Guantánamo Bay trial of David Hicks adjourned

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9 November 2004

Lawyers representing 29-year-old Australian David Hicks, one of four Guantánamo Bay prisoners formally charged with terrorism offences, secured a two-month adjournment of his military trial at a preliminary hearing last week. Previously scheduled for early January, the trial will now be held on March 15 to allow Hicks' attorneys more time to review evidence, interview potential witnesses and prepare their case.

Hicks, who was captured by Northern Alliance forces in Afghanistan in December 2001 and handed over to the invading US-led forces, has been held at the US military base on Cuba since January 2002. He is charged with conspiracy, attempted murder and aiding the enemy. The others facing trial are Sudanese citizens Mahmoud al Qosi, 44, and Salim Ahmed Hamdan, 34, and Ali Hamza Ahmad Sulayman al Bahlul, 33, both from Yemen.

Australia's Howard government immediately claimed that the rescheduling meant that Hicks would receive a "fair trial". A spokesman for Attorney-General Philip Ruddock declared: "It's another indication that the system is working... It shows the system is responsive."

To describe these tribunals as "responsive" is a cynical lie—one of the many perpetrated by the Howard government during the almost three-year detention of Hicks and fellow Australian citizen Mamdouh Habib in Guantánamo Bay.

The tribunals violate American military law, the US Constitution and basic legal rights established over centuries. Guantánamo Bay prisoners, who are defined as "enemy combatants" by the US military in order to by-pass the Geneva Conventions on prisoners' rights, have no access to a civil court appeal and even if found not guilty can still be held indefinitely by the US military. The tribunals allow hearsay and evidence extracted through torture. The only avenue of appeal against tribunal decisions is to the US president.

Hicks, who has been held in solitary confinement for the past 18 months, was denied access to a lawyer for over two years until he was officially charged in June 2003. He has also told his family that he was tortured on a US navy ship before being moved to Guantánamo Bay in 2002. British prisoners released this year from Guantánamo Bay who spoke with Hicks have confirmed this.

In a recent letter to his father, Hicks said he was "losing his sanity".

"I spend an average 350 hours by myself between brief visits. I can no longer picture what exists outside Camp Echo. My entire life has become this tiny room and everything else is no longer reality. I feel as though I'm teetering on the edge of losing my sanity after being in such a long ordeal," he wrote.

He said he suffered extreme mood swings and is so bewildered and confused that he is often making decisions with little thought. He reported that military authorities conduct all interviews under interrogation conditions with him chained to the floor. Hicks said the US military was intent on keeping him in a state of "low morale and depression".

Rather than oppose these blatant violations of the Geneva Conventions, the Howard government has bent over backward to legitimise them. It has endorsed every abuse of the prisoners' rights, stonewalled the Hicks and Habib families, and blocked all freedom of information requests to access correspondence between Canberra and Washington over the detentions. It is the only country in the world that has not demanded the repatriation of its citizens from the US military prison.

Reports from independent observers at last week's proceedings further demonstrated the "kangaroo court" character of the military tribunals and the commissioners' ignorance and contempt for basic legal questions. Two of the three commissioners have no legal training or experience whatsoever.

According to James Ross, a senior legal adviser for Human Rights Watch who observed the proceedings, tribunal members were "struggling to grasp basic legal concepts".

"The hearings in the Hicks case," he added, "resembled an introductory law school class".

Ross said the commissioners contested the meaning of ex post facto laws (laws that unfairly criminalise behaviour after the fact) and the requirement that charges contain a specified criminal offence.

"One panel member," he said, "expressed little concern that Hicks could be charged with conspiracy to commit a war crime even if such a crime does not now exist under the laws of war".

Ross reported that the commissioners appeared to be "unfamiliar" with the laws of war, including the legal meaning of concepts such as an "unprivileged belligerent" (a civilian who takes up arms) and the difference between an international and a non-international armed conflict.

Despite their obvious confusion about these key concepts, the commissioners did not hesitate to dismiss the explanations offered by Hicks' lawyers. They also ruled that Hicks' attorneys could not call six experts, including Antonio Cassese, former judge at the International Criminal Tribunal for Former Yugoslavia, and Michael Schmitt from the US Defense Department, to explain various aspects of customary international law, military law and the law of war. The commissioners decided that the only experts allowed would be those that they specifically requested.

Defence attorneys called for the dismissal of the charges against Hicks and argued that charges involving conspiracy and terrorism were not valid under international law. They attacked Bush

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administration claims that US laws do not apply to Guantánamo Bay prisoners and pointed out that the US government was trying people charged with the same crime under different standards.

