in a guesthouse before being asked to vacate.¹⁹ It appears to be undisputed that Hicks, armed with an AK-47, guarded a tank for the Taliban near Kandahar Airport for approximately one week but did not fire a shot during this time.²⁰ According to his father, David Hicks then attempted to flee the country.²¹ In November 2001, Hicks was captured at a taxi stand by the Northern Alliance and sold to the United States for US\$1000.²²

12 *United States v David Matthew Hicks*, above n 4; United States Department of Defence, Office of the Chief Prosecutor, Office of Military Commissions, 'Memorandum for Detainee David M Hicks 0002, Guantanamo Bay, Cuba', 2 February 2007.

13 Whitmont, 'The Case Against David Hicks', above n5.

14 Levy & Dean, above n10.

15 George W Bush, 'Address to a Joint Session of Congress and the American People', 20 September 2001, <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>>.

16 UN General Assembly Resolution 56/1 (Condemnation of Terrorist Attacks in the United States of America), A/RES/56/1 (September 12 2001); UN Security Council Resolution 1373, S/RES/1373, 4385th meeting, September 28 2001.

17 *United States v David Matthew Hicks*, above n4; 'Memorandum for David Hicks', above n12.

18 Whitmont, 'The Case Against David Hicks', above n5.

19 *Ibid.*

20 *Ibid.*; *United States v David Matthew Hicks*, above n4.

21 Terry Hicks, above n2.

Whilst in the custody of the United States Hicks was detained aboard the *USS Peleliu*. Hicks has alleged that during this time he was tortured and sexually abused by members of the United States armed forces.²³ It was alleged that Hicks was transported off the ship by helicopter, blindfolded and shackled, and subjected to two 10-hour beatings.²⁴ Terry Hicks has also revealed that his son told him that he was given injections and then penetrated anally with various objects.²⁵ These allegations are denied by both the United States and Australian governments. According to Australian Attorney-General Philip Ruddock the former United States Deputy Secretary of Defence, Paul Wolfowitz, conducted a 'comprehensive review' of Hicks' treatment whilst in the custody of the United States and found no evidence to support the allegations.²⁶ A US Naval Criminal Investigation Service inquiry also found no evidence of Hicks' torture.²⁷ In his pre-trial agreement, Hicks stated that he had 'never been illegally treated by any person or persons while in the custody and control of the United States'.²⁸

In November 2001, the same month in which Hicks was captured, United States President George W Bush issued a Presidential Order detailing how Hicks and hundreds of others captured during the 'war on terrorism' would be detained, treated and tried. The Presidential Order provided that non-citizens of the United States could either be detained within or outside the United States.²⁹ Consequently, Hicks and over 600 others were transported to Guantanamo Bay, a naval base in Cuba leased and controlled by the United States. Hicks arrived at Guantanamo Bay in January 2002 and remained incarcerated for over five years.

Throughout this period Hicks was detained in a number of different locations. Upon his arrival in Guantanamo Bay Hicks was detained at Camp X-Ray where he was held incommunicado in a small cage with no windows and no direct access to sunlight.³⁰ In the four months he spent at Camp X-Ray Hicks was permitted only 30 minutes of exercise per week.³¹ Hicks spent approximately 15 months at Camp Delta in which he was permitted to communicate with other detainees but then spent a further eight months in solitary confinement at Camp Echo.³² In February 2004 Hicks was transferred back to Camp Delta but after two years was moved to Camp Five. At Camp Five Hicks spent 15 months in isolation before his release from Guantanamo Bay in May 2007. In his five years at Guantanamo Bay, Hicks spent over two years in solitary confinement.

22 Major Michael Mori, above n3.

23 Whitmont, above n5.

24 Ibid.

25 Ibid.

26 Phillip Ruddock MP 'David Hicks – FAQ', April 2006, <<http://www.fairgofordavid.org/htmlfiles/documents/aghicksfaq.htm>>.

27 Ibid.

28 'Hicks' pre-trial agreement, above n1.

29 Military Order of 13 November 2001: *Detention, Treatment and Trial of Certain Non Citizens in the War Against Terrorism*, section 3.

30 Terry Hicks, above n2.

31 Ibid.

32 Major Michael Mori, above n3.

D. Challenges to the Lawfulness of Hicks' Detention

According to the United States, neither Taliban nor al-Qaeda members were entitled to prisoner of war status under the Third Geneva Convention. It was determined, at least initially, that the Third Geneva Convention did not apply because the United States did not recognise the Taliban as being the legitimate government of Afghanistan.³³ Further, members of al-Qaeda were not entitled to prisoner of war status because al-Qaeda was not a High Contracting Party to the Third Geneva Convention.³⁴ According to the Bush Administration, as the Third Geneva Convention did not apply to either members of the Taliban or members of al-Qaeda, neither could be prisoners of war and instead were 'illegal combatants'.³⁵ The position of the United States was that detainees were entitled to be treated humanely, but were not entitled to the protections afforded in the Geneva Conventions and were not entitled to prisoner of war status. The United States' position in relation to the Taliban changed on 7 February 2002 when President Bush issued a Presidential Order announcing that, whilst the Third Geneva Convention applied to the Taliban detainees, members of the Taliban could not qualify for prisoner of war status because they were 'unlawful combatants'.³⁶

The Presidential Order purported to prevent the detainees from having the legality of their detention reviewed by any United States court, any foreign court, or any international tribunal.³⁷ Hicks' legal team challenged the validity of this section of the Order by joining two British Citizens in lodging a writ of habeas corpus. At first instance, the United States District Court in *Rasul v Bush*³⁸ dismissed the case on the grounds that it did not have jurisdiction to hear the matter, a decision which was upheld by the United States Court of Appeals for the District of Columbia Circuit.³⁹ In June 2004, however, the United States Supreme Court, in a 6-3 decision, held that as the United States had de facto sovereignty over Guantanamo Bay, the District Court had jurisdiction to hear the habeas corpus challenges.⁴⁰

33 The White House, 'President Meets with Afghan Interim Authority Chairman', 28 January 2002, <<http://www.whitehouse.gov/news/releases/2002/01/20020128-13.html>>.

34 Ibid.

35 Ibid. The US authorities appear to have used the terms 'illegal combatant', 'enemy combatant', 'unlawful combatant', 'unlawful belligerent' and 'unlawful enemy combatant' synonymously and interchangeably. For the purposes of this discussion each of these terms are assumed to mean 'persons taking direct part in hostilities without being entitled to do so'. See John Cerone, 'Status of Detainees in International Armed Conflict, and their Protection in the Course of Criminal Proceedings', *American Society of International Law*, January 2002, <<http://www.asil.org/insights/insigh81.htm>>. In his Pretrial Agreement, Hicks agreed that 'the entire period of detention as an unlawful enemy combatant is based upon my capture during armed conflict, has been lawful pursuant to the law of armed conflict and is not associated with, or in anticipation of any criminal proceedings against me', above n1.

36 George W Bush, 'Humane Treatment of Taliban and al-Qaeda Detainees', *Memorandum for the Vice President et al*, 7 February 2002.

37 Military Order of 13 November 2001, above n23, section 7(b)(2).

38 *Rasul v Bush* 215 FSupp.2d 55 (DDC 2002).

39 *Al Odab v United States* 321 F 3d 1134 (DCCir 2003).

40 *Rasul v Bush* (03-334) 542 US 466 (2004).

In response to the Supreme Court's decisions in *Rasul v Bush*⁴¹ and *Hamdi v Rumsfeld*⁴² the United States Government set up the Combatant Status Review Tribunal (CSRT) to determine the legality of the detention of each individual detainee. Hicks was prevented from having legal counsel at his hearing and as a consequence he refused to participate.⁴³ The proceedings and the hearing were conducted without Hicks' participation. On 30 September 2004, the CSRT determined Hicks to be an 'enemy combatant', and hence his detention to be legal.⁴⁴

E. The Trial of David Hicks

According to the Presidential Order, non-citizens of the United States were not to be tried in the US domestic court system or in the United States court martial system. Rather, non-US citizens believed to have been members of al-Qaeda or believed to have aided or abetted al-Qaeda were to be tried by Military Commission.⁴⁵ The Order, based on a procedure last adopted in the 1940s, did not rely on any explicit legislative or Congressional authorisation, but rather on the President's constitutional capacity as Commander in Chief of the United States Military.⁴⁶ In July 2003, President Bush announced that David Hicks was one of the first detainees to be eligible for trial before a Military Commission.

