
UNITED STATES OF AMERICA)	
)	
v.)	DEFENSE MOTION FOR
)	APPROPRIATE RELIEF:
)	IMPOSITION OF IMPROPER
)	PRE-TRIAL DETENTION
DAVID M. HICKS)	UNDER INTERNATIONAL
)	LAW

1 October 2004

The defense in the case of the *United States v. David M. Hicks* moves the military commission for appropriate relief, up to and including dismissal of all charges against Mr. Hicks, because his continued pre-trial detention violates international law, and states in support of this request:

1. **Synopsis:** Mr. Hicks was arbitrarily and improperly detained by U.S. forces in Afghanistan. Even if the commission were to find that his detention had been justified during military operations in, and the occupation of, Afghanistan, his ongoing detention at Guantanamo Bay Naval Base is no longer appropriate. It is disproportionate and unjust, and therefore arbitrary. Mr. Hicks’s arrest and detention do not comply with U.S. domestic or international substantive law. Protective detention is not recognized by either U.S. or international law. Finally, Mr. Hicks’s arrest and detention violates both U.S. domestic and international procedural law. Temporal limits have been clearly and severely breached with regard to the requirements that Mr. Hicks be promptly informed of the reasons for arrest, be produced before a judge, and be informed of the details of the charges against him. Also, Mr. Hicks’s right to challenge the legality of his detention by means of *habeas corpus* was denied until he was given access to counsel in December 2003. The arrest and detention of Mr. Hicks are therefore illegal in numerous respects under both U.S. domestic law and international law.

2. **Facts:** Mr. Hicks was seized and concurrently detained in Afghanistan in or around November 2001. The armed conflict in Afghanistan concluded at the latest 1 May 2003. On 3 July 2003, Mr. Hicks was designated as eligible for trial by military commission. Charges were instituted against Mr. Hicks on 10 June 2003. Mr. Hicks appeared before the commission for the first time 25 August 2004.

3. **Discussion:**

A: The Prohibition on Arbitrary Arrest and Detention

The prohibition against arbitrary detention has been a fundamental guarantor of liberty since its codification in the Magna Carta in the 13th century.¹ It remains at the heart of the

¹ The Magna Carta (Latin for the ‘Great Charter’) was signed by King John of England on 15 June 1215, at Runnymede, England. King John was forced to sign the Magna Carta to appease the barons of England who had revolted against high taxes, and were concerned that the King’s actions were not subject to the law. The Magna Carta contained 63 provisions, one of the most important being the fundamental concept of *habeas corpus* (by which no one can be imprisoned without due process of law). The short term effects of the Magna Carta were minimal, as Pope Innocent III quickly excommunicated every baron who signed the Magna Carta and declared it null and void.

common law and is an essential component of due process and the rule of law. It has been affirmed in the Constitution of the United States and other national Constitutions,² and is recognized by both international and regional human rights instruments.³

Article 9(1) of the *International Covenant on Civil and Political Rights (ICCPR)*⁴ provides for the right to “liberty and security of person.” It states that no one shall be subjected to “arbitrary arrest or detention.” The construction “liberty and security of person” has been interpreted to mean freedom of bodily movement and freedom from interference with personal dignity. A breach of this Article occurs, *inter alia*, when an individual is physically confined in a prison or detention facility. Arrest or detention will be “arbitrary” when it is discriminatory, inappropriate, disproportionate, unjust or unpredictable in view of the circumstances of the case. In addition, according to the *travaux préparatoires*, the term “arbitrary” encompasses conduct broader than what is simply “illegal.” Thus, deprivations of liberty that fall short of “illegal” conduct nevertheless qualify as breaches of Article 9(1). In addition, neither the law itself, nor its enforcement, can be arbitrary.⁵

It is submitted that the detention of Mr. Hicks has been “arbitrary” within this definition. Mr. Hicks was detained indefinitely, solely on the basis that he allegedly participated in the hostilities in Afghanistan. The United States Government has claimed the right to detain individuals such as Mr. Hicks until the “war on terrorism” is over, even if such individuals are tried by a military commission and found not guilty.⁶ This is completely disproportionate, and therefore arbitrary.

B: Substantive and Procedural Law Regarding Arrest and Detention

Article 9(1) of the ICCPR states that no one shall be “deprived of his liberty except on such grounds and procedures as are established by law.” The references to “grounds” and

However, the Magna Carta was confirmed by later English kings, and its impact on modern law remains strong as both a fundamental source of the common law and as a forerunner to American civil rights and liberties.

² Fifth Amend. U.S. Const. See also *Constitution Act 1982 — Canadian Charter of Rights and Freedoms*, section 9. Available at <http://www.solon.org/Constitutions/Canada/English/ca_1982.html>.