The Bush Administration's decision to try Hicks and others by Military Commission rather than before the United States courts is openly acknowledged as being based on the need to avoid the procedural safeguards and rules of evidence such domestic judicial systems provide.⁴⁷ Attempts to prosecute Hicks in the United States domestic courts would almost certainly have been unsuccessful, as most of the evidence the prosecution would have sought to adduce would have been inadmissible. For example, as Hicks was not clearly informed of his right to remain silent, much of the evidence obtained during the questioning of Hicks would have been excluded under the *Miranda* rule.⁴⁸ By contrast, under the rules established for trial by Military Commission all evidence was to be admissible, regardless of how it was obtained, provided it would have probative value to a reasonable person.⁴⁹ Consequently, evidence obtained under duress or resulting from torture could be admitted and the hearsay rule was essentially abolished.

With doubts aroused as to whether a fair trial could be conducted under such circumstances, governments from a number of countries, including the United Kingdom, secured the release of their nationals from Guantanamo Bay.⁵⁰ Conversely, the

41 Ibid.

42 *Hamdi v Rumsfeld* (2004) 124 S Ct 2633.

43 Major Michael Mori, above n3.

44 *Hicks v United States* No. 02-CV-0299 (DDC 2004).

45 Military Order of November 13, 2001: *Detention, Treatment and Trial of Certain Non Citizens in the War Against Terrorism*, Federal Register: November 13, 2001 (Volume 66, Number 222) at 57831–57836.

46 *Authorization for Use of Military Force Joint Resolution*, Public Law 107–40, 115 Stat. 224; 10 USC §§ 821, 836.

47 Ibid. Section 1(g) states 'it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognised in the trial of criminal cases in the United States District courts'.

48 *Miranda v Arizona* 384 US 436 (1966).

49 United States Department of Defence, Military Commission Order No. 1, 21 March 2002, section 6D.

50 British Embassy in the United States, 'Statement by Jack Straw on return of British Guantanamo detainees', 2 February 2004.

Australian Government consistently maintained that it was satisfied that the Military Commission process would provide Hicks with a fair trial.⁵¹ Part of the reason for this position appears to be that the Australian Government received legal advice that Hicks could not be charged under domestic Australian law unless new offences were drafted to apply retrospectively. The lack of support from the Australian Government prompted Hicks to apply for British citizenship at the end of 2005.⁵²

Despite being held in custody from November 2001, Hicks was not permitted to communicate with legal counsel until December 2003.⁵³ It took over two and a half years in detention for Hicks to be charged. Initially, Hicks was charged with conspiracy, attempted murder by an unprivileged belligerent and aiding the enemy.⁵⁴ In August 2004, Hicks pleaded not guilty to each of these charges.⁵⁵ Hicks' trial date was set for January 2005, but prior to the commencement of the trial the District Court issued a stay of proceedings pending a final decision from the United States Supreme Court in *Hamdan v Rumsfeld*.⁵⁶ Hamdan worked as Osama bin Laden's personal driver before being captured and sent to Guantanamo Bay. Like Hicks, President Bush determined that Hamdan was to be tried by Military Commission and his status as an 'enemy combatant' was confirmed by the CSRT. The District Court held that the Military Commissions violated the Third Geneva Convention and the Uniform Code of Military Justice.⁵⁷ This decision was reversed by the United States Court of Appeals.⁵⁸

In June 2006, in a 5-3 decision, the United States Supreme Court upheld the decision of the District Court by holding that the Military Commissions were illegal under both United States domestic law and the Third Geneva Convention. Justice Stevens, writing for the majority, interpreted Common Article 3 broadly to find that the phrase 'conflict not of an international character' includes conflicts between High Contracting Parties and non-State actors where the conflict occurs on the territory of a High Contracting Party,⁵⁹ that is, in Afghanistan. Hamdan was therefore entitled to a trial by a 'regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples'.⁶⁰ The majority held that the Military Commissions did not provide for such judicial guarantees and hence were contrary to the Geneva Conventions.⁶¹ As a result, the charges against Hicks were rendered void.

As the Military Commissions were declared illegal, new Military Commissions were established by Congressional enactment in October 2006.⁶² Despite claiming to be a

51 Law Council of Australia, *The Australian Government's Position on David Hicks*, 7 December 2006.

52 *Hicks v Secretary of State for the Home Department* [2005] EWHC 2818.

53 Major Michael Mori, Hicks, above n3.

54 *United States v David Matthew Hicks*, above n4.

55 Major Michael Mori, above n3.

56 *David M Hicks v George W Bush*, US District Court of Columbia, Civil Action No. 2002-0299 per Judge Colleen Kollar-Kotelly, 15 November 2005.

57 *Ibid.*

58 *Hamdan v Rumsfeld*, 415 F 3d 33 DC Cir, 2005.

59 *Hamdan v Rumsfeld*, 126 S Ct 2749 at 2796.

60 *Ibid.*

61 See further below at p70.

62 *Military Commissions Act 2006*, Pub L No 109-366, 120 Stat 2600 (October 17, 2006).

‘regularly constituted court’ for the purposes of Common Article 3,⁶³ the procedures and rules governing these ‘new’ Military Commissions were criticised for the same reasons as their predecessor. For example, despite the decision of the United States Supreme Court in *Rasul v Bush* that the District Court had jurisdiction to hear habeas corpus challenges, the *Military Commissions Act 2006* purported to provide the United States Executive with exclusive and final authority to determine a detainee’s status as an ‘unlawful enemy combatant’.⁶⁴ Further, whilst evidence obtained through torture or cruel, inhuman or degrading treatment was to be inadmissible, these terms were defined in such a way that evidence obtained through techniques such as ‘water boarding’ or sleep deprivation could be admitted.⁶⁵

Pursuant to the *Military Commissions Act*, in February 2007 Hicks was charged with providing material support for terrorism and with attempted murder in violation of the law of war.⁶⁶ Essentially, Hicks was presented with two options. First, he could remain incarcerated for several more years challenging the lawfulness of the Military Commissions in the United States District Court, the United States Court of Appeals and the United States Supreme Court. Alternatively, Hicks could accept the plea bargain offered by the prosecution. Under the terms of the plea bargain, if Hicks pleaded guilty he would only have to serve nine months from the date of his conviction, and this time could be served in Australia. Hicks accepted the plea bargain and pleaded guilty to the charge of providing material support for terrorism on 26 March 2007. On 20 May 2007 Hicks returned to Australia to serve the remaining seven months of his sentence.

Part 1 has identified a significant factual uncertainty. Whilst it is undisputed that Hicks trained with al-Qaeda, it is not possible on the sources available to ascertain whether Hicks, when captured, was a member of the terrorist organisation. According to Hicks’ legal team, Hicks was trained by al-Qaeda as a member of the Taliban, and defended a tank on behalf of the Taliban. Conversely, US authorities allege Hicks was a member of al-Qaeda who, following the September 11 attacks joined his al-Qaeda associates to take direct part in hostilities in al-Qaeda’s armed conflict with the Coalition States. Given this uncertainty, Hicks’ status in both factual scenarios will be considered. This begins in Part 2 with a discussion on Hicks’ status as a member of the Taliban.

63 Ibid. Section 948b(f).

64 Ibid. Section 948a(1); Section 950j(b).

65 Ibid. Section 950v(b)(12).

‘Torture’ is defined to include ‘severe physical or mental pain or suffering’. ‘Severe physical pain or suffering’ is defined to mean bodily injury that involves a substantial risk of death, extreme physical pain, a burn or physical disfigurement of a serious nature and significant loss or impairment of the function of a bodily member, organ or mental faculty. ‘Severe mental pain or suffering’ is defined to mean ‘severe physical pain or suffering’. According to these definitions, it is possible for evidence to be admitted despite having been obtained through interrogation methods amounting to cruel, inhuman or degrading treatment or punishment. See Timothy L H McCormack, ‘David Hicks and the Charade of Guantanamo Bay’ (2007) 8 *Melbourne Journal of International Law* 273.

66 United States Department of Defence, Office of the Chief Prosecutor, Office of Military Commissions, ‘Memorandum for Detainee David M Hicks 0002, Guantanamo Bay, Cuba’, 2 February 2007.

2. Hicks' Status as a Member of the Taliban

A. Significance of Identifying the Armed Conflict

International humanitarian law recognises a fundamental distinction between two different types of armed conflict: international and non-international. If Hicks was captured during the course of an international armed conflict, close to 600 articles of the four 1949 Geneva Conventions could apply. Conversely, if Hicks was captured during a non-international armed conflict only one article would apply: Common Article 3 of the Geneva Conventions. Some have argued that such a division is 'arbitrary', 'undesirable', 'difficult to justify' and that it 'frustrates the humanitarian purpose of the law of war'.⁶⁷ Nevertheless, despite some convergence evident in recent developments in international criminal law, the distinction exists and so before Hicks' true status in international law can be determined it is first necessary to classify the armed conflict during which Hicks was captured.

Most would agree that if Hicks was a member of the Taliban he was captured during the course of an armed conflict between the Taliban and the Coalition States. Whilst the United States did not recognise the Taliban as being the legitimate government of Afghanistan, this is not relevant for the purposes of international law. Under international law, where all of the attributes of State sovereignty have in practice been transferred from the legitimate government to another group lacking in legitimacy, the second group will be recognised as being the de facto government of that State. The de facto government assumes all of the international legal obligations of its predecessor. The Taliban took control of Afghanistan's capital city, Kabul, in 1996 and by the time the armed conflict began the group controlled 95 per cent of the country. Therefore, despite only a handful of countries recognising the Taliban's legitimacy, it cannot be disputed that the Taliban were the de facto government of Afghanistan.⁶⁸ As the Taliban were the de facto government of Afghanistan and Afghanistan was a High Contracting Party to the Geneva Conventions, the conflict was between two High Contracting Parties and so must be classified as an international armed conflict.⁶⁹ Respectful of this interpretation of international law, former United States Secretary of State Colin Powell requested that

67 Knut Ipsen, 'Combatants and Non-Combatants' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) at 313.

68 George Aldrich, 'The Taliban, al-Qaeda, and the Determination of Illegal Combatants' (2002) 96(4) *American Journal of International Law* 891 at 893.

69 Common Article 2 of the Geneva Conventions provides that an international armed conflict exists where there is an armed conflict 'between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them': *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Force in the Field*, opened for signature 12 August 1949, 75 UNTS 31, entered into force 21 October 1950 ('First Geneva Convention'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85, entered into force 21 October 1950 ('Second Geneva Convention'); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, entered into force 21 October 1950 ('Third Geneva Convention'); *Geneva Convention Relative to the Treatment of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, entered into force 21 October 1950 ('Fourth Geneva Convention').

the United States reconsider its original position.⁷⁰ Consequently, on 7 February 2002 President Bush modified the original position of the United States and announced that the conflict between the Coalition States and the Taliban was an international armed conflict for the purposes of international humanitarian law.⁷¹ It must therefore be accepted that if Hicks was captured fighting for the Taliban it was during the course of an international armed conflict.

B. Hicks' Status as a Member of the Taliban

Whilst the United States accepted that the Geneva Conventions were applicable to members of the Taliban, it nevertheless denied detainees the full protections of the Geneva Conventions on the ground that Taliban members were not entitled to prisoner of war status. To be entitled to prisoner of war status, a captured person must fit into one of the six categories listed in Article 4A of the Third Geneva Convention, the first two of which are relevant to the present situation.⁷² Hicks would qualify as a prisoner of war if he was either:

- (a) a 'member of the armed forces of a Party to the conflict',⁷³ or
- (b) a member of a militia or volunteer corps belonging to a party to the conflict who fulfils the four criteria in Article 4A(2).⁷⁴

It is submitted that if Hicks was a member of the Taliban, he was entitled to prisoner of war status as he belonged to the first category. The Third Geneva Convention does not stipulate that members of the armed forces of a party to the conflict are required to satisfy the four criteria. Captured members of regular forces are entitled to prisoner of war status because of their link to the de jure or de facto government to which they belong.⁷⁵ It is unnecessary for members of regular armed forces to independently satisfy the four criteria in order to qualify for prisoner of war status. Consequently, it was incorrect for the United States to argue that members of the Taliban were not entitled to prisoner of war status because they did not satisfy the four additional criteria.⁷⁶

Alternatively, it is open for a competent tribunal to determine that members of the Taliban satisfied at least some of the four criteria of a party belonging to the conflict, namely that they:⁷⁷

70 Sean D Murphy, 'Decision not to Regard Persons Detained in Afghanistan as POWs' (2002) 96(2) *American Journal of International Law* 475 at 477.

71 Bush, above n36.

72 Third Geneva Convention, Article 4A. Whilst Article 43 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)*, opened for signature 8 June 1977, 1125 UNTS 3, entered into force 7 December 1978 ('Additional Protocol I') provides for less stringent criteria for the attainment of prisoner of war status, this Article is not relevant to the classification of Hicks' status as the United States is not a party to Additional Protocol I.

73 Third Geneva Convention, Article 4A(1).

74 Third Geneva Convention, Article 4A(2).

75 Toni Pfanner, 'Military Uniforms and the Law of War' (2004) 86 *International Review of the Red Cross* 93 at 115.

76 Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Status and Treatment of Taliban and al-Qaeda Detainees, Remarks at Chatham House, London, United Kingdom, 20 February 2002.

77 Third Geneva Convention, Article 4A(2).

- (a) were commanded by a person responsible for his subordinates;
- (b) had a fixed distinctive sign recognisable at a distance;
- (c) carried arms openly; and
- (d) conducted their operations in accordance with the laws and customs of war.

First, the Taliban were known to have had a command structure and Mulla Omar was known to have been the leader of the Taliban.⁷⁸ Whilst the nature of the Taliban's command structure and all of its members were not known, it is submitted that this should not preclude its members from attaining prisoner of war status. Second, whilst members of the Taliban did not wear customary military uniforms, the rationale for militia and volunteer corps wearing uniforms is to distinguish them from civilians.⁷⁹ The Taliban were distinguished from civilians by the fact that they were carrying arms openly. According to Article 44(3) of Additional Protocol I, the carrying of arms openly may be sufficient to distinguish the combatants from civilians.⁸⁰ Finally, even if the members of the Taliban violated the laws and customs of war by providing support to the terrorist activities of al-Qaeda, these prior breaches of international humanitarian law should not deny its members prisoner of war status.⁸¹ For example, the allegation that German soldiers had committed war crimes during the Second World War did not deprive those soldiers of prisoner of war status.⁸²

It is therefore submitted that if Hicks was a member of the Taliban, his true status under international law was that of a prisoner of war. Like all treaties, the Geneva Conventions must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁸³ As the Taliban were the armed force of a State Party to the conflict, its members were automatically entitled to prisoner of war status. The position of the United States has been strongly criticised by commentators and the ICRC International Committee of the Red Cross (ICRC), and is at odds with its own Army Operational Law Handbook.⁸⁴ Therefore, if it is accepted that Hicks was a member of the Taliban, there can be no doubt that he was entitled to prisoner of war status.

78 Lawrence Azubuike, 'Status of Taliban and Al Qaeda Soldiers: Another Viewpoint' (2003) 19(1) *Connecticut Journal of International Law* 127.

79 International Committee of the Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (1960) at 52.

80 Third Geneva Convention, Article 130; *Additional Protocol I*, Article 44(3). Whilst the United States is not a party to Additional Protocol I, Article 44(3) is nevertheless illustrative in interpreting how Article 4A(2) of the Third Geneva Convention should be interpreted.

81 Azubuike, above n78.

82 Pfanner, above n75.

83 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 31.

84 Avril McDonald, 'Defining the War on Terror and the Status of Detainees: Comments on the Presentation of Judge George Aldrich' (2002) 4 *Humanitares Volkerrecht* 206; Pfanner, above n75; Murphy, above n70.

C. *Hicks' Rights as a Prisoner of War*⁸⁵

As a prisoner of war, Hicks was entitled to all of the protections contained in the Third Geneva Convention. These protections are contained in Articles 21 to 108 and apply from the time the prisoner of war falls into enemy hands until they have been released.⁸⁶ Several are particularly relevant. First, upon capture, prisoners of war are only required to provide their name, military rank, date of birth and serial number.⁸⁷ It follows that, whilst the United States authorities were entitled to question Hicks on his suspected links with al-Qaeda, Hicks was not required to provide answers to any of these questions and the United States was not entitled to punish Hicks for remaining silent.

Second, prisoners of war must be treated humanely at all times and must not be subjected to any physical or mental torture.⁸⁸ There have been several allegations that detainees at Guantanamo Bay were subjected to torture. First, according to an ICRC report allegedly leaked to the *New York Times*, the United States used psychological and physical coercion 'tantamount to torture' on detainees at Guantanamo Bay.⁸⁹ Secondly, emails and memos written by the United States Executive and the FBI which were obtained by the American Civil Liberties Union in 2004 reveal the torture of detainees during interrogation.⁹⁰ Finally, in a report released in February 2006, the United Nations Commission on Human Rights wrote that treatment of detainees amounted to torture.⁹¹ Whilst it would appear that detainees at Guantanamo Bay were subjected to torture, it is uncertain whether Hicks was one of these detainees. Hicks claims to have been physically assaulted on numerous occasions,⁹² but as yet there is insufficient evidence to prove that he was one of the detainees subjected to torture during interrogations. Further, in his pre-trial agreement, Hicks stated that he had 'never been illegally treated by any person or persons while in the custody and control of the United States'.⁹³

It is arguable, however, that Hicks' detention amounted to inhumane treatment. The opinions of the European Court of Human Rights (ECHR) and the Human Rights Committee are instructive on what amounts to inhumane treatment. The European Court of Human Rights has held that the use of stress positions, hooding, sleep deprivation and sensory deprivation amounts to cruel, inhuman or degrading

85 As a prisoner of war, Hicks is entitled not only to the protections contained in the Third Geneva Convention but also to the protections afforded by international human rights law. This Part considers only the former. International human rights law is applied to Hicks situation in Part IV.