³ *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/Res/217A (III) (1948), Article 9. Available at <<http://www.unhchr.ch/udhr/lang/eng.pdf>>. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, Article 5 (entered into force 3 September 1953). Available at <<http://www.echr.coe.int/Convention/webConvenENG.pdf>>. *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, Article 7 (entered into force 18 July 1978). Available at <<http://www.oas.org/juridico/english/Treaties/b-32.htm>>.

⁴ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Available at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>. Ratified by the US on 8 June 1992. See also Executive Order 13107 “Implementation of Human Rights Treaties” of 10 December 1998. Available at <<http://usgovinfo.about.com/library/eo/bl13107.htm>>.

⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), p. 172.

⁶ U.S. Department of Defense News Briefing, 21 March 2002, transcript published by M2 PressWIREe, 22 March 2002. General Counsel William J. Haynes stated that “[i]f we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge, but may not necessarily automatically be released. The people that we are detaining, for example, in Guantanamo Bay, Cuba, are enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies, and they’re dangerous people. At the moment, we’re not about to release any of them unless we find that they don’t meet those criteria . . .”

“procedures” will mean that deprivation of liberty must be in accordance with domestic substantive and procedural law. Furthermore, such laws must be applicable and accessible to all, whether laid down in statute or forming part of the common law.

International law also provides certain procedural requirements at arrest and during detention. The ICCPR and article 75 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I)⁷ provide for certain minimum procedural or temporal rights, relating to:

- the right to be informed of the reasons for arrest;
- the right to be informed of any charges; and
- the right to be brought before a judicial authority.

The ICCPR and Additional Protocol I also provide the procedural right to challenge the legality of detention.

1. Power to Detain Under the Law of War— The United States Government has maintained its authority to detain enemy combatants under the law of war.⁸ However, at the point that the armed conflict in Afghanistan ceased (in December 2001),⁹ the Government no longer had the right to continue detaining Mr. Hicks, unless it instituted criminal charges against him. Yet, criminal charges against Mr. Hicks were not filed after the armed conflict in Afghanistan had ended. Therefore, during the period between the end of the armed conflict, and the date charges were filed against Mr. Hicks (10 June 2003), his detention failed to comply with procedural law.

2. The Right to be Informed of Reasons for Arrest— Article 9(2) of the ICCPR states that anyone who is arrested “shall be informed, at the time of arrest, of the reasons for his arrest.” Article 75(3) of Additional Protocol I states that individuals arrested or detained for actions related to the armed conflict “shall be informed promptly ... of the reasons why these measures have been taken.” The purpose of these articles is to provide the detainee with enough general information to put him in a position to challenge the legality of the detention, which is provided for in article 9(4) of the ICCPR.

Mr. Hicks was not informed of the reasons for his detention at the time he was placed under United States control and transported to Guantanamo Bay Naval Base. While the government has previously publicly stated that Mr. Hicks and others detained in Afghanistan were being held at that time solely for the purposes of preventing them from rejoining hostilities, *see ante*, at n. 8, neither the ICCPR nor Additional Protocol I recognize that excuse as a valid reason for failure to comply with procedural time limits. Furthermore, the authorities failed to inform Mr. Hicks of the reasons for his detention at the point the armed conflict in Afghanistan ended, and detention persisted for the clear and exclusive purpose of prosecution.

⁷ Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

⁸ The United States Government stated to the United Nations in its letter dated 2 April 2003 that detainees “are being held in accordance with the laws and customs of war, which permit the United States to capture and detain enemy combatants to prevent their re-engaging in the on-going armed conflict”: UN Doc E/CN.4/2003/G/73.

⁹ See Defense Motion to Dismiss as the International Armed Conflict Has Ended, *United States v. David M. Hicks*.

3. The Right to Challenge the Legality of Detention— Article 9(4) of the ICCPR states that anyone who is deprived of his liberty by arrest or detention “shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Although this Article does not expressly mention *habeas corpus*, the right to such relief is indeed provided. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, requires that procedures for *habeas corpus* be “simple and expeditious and at no cost for detained persons without adequate means.”¹⁰ The detainee has the right to continuing review of the lawfulness of detention at reasonable intervals.¹¹ The United Nations Human Rights Committee, the Inter-American Commission on Human Rights and the European Court of Human Rights have all found that detention for a period of as little as one week or less violates the requirement that an accused be able to bring judicial proceedings to challenge the legality of detention.¹²

As Mr. Hicks was not informed of the reasons for his detention, was held incommunicado, and was not permitted access to legal counsel, he was improperly deprived of his right and ability to challenge the lawfulness of his detention for an lengthy period of time.

4. The Right to be Informed Promptly of Charges— Article 14(3)(a) of the ICCPR states that everyone shall be “informed promptly and in detail ... of the nature and cause of the charge against him.”¹³ Article 75(4)(a) of Additional Protocol I states that the procedure of the court “shall provide for an accused to be informed without delay of the particulars of the offence alleged against him.”