86 Third Geneva Convention, Article 5.

87 Third Geneva Convention, Article 17.

88 Third Geneva Convention, Article 13, Article 17.

89 Neil A Lewis, 'Red Cross Finds Detainee Abuse in Guantanamo', *New York Times*, 30 November 2004. It should be noted, however, that in keep with its usual policy, the ICRC has neither publicly confirmed nor denied these allegations, see International Committee of the Red Cross, 'The ICRC's Work at Guantanamo Bay', Press Release No 04/70, 30 November 2004.

90 Dan Eggen & R. Jeffrey Smith, 'FBI Agents Allege Abuse of Detainees at Guantanamo Bay' (*Washington Post*, 21 December, 2004).

91 Economic and Social Council, Commission on Human Rights, 'Situation of Detainees at Guantanamo Bay', E/CN.4/2006/120, 15 February 2006 at 22–27.

92 The David Hicks Affidavit *Sydney Morning Herald* (10 December, 2004).

93 'Hicks pre-trial agreement', above n1.

treatment.⁹⁴ The Secretary of Defence approved of interrogation techniques involving the use of stress positions, detention in isolation for up to 30 days, hooding, sleep deprivation and sensory deprivation.⁹⁵ Hicks was subjected to each of these interrogation techniques and, if the approach of the ECHR is adopted this amounted to inhumane treatment.⁹⁶ Further, according to the Human Rights Committee, acts that cause mental suffering such as prolonged solitary confinement amount to inhumane treatment.⁹⁷ There is evidence that detainees suffered severe deterioration in their mental health, with hundreds of acts of self-harm and several suicide attempts.⁹⁸ In particular, Hicks told the detainee occupying the cell next to him, Mozamm Begg, that he quite often felt like banging his head against the wall in order to kill himself.⁹⁹ It is therefore submitted that not only did the interrogation of Hicks constitute inhumane treatment, but so too did the solitary confinement. These are grave breaches of the Third Geneva Convention and those responsible may be prosecuted for committing war crimes.¹⁰⁰

A third right that all prisoners of war are entitled to is the right to be released at the end of hostilities. Article 118 provides that ‘prisoners of war shall be released and repatriated without delay after the cessation of active hostilities’.¹⁰¹ The position of the United States was that Hicks was captured during the active hostilities of the ‘war on terrorism’.¹⁰² In an address to Congress, the US President stated that this ‘war’ will not cease until ‘every terrorist group of global reach has been found, stopped and defeated’.¹⁰³ Given this objective, the ‘war on terrorism’ may never cease, thereby providing the US with a justification to detain Hicks indefinitely. It is submitted that the United States is wrong to regard the ‘war on terrorism’ to be an armed conflict for two reasons. First, ‘terrorism’ is not a State. As the ICRC has observed, terrorism and non-State violence have existed for some time and the fact that networks are now transnational and violence can now be aimed across international borders is not sufficient justification for categorising what is essentially a criminal phenomenon as an armed conflict.¹⁰⁴ Second, whilst some aspects of the ‘war on terrorism’ do take the

94 *Ireland v The United Kingdom* [1978] ECHR 1 (18 January 1978) 5310/71.

95 Commission of Human Rights, above n 91 at 23–25.

96 Terry Hicks, above n2.

97 Human Rights Committee, General Comment 20, Article 7 (Forty-fourth Session, 1992), UN Doc HRI/Gen/1/Rev1 (1994).

98 Commission of Human Rights, above n91 at 71; Amnesty International, ‘Guantanamo Bay: Lives Torn Apart – The Impact of Indefinite Detention on Detainees and Their Families’, AMR51/007/2006, 6 February 2006.

99 Whitmont, above n5.

100 Third Geneva Convention, Article 130; Additional Protocol I, Article 85(5).

101 Third Geneva Convention, Article 118.

102 Mary Ellen O’Connell, ‘The Legal Case Against the Global War on Terror’ (2004) 36(2) *Case Western Reserve Journal of International Law* 349 at 350; Gabor Rona, ‘Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”’ (2003) 27 *Fletcher Forum on World Affairs* 157 at 164.

103 *Id* at 350.

104 International Committee of the Red Cross, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, Report Prepared by the International Committee of the Red Cross, Geneva, 03/IC/09, September 2003 at 17–18.

form of an armed conflict, the 'war on terrorism' is far more multi-faceted. The 'war on terrorism' has been said to include intelligence gathering, criminal sanctions, financial investigations, the freezing of assets and attempts to control the proliferation of weapons of mass destruction.¹⁰⁵ It must therefore be accepted that if Hicks was a member of the Taliban he was not captured during the 'war on terrorism' but was rather captured during an international armed conflict between the Taliban and the Coalition States. As the United States Supreme Court held in *Hamdi*, persons at Guantanamo Bay could only be detained so long as 'United States troops are still involved in active combat in Afghanistan'.¹⁰⁶ Therefore, Hicks could not be detained indefinitely during the ongoing 'war on terrorism'. Rather, Hicks could only be detained so long as the US was engaged in an international armed conflict in Afghanistan. This international armed conflict ended in June 2002 when the Transitional Authority was established. Thereafter, the conflict in Afghanistan transformed into a non-international conflict between the Coalition States and the domestic insurgents. It follows that, from June 2002, as a prisoner of war Hicks was entitled to be released unless he was being detained for trial.

This leads to another protection afforded to Hicks by the Third Geneva Convention: combatant immunity. Prisoners of war may only be prosecuted for violations of the laws of war or the domestic law of the detaining power.¹⁰⁷ Hicks faced four charges that supposedly constituted violations of the laws of war. The first charge, conspiracy to commit violations of the laws of war, is not recognised as a crime under international law. The crime of 'conspiracy' for war crimes does not exist under the Geneva Conventions, the Hague Conventions, the Rome Statute or the UN resolutions establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda. Further, the existence of the crime was rejected by the Nuremberg Tribunal¹⁰⁸ and by four justices of the United States Supreme Court in *Hamdan*.¹⁰⁹ The second charge was of aiding the enemy, which is also unknown in international humanitarian law. It is apparent that this offence can only ever be relevant where the accused owed an allegiance to the United States armed forces. Hicks, an Australian citizen, owed no such allegiance so was not entitled to be charged with this offence. The third charge was attempted murder. This charge was laid despite there being no evidence that Hicks ever fired a shot. Justice Crawford dismissed the charge as there was 'no probable cause' to justify it.¹¹⁰ Even if there was probable cause, as a prisoner of war Hicks was entitled to combatant immunity under customary international law. Whilst wilful killing of persons *hors de combat* is a war crime, there was never any allegation that Hicks ever engaged in such activity. The fourth charge was of providing material

105 Ibid.

106 *Hamdi v Rumsfeld* (2004) 124 S.Ct. 2633 at 2642.

107 Third Geneva Convention, Article 99 states: 'No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by International Law, in force at the time the said act was committed'.

108 Trial of Major War Criminal before the International Military Tribunal, Nuremberg, 14 November – 1 October 1946, Vol 1 at 224–6.

109 *Hamdan v Rumsfeld*, 126 S.Ct 2749 at 2786–2797.

110 Jane Holroyd, 'Hicks Charged with Material Support for Terrorism' *The Age* (7 March, 2007).

support to terrorism. This is a criminal offence of the United States that was enacted in October 2006 and was drafted to apply retrospectively to Hicks in 2001.¹¹¹ This drafting of a retrospective domestic criminal offence violates international human rights law.¹¹² Further, the offence of providing material support for terrorism does not form part of international humanitarian law. In summary, Hicks was never charged with a violation of an existing law, so Hicks' detention cannot be justified by claims that he was being held for trial.

Prisoners of war must also be afforded certain fundamental trial rights. First, the trial of a prisoner of war must take place as soon as possible and the period of pre-trial confinement cannot exceed three months.¹¹³ Hicks was captured in November 2001 but not charged until June 2004 and not tried until March 2007. This was clearly in breach of the Third Geneva Convention. Secondly, a prisoner of war may only be sentenced by the same courts and according to the same procedure as members of the armed forces of the detaining power.¹¹⁴ Hicks' case was heard by a specially constituted Military Commission which applied only to non-citizens of the United States, thereby violating this provision. Likewise, in limiting Hicks' right of appeal to issues of standards and procedures rather than the merits, the trial process violated Hicks' right to appeal his conviction in the same manner as members of the armed forces of the detaining power.¹¹⁵ Finally, prisoners of war are entitled to 'all the judicial guarantees which are recognised as indispensable by civilised peoples'.¹¹⁶ The decision of the US Supreme Court in *Hamdan* held that the Military Commissions violated the fundamental guarantees provided by Article 75 of Additional Protocol I by denying the accused the right to be present at his trial and be privy to the evidence against him.¹¹⁷

It is arguable that the denial of these fundamental trial rights amounts to a war crime.¹¹⁸ Wilfully depriving a prisoner of war of the rights of a fair and regular trial as prescribed by the Third Geneva Convention is a grave breach of the Convention.¹¹⁹ A grave breach of the Geneva Conventions is a war crime and the International Criminal Court has jurisdiction to hear the case.¹²⁰ The United States has not ratified the Rome

111 Peter Vickery QC, 'David Hicks and Retrospective Criminal Laws', February 2007, <http://www.icj-aust.org.au/content/view/36/52/>.

112 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 302, entered into force 23 March 1976. Article 15 states that 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.'

113 Third Geneva Convention, Article 103.

114 Third Geneva Convention, Article 102.

115 Third Geneva Convention, Article 106.

116 Third Geneva Convention, Article 3(1)(d).

117 *Hamdan v Rumsfeld*, 126 S.Ct 2749 at 2818.

118 Hon Alastair Nicholson AO RFD QC, Peter Vickery QC, Prof Hilary Charlesworth, Prof Andrew Byne, Gavan Griffith AO QC & Professor Tim McCormack, 'David Hicks – Military Commissions Act 2006 – Compliance with Common Article 3 of the Geneva Conventions, the *Hamdan* Decision and Australian Law', <http://www.icj-aust.org.au/content/view/36/52/>.

119 Third Geneva Convention, Article 130; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, entered into force 1 July 2002 ('Rome Statute') Article 8(2)(vi).

120 Rome Statute, Article 8.

Statute, so its citizens cannot be brought before the ICC unless the offence occurs on the territory of another State party or the matter is referred to the ICC by the Security Council. By contrast, Australia has ratified the Rome Statute. If an Australian citizen counsels or urges the deprivation of a fair and regular trial that person commits a war crime.¹²¹ Significantly, the Rome Statute applies equally to all persons, including to members of a government.¹²² It therefore follows that if a member of the Australian Government counselled or urged the denial of a fair or regular trial for Hicks, that person may be prosecuted for having committed war crimes.

D. Conclusion

Part 2 has established that if Hicks was a member of the Taliban, he was captured during an international armed conflict. As such he was a member of an armed force of a party to the conflict and so was undoubtedly entitled to prisoner of war status. As a prisoner of war, Hicks was entitled to fundamental protections contained in the Third Geneva Convention, including the right to be treated humanely, the right to be released at the end of hostilities, the right to combatant immunity and the right to fundamental trial rights. Since it cannot be concluded with certainty that Hicks was a member of the Taliban when captured, however, it is necessary to consider Hicks' status as a member of al-Qaeda.

3. Hicks' Status as a Member of Al-Qaeda

A. The Existence of Two Simultaneous Armed Conflicts

As was the case in Part 2 in relation to Hicks' status as a member of the Taliban, in determining Hicks' status as a member of al-Qaeda it is first necessary to identify and classify the conflict during which Hicks was captured. Part 2 identified that if Hicks was a member of the Taliban, he was captured during the course of an international armed conflict between the Coalition States and the Taliban as the de facto government of Afghanistan. The situation is not so clear, however, if Hicks was instead a captured member of al-Qaeda. Determining Hicks' true status as a member of al-Qaeda first requires a consideration as to whether there were in fact two simultaneous armed conflicts being fought in Afghanistan.

Whilst it appears evident that Hicks was captured during the course of an international armed conflict between the Taliban and the Coalition States, the United States refutes this position. According to the United States, there was not one armed conflict being waged in Afghanistan, but rather two being fought simultaneously.¹²³ The first conflict was said to have been between the Taliban and the Coalition States which, as shown in Part 2, was an international armed conflict attracting the application of the Geneva Conventions. The second conflict was alleged to have been between the Coalition States and al-Qaeda which, whilst being fought simultaneously on the territory

121 *Criminal Code 1995* (Cth) sections 11.1, 11.2, 11.4, 268.76 and 268.31.

122 Rome Statute, Article 27.

123 George W Bush, above n36.

of Afghanistan, was not limited to that location.¹²⁴ The conflict with al-Qaeda is alleged to have been fought in many countries and to have been ongoing for more than a decade. For example, it is said to include al-Qaeda's 1993 bombing of the World Trade Centre, the 1998 strike on the United States' embassies in Kenya and Tanzania, the United States' attack of al-Qaeda facilities in Sudan and Afghanistan, al-Qaeda's attack on the *USS Cole* in Yemen and the September 11 terrorist attacks. The position of the United States was that as Hicks was a member of al-Qaeda he was captured during this second conflict. According to the United States, Hicks trained with al-Qaeda during 2001 and, following the terrorist attacks 'returned to Afghanistan to rejoin his al-Qaeda associates'.¹²⁵

The first question to consider is whether it is legitimate under international humanitarian law to separate the war in Afghanistan into two separate conflicts: one between the Coalition States and the Taliban; and a second between the Coalition States and al-Qaeda. Whilst the Geneva Conventions make a distinction between international armed conflicts and non-international armed conflicts, they neither provide for nor preclude the existence of simultaneous armed conflicts. The majority of the United States Supreme Court in *Hamdan v Rumsfeld* considered it unnecessary to reach a conclusion on whether there were in fact two separate conflicts in Afghanistan because it held that at the very least Common Article 3 encompasses the conflict with al-Qaeda.¹²⁶ The attempt by the United States to separate the conflicts, however, was strongly criticised by Justice Robertson in the District Court's decision in *Hamdan v Rumsfeld*:

The government's attempt to separate the Taliban from al-Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with.¹²⁷

For logical and pragmatic reasons, the conflicts should not be separated because they were fought on the same territory, at the same time, and under the same Congressional resolution.¹²⁸ Separating the conflicts is also undesirable from a policy perspective as it inevitably leads to complications as to the obligations owed by one party to the other under international humanitarian law.¹²⁹ For these reasons, it would appear appropriate to look at the conflict in Afghanistan in its entirety and conclude that it was a single conflict that was international in character.¹³⁰

124 Ibid.

125 *United States v David Matthew Hicks*, above n4.

126 *Hamdan v Rumsfeld*, 126 S Ct 2749 at 2796.

127 *Hamdan v Rumsfeld*, United States District Court for the District of Columbia 04-1519 at 15.

128 Peter Vickery QC, 'Report to the International Commission of Jurists (Victoria) on David Hicks and Guantanamo Bay', 1 June 2006 at 10.

129 James G Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalised Armed Conflict' (2003) 85(850) *International Review of the Red Cross* 313.

130 See, for example, *Prosecutor v Tadic*, IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* ('*Tadic Appeals Judgment*'), Separate Opinion of Judge Li at [18]-[19]: 'I am of the opinion that the submission of the Prosecution to view the conflict in the former Yugoslavia in its entirety and consider it international in character is correct'.

The weight of international jurisprudence, however, would appear to be supportive of US attempts to separate the conflicts. The Appeals Chamber of the ICTY in *Tadić* accepted the principle that separate armed conflicts may be fought simultaneously on the same territory involving different actors.¹³¹ This position has since been followed by subsequent cases before the ICTY.¹³²

Therefore, despite sound logical and pragmatic reasons to reject the separation of the conflicts it would appear consistent with recent decisions on international humanitarian law to regard the war in Afghanistan as two separate conflicts: one involving the Taliban, the other involving al-Qaeda. If Hicks was a member of al-Qaeda, he was captured during the course of this second conflict. To determine Hicks' true status under international humanitarian law, it is next necessary to classify this armed conflict.

B. Classifying the Armed Conflict between the Coalition States and al-Qaeda

According to the United States, the conflict between the Coalition States and al-Qaeda cannot be considered to be an international armed conflict attracting the application of the four Geneva Conventions. Common Article 2 provides that the Geneva Conventions apply to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'.¹³³ The United States is correct in asserting that as a clandestine transnational organisation, al-Qaeda lacks international legal personality and so can never become a High Contracting Party to the Geneva Conventions.¹³⁴ Further, whilst Common Article 2 provides that the Convention applies if a non-party Power to the conflict 'accepts and applies' the provisions of the Convention, given the nature of their attacks, the presumption here is that a 'Power' is a State. It follows that the conflict with al-Qaeda cannot be considered to be an international armed conflict and, consequently, Hicks cannot qualify as a prisoner of war under the Third Geneva Convention or as a civilian under the Fourth Geneva Convention.

The United States has gone further, however, by arguing that the conflict with al-Qaeda was also not a non-international armed conflict. Instead, the United States appears to be advocating for the existence of a hybrid 'transnational' armed conflict category, not covered by existing international humanitarian law. Non-international armed conflicts are covered by Common Article 3 and are defined as armed conflicts 'not of an international character occurring in the territory of one of the High

131 *Tadić* Appeals Judgment at [84].