General Comment 13 on the ICCPR explains that the right to be informed “promptly” requires that information be given “as soon as the charge is first made by a competent authority.” In the opinion of the Human Rights Committee, the expert body set up by the ICCPR to monitor that treaty’s implementation, “this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such.” The information must indicate both the law, and the alleged facts upon which the charge is based.¹⁴ In considering the same provision (found in the Geneva Conventions), the International Committee of the Red Cross has stated that the maximum period should be ten days.¹⁵

¹⁰ See Principles 32. Adopted by General Assembly Resolution 43/173 of 9 December 1988. Available at <http://www.unhchr.ch/html/menu3/b/h_comp36.htm>.

¹¹ *Id.*

¹² Human Rights Committee, “Torres v. Finland,” U.N. Doc. CCPR/C/38/D/291/1988 (5 April 1990), para. 5.3; Inter-American Commission on Human Rights, “The Situation of Human Rights in Cuba, Seventh Report,” OEA/Ser.L/V/II.61 Doc. 29 rev. 1 (4 October 1983), para. 13; European Court of Human Rights, “Brogan and Others v The United Kingdom,” [1988] ECHR 24 (29 November 1988), para. 62.

¹³ See also article 9(2) of the ICCPR which states that anyone who is arrested ‘shall be promptly informed of any charges against him.’

¹⁴ General Comment 13, reproduced in “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” U.N. Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 8.

¹⁵ Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), para. 3072. Available at <<http://www.icrc.org/ihl.nsf/WebCOMART?OpenView>>.

On 27 February 2002, the Secretary of Defense stated “[w]e are now starting the process of doing a series of interrogations that involve law enforcement.”¹⁶ At this point, they were interviewing with a view to possible prosecution, as opposed to earlier interrogation for intelligence purposes. Regardless whether and when (the government may argue) the clock began to run, Mr. Hicks’s right to be informed promptly of the nature and cause of the charges was still violated.

On 3 July 2003, Mr. Hicks was designated eligible for trial by military commission, more than one and a half years after his detention began. That was the very last point in time at which the Government decided to take “procedural steps” against him, thereby starting the procedural clock for notice of charges.¹⁷ No charges were brought against Hicks until 10 June 2004, almost another year later. A delay of almost one year far exceeds the time limit for being “promptly” informed of formal charges, especially when measured against the prior year and a half of incommunicado, uncounseled detention and interrogation.

4. The Right to be Brought Promptly Before a Judge — According to Article 9(3) of the ICCPR, once charged, a person “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.” General Comment 8 on the ICCPR states that delays must not exceed “a few days.”¹⁸ Article 9(3) also provides that anyone detained on a criminal charge “shall be entitled to trial within a reasonable time or to release.” General Comment 8 states that the total length of detention pending trial may be in conflict with this entitlement. It says that pre-trial detention should be an exception and should be as short as possible. Article 14(3)(c) states that everyone has the right “to be tried without undue delay.”

Mr. Hicks was not brought before a judge until the week of 23 August 2004. That was more than a year after his initial designation, and three months after he was charged. His trial is not scheduled to begin until more than three years after his initial detention.

Accordingly, the clear and serious contravention of the substantive and procedural law of arrest and detention require that the charges against Mr. Hicks be dismissed, and/or for any such other and proper relief.

4. Evidence:

A: The testimony of expert witnesses.

B: Attachments

1. *Constitution Act 1982 — Canadian Charter of Rights and Freedoms*, section 9.
2. *Universal Declaration of Human Rights* (1948), Article 9.
3. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 5.
4. *American Convention on Human Rights*, Article 7.

¹⁶ Interview with KSTP-ABC, St Paul, Minnesota.

¹⁷ It could be argued that the procedural clock was started even earlier, i.e. at the time of transfer to Guantanamo Bay Naval Base in early 2002, or even at the time of capture in late 2001.

¹⁸ General Comment 8, reproduced in “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” U.N. Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 2.

5. *International Covenant on Civil and Political Rights*, Articles 9 and 14.
6. Executive Order 13107 “Implementation of Human Rights Treaties” (1998).
7. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), p. 172.
8. U.S. Department of Defense News Briefing (21 March 2002).
9. United States Government Letter to the United Nations (2 April 2003), U.N. Doc E/CN.4/2003/G/73.
10. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Article 75.
11. United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32.
12. Human Rights Committee, “Torres v. Finland.”
13. Inter-American Commission on Human Rights, “The Situation of Human Rights in Cuba, Seventh Report.”
14. European Court of Human Rights, “Brogan and Others v The United Kingdom.”
15. General Comment 13, reproduced in “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” U.N. Doc. HRI/GEN/1/Rev.7.
16. Claude Pilloud et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987).
17. Secretary of Defense, Interview with KSTP-ABC, St Paul, Minnesota, 27 February 2002.
18. General Comment 8, reproduced in “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,” U.N. Doc. HRI/GEN/1/Rev.7.

5. **Relief Requested:** For the above reasons, the defense requests that this commission dismiss all charges against Mr. Hicks and direct that he be released from confinement.

6. The defense requests oral argument on this motion.

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