132 *Prosecutor v Blaskić*, IT-95-14-T (Trial Judgment) at [75]; *Prosecutor v Kordić*, IT-95-14/2-T, (Trial Judgment) at [66].

133 Common Article 2 of the Geneva Conventions.

134 George W Bush, above n36; ICRC, above 104 at 18–19; Michael H Hoffmann, 'Terrorists are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law' (2002) 34(2) *Case Western Reserve Journal of International Law* 227; Roberta Arnold, 'Terrorism and IHL: A Common Denominator?' in Roberta Arnold & Pierre-Antoine Hildbrand (eds), *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges*, Lausanne, Editions interuniversitaires suisses, 2005 at 51.

Contracting Parties'.¹³⁵ The question then becomes whether the conflict with al-Qaeda was an 'armed conflict not of an international character'. The ICRC's Official Commentary states that the types of conflicts covered by Common Article 3 are armed conflicts 'which in many respects are similar to an international war, but take place within the confines of a single country'.¹³⁶ It therefore appears that when Common Article 3 was being drafted in 1949 it was intended to apply to internal armed conflicts. The United States argued that the conflict with al-Qaeda was not confined to the territory of one High Contracting Party because it was international in scope. Hence, the position of the United States was that as the conflict was neither 'international' nor 'non-international', none of the provisions of the Geneva Conventions apply to the conflict.¹³⁷

Whilst the argument that the conflict with al-Qaeda was not an international armed conflict should be accepted, the argument that the conflict was also not a non-international armed conflict should be rejected. It is well-accepted in international humanitarian law that when a conflict cannot be regarded as 'international', it must instead be considered to be 'non-international'. The ICRC Official Commentary states that 'the scope of the Article must be read as widely as possible'.¹³⁸ To interpret Common Article 3 as intending only to apply to internal armed conflicts would be to apply a narrow interpretation to the Article, contrary to the Official Commentary. In other words, Common Article 3 must be interpreted to apply to all conflicts not covered by Common Article 2. This interpretation is consistent with a decision of the International Court of Justice,¹³⁹ a decision of the ICTY¹⁴⁰ and the United States' Army's Law of War Handbook.¹⁴¹

It must therefore be accepted that if the conflict with al-Qaeda cannot qualify as an international armed conflict, it must properly be regarded as a non-international armed conflict. It follows that if Hicks was a member of al-Qaeda, he was captured during the course of a non-international armed conflict.

C. *Hicks' True Status as a Member of al-Qaeda*

The United States' position was that, as the Third Geneva Convention did not apply to the conflict with al-Qaeda, its members could not qualify for prisoner of war status. Further, as the Fourth Geneva Convention did not apply, the US argued that al-Qaeda members did not qualify as civilians. Rather, the US position was that the true status of al-Qaeda members under international law was that of 'unlawful combatants'. According to the United States, as 'unlawful combatants', members of al-Qaeda were not entitled to the protections afforded under either the Third or Fourth Geneva Conventions.

135 Common Article 3 of the Geneva Conventions.

136 ICRC, above n79 at 36.

137 George W Bush, above n36.

138 ICRC, above n136 at 36.

139 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14 at 218.

140 *Prosecutor v Tadic, (Jurisdictional Decision)* Case No IT-94-1 at 102.

141 US Department of the Army, *Law of War Handbook* (2004) at 144.

The first question to consider is whether members of al-Qaeda were entitled to prisoner of war status. Unlike the Taliban, al-Qaeda was not a State party to the international armed conflict. However, if al-Qaeda was a militia or volunteer corps forming part of the armed forces of a party to the conflict, its captured members were entitled to be treated as prisoners of war.¹⁴² However, it is not possible to conclude that al-Qaeda was a militia or volunteer corps of the Taliban. At present there exists no accurate or reliable evidence proving the requisite link between al-Qaeda and the Taliban. For a similar reason, members of al-Qaeda cannot qualify for prisoner of war status under Article 4A(2) of the Third Geneva Convention, since al-Qaeda did not 'belong' to the Taliban in the requisite sense – quite apart from the additional difficulty that they did not satisfy each of the four cumulative criteria of Article 4A(2). Given that al-Qaeda does not have a traditional command structure, does not have a distinctive sign, does not carry arms openly and does not conduct its operations in accordance with the laws of war, these criteria cannot be satisfied. Consequently, if Hicks was a member of al-Qaeda, he would not be entitled to prisoner of war status.

The question then becomes, if Hicks was a member of al-Qaeda but was not a prisoner of war, what was his true status? The United States' position was that al-Qaeda members were not prisoners of war, they were 'unlawful combatants' who were not entitled to any rights under the Geneva Conventions. However, this status is not recognised by international law, even if the term is sometimes used as a shorthand factual description of those civilians who participate in hostilities without qualifying as combatants. Whilst the terms 'combatant', 'prisoner of war' and 'civilian' are clearly established under international humanitarian law, the terms 'illegal combatant', 'unlawful combatant', 'enemy combatant' and 'unprivileged belligerent' are not.¹⁴³ Classifying Hicks as an 'unlawful combatant' and denying him the protection of the Geneva Convention has no basis under international humanitarian law for several reasons. First, the ICRC's commentary on the Fourth Geneva Convention states that:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.¹⁴⁴

The ICRC's commentary on Article 45 of Additional Protocol I makes a similar pronouncement.¹⁴⁵ Second, this interpretation has received support from the ICTY which has held that 'if an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she

142 Third Geneva Convention, Article 4A(1).

143 Knut Dormann, "The Legal Situation of 'Unlawful/Unprivileged Combatants'" (2003) 85(849) *International Review of the Red Cross* 45 at 46.

144 Oscar Uhler & Henri Coursier (eds), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary*, Geneva, ICRC, 1958 at 51.

145 Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC, 1987 at 558.

necessarily falls within the ambit of Convention IV, provided that its Article 4 requirements are satisfied.¹⁴⁶ Third, a large number of commentators have adopted this interpretation.¹⁴⁷ Finally, even the United States itself would appear to be supportive of this common understanding as the United States Military Manual provides that those persons who are not subject to the Third Geneva Convention are subject to the Fourth Geneva Convention.¹⁴⁸

As the legal status of ‘unlawful combatant’ does not exist, it is submitted that if Hicks was not a prisoner of war he must have been a civilian. Article 4 of the Fourth Geneva Convention provides that that Convention applies to ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’¹⁴⁹ If these words are given their natural and ordinary meaning and interpreted in light of the object and purpose of the Convention, it follows that this all-embracing definition was intended to protect all persons not protected by any of the first three Geneva Conventions, provided such persons satisfy the nationality criteria.¹⁵⁰ Hicks was in the hands of a party to the conflict, the United States, and he was not a national of this party. As Hicks satisfied the nationality criteria, he was *prima facie* entitled to be treated as a civilian according to the Fourth Geneva Convention.

However, the *quid pro quo* for civilians receiving protection is that they are prohibited from taking part in hostilities. Consequently, any civilian who takes direct part in hostilities forfeits his or her protected status as a civilian for the duration of such participation in hostilities, and thus renders themselves liable to attack as a legitimate military objective while so participating. Such persons resume their civilian status when they cease taking a direct part in hostilities, including as a result of being detained. Mere civilian participation in hostilities is not a war crime, although if such participation entails, for instance, indiscriminate attacks on non-combatants it may amount to a war crime, and civilian participation in hostilities may also constitute a violation of the local criminal law.

The issue then becomes whether Hicks took ‘direct part in hostilities’. The ICRC has identified this phrase as being the subject of some uncertainty.¹⁵¹ Attacking the enemy’s armed forces, laying mines or sabotaging lines of communication undoubtedly constitute ‘direct participation in hostilities’.¹⁵² Conversely, civilians working in canteens or

146 *Prosecutor v Delalic* IT-96-21-T at [271].

147 See for example Rona, ‘Interesting Times for International Humanitarian Law’, above n102 at 165; Silvia Borelli, ‘Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”’ (2006) 87(857) *International Review of the Red Cross* 39 at 46–47; ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, above, n85 at 9; Roberta Arnold, ‘Terrorism and IHL: A Common Denominator?’ in Roberta Arnold & Pierre-Antoine Hildbrand (eds), *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges* (2005) at 51.

148 Dormann, ‘The Legal Situation of ‘Unlawful/Unprivileged Combatants’, above n143 at 51.

149 Fourth Geneva Convention, Article 4.

150 Dormann, ‘The Legal Situation of ‘Unlawful/Unprivileged Combatants’, above n143 at 48–49.

151 ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, above n104 at 28.

152 *Ibid.*

munitions factories should not be considered as having taken ‘direct part in hostilities’.¹⁵³ Between these two extremes lie a number of ambiguous situations, including civilians being in possession of arms.¹⁵⁴ It is submitted that as Hicks not only was in possession of an AK–47, but also guarded a tank, this is sufficient to conclude that Hicks did take direct part in hostilities. Consequently, if Hicks was a member of al-Qaeda he forfeited his status as a civilian while so participating, and exposed himself to military attack during that time. However, Hicks was captured at a taxi stand and was no longer participating in hostilities at that time.

Regardless of whether Hicks was in fact engaged in active hostilities, however, it cannot be disputed that from the moment of his capture, Hicks ceased to be engaging in direct participation in hostilities. It follows that, from this moment, Hicks was entitled to all of the fundamental protections afforded by Common Article 3 of the Geneva Conventions.

D. Hicks’ Rights as a Member of al-Qaeda

It follows from the above discussion that if Hicks was a member of al-Qaeda there are three ways of interpreting his status. The first and most-preferred interpretation is that Hicks was captured during the course of an international armed conflict against the Taliban and as such his true status was that of a civilian who had forfeited his civilian status by taking part in hostilities. Secondly, if there was a separate armed conflict with al-Qaeda, Hicks was captured during a non-international armed conflict. The third interpretation is that advocated by the United States, that Hicks was captured during a ‘transnational’ conflict that was neither international nor non-international.

Whilst the validity of the United States’ interpretation is disputed, even if it is accepted, it still does not follow that Hicks was not entitled to any protections. Non-derogable human rights apply to all persons at all times. They remain applicable throughout the course of an armed conflict,¹⁵⁵ and continue to apply even where persons are held outside of the territory of the State.¹⁵⁶ Consequently, at all times during Hicks’ detention, the United States were obliged to uphold, *inter alia*, the provisions of the International Covenant on Civil and Political Rights¹⁵⁷ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁵⁸ each of which have been ratified by the United States. Even if the United States’ interpretation is accepted, Hicks was entitled to these fundamental guarantees.

153 Ibid.

154 Ibid.

155 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] 1 ICJ Rep 96 at [25].

156 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* [2004] ICJ Rep 136 at [111].

157 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 302, entered into force 23 March 1976 (‘ICCPR’).

158 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 1985, UN Doc A/39/51 (1984), entered into force 26 June 1987 (‘Convention Against Torture’).

If, as has been argued, Hicks was a civilian who forfeited his civilian status by unlawfully participating in hostilities, some commentators are of the view that he nevertheless remained a protected person under the Fourth Geneva Convention and hence was entitled to these protections.¹⁵⁹ Even if this is not accepted, it cannot be disputed that Hicks was entitled to the protections afforded in Article 75 of Additional Protocol I, which has attained the status of customary international law.

Finally, as the United States Supreme Court recognised, if Hicks was captured during a non-international armed conflict he was protected by the provisions of Common Article 3. Essentially, Common Article 3, Article 75 and international human rights law provide for two relevant forms of protection: freedom from torture and the right to a fair trial.

The prohibition on torture is well-established in both international human rights law and international humanitarian law. The Convention Against Torture and the ICCPR recognise the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment as a right that may not be derogated from at any time.¹⁶⁰ Common Article 3 prohibits violence to life and person and in particular murder of all kinds, mutilation, cruel treatment and torture.¹⁶¹ Further, the right to be treated humanely and to not be subjected to torture has also attained the status of customary international law.¹⁶² Therefore, regardless of Hicks' status, he was entitled to these protections. For the reasons outlined in Part 3 there is evidence that the interrogation and detention of Hicks amounted to inhuman or degrading treatment. It is therefore submitted that the United States violated its international obligations under the Convention Against Torture, the ICCPR, the Geneva Conventions and customary international law.

As a detainee at Guantanamo Bay, Hicks was also entitled to a fair trial. Article 14 of the ICCPR provides that all persons 'shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'¹⁶³ Again, decisions of the ECHR are helpful in determining what is meant by this phrase. In *Findlay v United Kingdom*,¹⁶⁴ the ECHR held that a tribunal will only be impartial if it is free from prejudice and bias both subjectively and objectively. In *Ocalan v Turkey*,¹⁶⁵ the ECHR held that, in the circumstances, the presence of a military judge prevented the court from being an independent and impartial tribunal. Hicks was alleged to have engaged in armed conflict against the United States military, however the Military Commission system established to try Hicks was composed entirely of United States military officers under the command of the United States President and these officers could be removed at the discretion of the Secretary of Defence.¹⁶⁶ There is then no doubt that the Military

159 Dormann, 'The Legal Situation of 'Unlawful/Unprivileged Combatants'', above n143 at 50; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', above n104 at 9; Borelli, 'Casting Light on the Legal Black Hole', above n147.

160 Convention Against Torture; ICCPR Article 7, Article 4(2).

161 Common Article 3 to the Geneva Conventions.

162 International Committee of the Red Cross, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law Vol 1* (2005) at 306–319.

163 ICCPR Article 14(1).

164 *Findlay v United Kingdom* (1997) 24 European Human Rights Reports 221.

165 *Ocalan v Turkey* 46221/99 [2003] ECHR 125.

Commission was not independent or impartial and hence violated Article 14 of the ICCPR.

Common Article 3 required Hicks to be tried by a 'regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.'¹⁶⁷ In interpreting the phrase 'regularly constituted court' the Supreme Court in *Hamdan* referred to official commentaries and held that it means an ordinary military court that is 'established and organised in accordance with the laws and procedures already in force in a country.'¹⁶⁸ As the Military Commissions were not already in force at the time of Hicks' capture, and as they were set up only to try foreign nationals, the United States Supreme Court correctly held that the Military Commissions did not meet the requirements of a 'regularly constituted court'.

Nor can it be said that the Military Commission provided for a fair trial 'affording all the judicial guarantees which are recognised as indispensable by civilised peoples.' First, the Commission provided only a limited right of appeal to an independent judicial body, essentially rendering the United States Executive as the prosecutor, judge and jury.¹⁶⁹ Second, as described in Part 3, the Commission largely abandoned the rules of evidence in allowing for the admission of hearsay evidence and evidence obtained through torture.¹⁷⁰ Third, the Commission allowed for evidence to be presented in the absence of the accused and his legal counsel.¹⁷¹ Finally, the two and a half years it took Hicks to be charged and the five and a half years it took him to be tried clearly violated his right to a trial without unreasonable delay.¹⁷² Therefore, regardless of Hicks' true status, there can be no doubt that the Military Commission set up to try Hicks violated customary international law, the ICCPR and Common Article 3 of the Geneva Conventions.

E. Conclusion

If Hicks was a member of al-Qaeda then he was not a prisoner of war but a civilian who had previously participated in hostilities and was then captured during the course of a non-international armed conflict between the Coalition States and al-Qaeda. As a civilian, Hicks would be detained for trial if there was evidence the he undertook direct participation in hostilities which, given he spent a week guarding a tank, could have potentially been satisfied. At the very least he was entitled to the fundamental protections of international human rights law and the minimum guarantees enjoyed by civilians under humanitarian law, such as the customary law fair trial protections reflected in Article 75 of Additional Protocol I. These protections should have been afforded to Hicks by the United States even if he was captured during a second and separate non-international armed conflict with al-Qaeda, which would trigger the application of

166 Peter Vickery QC, 'Report to the International Commission of Jurists', above n128 at 21–22.

167 Common Article 3 to the Geneva Conventions.

168 *Hamdan v Rumsfeld*, 126 S.Ct 2749 at 2817.

169 Peter Vickery QC, 'Report to the International Commission of Jurists', above n128 at 22–23; Article 14(5) of the ICCPR provides: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law.'

170 ICCPR Article 14(3)(5); Additional Protocol I Article 75(4)(g).

171 ICCPR Article 14(3); Additional Protocol I Article 75(4)(e).

172 ICCPR Article 9(3), Article 14(3).

common Article 3 of the four Geneva Conventions. Hicks' detention and trial did not satisfy these requirements and hence it is apparent that the United States may have violated the Convention Against Torture, the ICCPR, the Geneva Conventions and customary international law.

Part 2 identified that if Hicks was a member of the Taliban he was entitled to prisoner of war status. Part 3 has concluded that if Hicks was a member of al-Qaeda he was not entitled to be treated as a prisoner of war. Given this uncertainty over Hicks' status, the final consideration is how Hicks should have been classified by the United States.

4. Determining Hicks' Uncertain Status

A. Presumptive Prisoner of War Status

Regardless of whether Hicks was captured during the course of an international armed conflict or a non-international armed conflict, Hicks was entitled to be treated as a prisoner of war from the moment he claimed such a status. Article 45 of Additional Protocol I, which was a codification of customary international law and applies to both international and non-international conflicts, provides that a person is entitled to be treated as a prisoner of war 'if he claims the status of a prisoner of war'.¹⁷³ This rule is replicated in the United States' Army Regulations.¹⁷⁴ In his signed affidavit, Hicks stated that he repeatedly asked why he was not being treated as a prisoner of war.¹⁷⁵ Therefore, from the moment Hicks claimed to be a prisoner of war, the United States was obliged by customary international law to treat Hicks as such.

If it is accepted that Hicks was a member of the Taliban who was captured during the course of an international armed conflict, then Article 5 of the Third Geneva Convention applies. Article 5 provides that where there is any doubt concerning a detainee's status in an international armed conflict, that person shall be treated as a prisoner of war until his status has been determined by a competent tribunal.¹⁷⁶ This rule is recognised by United States Army Regulation 190-8, which states that:

In accordance with Article 5, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the Convention until such time as their status is determined by a competent tribunal.¹⁷⁷

This then raises two questions. First, was there any doubt as to Hicks' status? If so, was Hicks' status determined by a 'competent tribunal'?

¹⁷³ Additional Protocol I, Article 45.

¹⁷⁴ Yasmin Naqvi, 'Doubtful Prisoner of War Status' (202) 84(847) *International Review of the Red Cross* 571 at 576.

¹⁷⁵ 'The David Hicks Affidavit' *Sydney Morning Herald* (10 December 2004).

¹⁷⁶ Article 5 of the Third Geneva Convention states: 'Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.'

¹⁷⁷ US Army, Army Regulation 190-8: Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1 October 1997), <http://www.usapa.army.mil/pdffiles/r190_8.pdf>.

B. Doubt over Hicks' Status

The initial position of the United States towards Hicks and other detainees appears to be that there was absolutely no doubt as to their status. According to the Presidential Order of February 2002, all Taliban members and all al-Qaeda members were 'unlawful combatants' and hence there was no doubt that they were not entitled to prisoner of war status.¹⁷⁸ Rather than considering each individual case on its merits, this decision of the Executive sought to definitively determine that not a single detainee could possibly qualify as a prisoner of war. It appears that the United States considered it unnecessary to convene 'competent tribunals' because no doubt existed as to the detainees' status.

It is submitted, however, that the test of whether there is doubt is an objective one and that it must be accepted that there was at least some doubt over Hicks' status. According to the ICRC's commentary on the Third Geneva Convention, Article 4 'should not be interpreted too restrictively', indicating that there should not be too high a threshold for raising a doubt over a person's status.¹⁷⁹ The ICRC's commentary would also appear to preclude the detaining power from denying the application of Article 5 through the mere assertion by the Executive that no doubt exists as to a detainee's status. If Hicks' situation is considered objectively, it must be accepted that there was at least some doubt as to his status. Whilst the United States argued that Hicks was a captured member of al-Qaeda, in a letter to his father prior to his capture, Hicks wrote that he was a member of the Taliban and that he intended to fight for the Taliban. It is submitted that, considered objectively, this raises sufficient doubt over Hicks' status to satisfy the low threshold in Article 5. In conclusion, as there was doubt over Hicks' status or, alternatively, as Hicks claimed to be a prisoner of war, the United States was obliged to treat Hicks as a prisoner of war until such times as his status was determined by a competent tribunal.

C. Determination by a Competent Tribunal

Hicks' status was initially determined by the United States Executive through the Presidential Order. This generalised determination by the President is irreconcilable with Article 5 which requires status to be assessed on a case-by-case basis.¹⁸⁰ There can be no doubt that the Presidential Order does not constitute a 'competent tribunal'. According to the ICRC's commentary on Article 5, the decision as to a person's status should not be left to a single person.¹⁸¹ It was therefore not consistent with Article 5 for the President of the United States to determine the status of all detainees. In recognition of this, the Inter-American Commission on Human Rights urged the United States to take urgent measures to have the legal status of all detainees at Guantanamo Bay determined by a competent tribunal.¹⁸² Despite this, it was not until the US Supreme Court held that

178 George W Bush, above n36.

179 Yasmin Naqvi, 'Doubtful Prisoner of War Status' (2002) 84(847) *International Review of the Red Cross* 571 at 574.

180 Peter Vickery QC, above n128 at 11–12.

181 International Committee of the Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (1960).

182 Inter-American Commission on Human Rights, *Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures*, 13 March 2002.

the detainees were entitled to have their status determined by a competent tribunal that the US Government established such a tribunal.¹⁸³

On 7 July 2004, the US Department of Defence established the Combatant Status Review Tribunal (CSRT) to enable detainees to challenge their status.¹⁸⁴ Whilst the CSRT decided Hicks was an enemy combatant, it cannot be argued that this amounted to a determination of Hicks' prisoner of status in accordance with Article 5. In considering what would amount to a 'competent tribunal', reference should again be made to the requirements of a fair hearing under Article 14 of the ICCPR. A 'competent tribunal' would at the very least be required to have properly constituted procedures.¹⁸⁵ The CSRT departed from what may be considered to be 'properly constituted procedures' that ensure the detainee has the right to a fair hearing.¹⁸⁶ Hicks was prevented from having legal counsel in attendance at his hearing and from having any contact with his legal representatives in the week leading up to the hearing, and any evidence obtained through torture was admissible.¹⁸⁷ Such a process cannot be considered to be a determination of Hicks' status by a competent tribunal. Further, the wording of Article 5 would appear to indicate that a 'competent tribunal' should at the very least be in a position to determine that the detainee's true status was that of a prisoner of war. Despite this, the CSRT was only given the power to determine whether or not a detainee was an enemy combatant. For these reasons, it is submitted that the CSRT do not satisfy the Article 5 requirement of a 'competent tribunal'.

A detainee who was found by the CSRT to be an enemy combatant then appeared before the Administrative Review Board (ARB). Despite this, Hicks never appeared before the ARB. In any event, the ARB was concerned only with whether the detainee presented a threat to the United States and whether the person should continue to be detained for 'intelligence purposes'.¹⁸⁸ Consequently, the ARB was not a 'competent tribunal' for the purposes of Article 5.

As Hicks claimed to have been a prisoner of war, the United States was bound by customary international law to treat Hicks as a prisoner of war until his true status was determined. Further, as there was doubt over his status, if Hicks was captured during the course of an international armed conflict, he was entitled to presumptive prisoner of war status until his status was determined by a competent tribunal. Throughout his period of detention Hicks never appeared before a competent tribunal within the meaning of Article 5. It follows that, given that Hicks claimed to be a prisoner of war and there was uncertainty over his status, the United States was obliged to treat Hicks as a prisoner of war in accordance with the Third Geneva Convention.

183 *Hamdi v Rumsfeld* (2004) 124 S Ct 2633 at 2639.

184 Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy, *Order Establishing Combatant Status Review Tribunal*, 7 July 2004, <<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>>.

185 Naqvi, above n174 at 578.

186 Deputy Secretary of Defence, 'Memorandum for the Secretary of the Navy', 7 July 2004, <<http://www.pentagon.mil/news/jul2004/d20040707review.pdf>>.

187 Major Michael Mori, above n3.

188 Peter Vickery QC, above n128 at 13–14.

Conclusion

It is submitted that on the information that is presently available, it is not possible to determine conclusively whether Hicks, when captured, was a member of the Taliban or a member of al-Qaeda. If Hicks was a member of the Taliban he was entitled to prisoner of war status and the protections of the Third Geneva Convention. Whilst the United States claims Hicks was a member of al-Qaeda and hence did not qualify as a prisoner of war, Hicks claimed to be a prisoner of war and there was at the very least doubt over Hicks' status so he should have been afforded presumptive prisoner of war status. The conditions of Hicks' detention and the conduct of his trial failed to guarantee these protections and hence the United States violated the Third Geneva Convention. To the extent that members of the Australian Government counselled or urged grave breaches of the Convention, those persons may be criminally responsible for committing war crimes.

If doubt over Hicks' status is removed through conclusive proof that at the time of his capture he was a member of al-Qaeda, it does not follow that Hicks' true status was that of an 'unlawful combatant'. If Hicks was a member of al-Qaeda, he was captured during the course of a non-international armed conflict between the Coalition States and al-Qaeda. In such a situation, as the detaining power the United States was obliged to afford Hicks the protections contained in Common Article 3, customary international law and international human rights law. In failing to do this, the United States may have breached the Geneva Conventions, the Convention Against Torture, the ICCPR and customary international law.

David Hicks was detained at Guantanamo Bay for five and a half years and spent much of this time held incommunicado. Whilst detained he was possibly subjected to conditions and practices that amounted to inhumane treatment. It took two and a half years for him to be charged and over five years for him to be tried by a Military Commission devoid of fundamental legal safeguards. In the face of this unjust system Hicks may have been left with little alternative but to accept a plea bargain and plead guilty to the charge of providing material support for terrorism. It is apparent that whilst Hicks should have been either afforded the protections of Common Article 3 or treated as a prisoner of war, he in fact became a prisoner of the 'war on terrorism'.