Hicks' attorneys have not yet been given a complete list of government witnesses, nor have they been shown all the evidence. Hicks is barred from being present during those parts of the trial that the Pentagon claims are "classified". Defence lawyers are also prevented from discussing any so-called classified information with him.

In August 2004, defence attorneys sought the removal of several commissioners for obvious bias. They included the presiding officer, Colonel Peter E. Brownback, who is a close personal friend of the Military Commission Appointing Authority Major General John D. Altenburg, and two other commissioners directly involved in the US-led attack on Afghanistan.

Altenburg agreed on October 19 to remove two commissioners, not including Brownback, but refused to reappoint any replacements for the Hicks and Hamdan hearings, thus reducing panel members from five and one alternate to three and no alternates. This makes it much easier for the prosecution to obtain the two-thirds majority required for a guilty verdict.

In other words, Hicks and Hamdan have been penalised because their lawyers successfully pointed out the obvious bias of the commissioners. Altenburg has not provided any explanation for this decision.

The military commissioners brushed aside defence objections that Hicks was being penalised and refused to allow any further discussion on this objection. Hicks' civilian defence counsel Josh Dratel rejected this, telling the hearing: "We lost panel members because of the presumption of innocence. Now we suffer because they have poisoned the well."

At one point in the two-day proceedings the prosecution attempted to have Combatant Status Review Tribunal (CSRT) information on Hicks put into the tribunal record. CSRTs, which supposedly determined whether detainees are so-called "enemy combatants" or not, were hastily established by the Pentagon after the US Supreme Court ruled in June that Guantánamo Bay prisoners had the right to challenge their detention in US courts.

But the CSRTs are even more arbitrary than the military tribunals and many detainees have boycotted them. Prisoners brought before them have no right to legal representation and cannot call witnesses. Only one of the 104 CSRTs held so far has resulted in a prisoner being repatriated. At the same time, the Pentagon, on Bush administration orders, has repatriated prisoners from Afghanistan, Pakistan and other countries without any hearings whatsoever.

When Hicks' case was brought before a CSRT in October he was not allowed any legal representation—in fact, his lawyers were banned from going to Guantánamo Bay that week. Although Hicks refused to participate, the CSRT went ahead in his absence. Commissioners have reserved their decision on whether the CSRT report can be admitted.

Brownback said rulings on 30 motions by Hicks' attorneys, including calls for dismissal of all charges against the 29-year-old Australian, would be made sometime before the scheduled trial in March.

The unjust and arbitrary character of the tribunals, whose rules were drawn up by the US Defense Department, was highlighted in an email from Brownback to defence lawyers' questions last July about his authority.

As Brownback explained: "a. I have the authority to set, hear, and decide all pretrial matters; b. I have the authority to order counsel to perform certain acts; c. I have the authority to set motion dates and trial dates; d. I have the authority to act for the Commission without the formal assembly of the whole Commission.

"The above listing is not supposed to be all inclusive. Perhaps a better way of looking at the matter is to say that I have the authority to order those things which I order done... [T]he counsel must accept my order or face sanctions".

His ruling on procedures was "the one that counts," he declared, unless and until a "superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stat[ing] that what I am doing is incorrect." In other words, Brownback and the commissioners are a law onto themselves, only accountable to the Bush administration.

These procedures, which have much in common with the methods of a military junta, were further underlined in Brownback's arrogant attitude towards defence attorneys during last week's proceedings.

On November 3, Brownback disagreed with a basic point of international law raised by defence attorney Major Michael Mori, responding with the patronising remark, "No way, sunshine". Later, in an exchange with Mori over the Geneva Conventions, Brownback impatiently declared: "I'm looking at Third Convention, article 3, Sunshine."

In late breaking news, Colonel Brownback has announced that he is halting the impending military trial of Salim Ahmed Hamdan after a US federal court ruled yesterday that the case could not proceed until Hamdan's status as an "enemy combatant" had been determined by a "competent tribunal".

US District Judge James Robertson in Washington found that: "Unless and until a competent tribunal determines that the petitioner is not entitled to protections afforded prisoners of war under Article 4 of the Geneva Convention ... of August 12, 1949, he may not be tried by military commission for the offenses with which he is charged".

Robertson also ruled that Hamdan, who is accused of being Osama bin Laden's driver, could not be tried until the military commission guidelines were modified to conform to the Uniform Code of Military Justice. He ordered Hamdan, whose military trial was to have begun December 7, moved from the pre-commission wing at the Camp Delta prison camp to the general prisoner population

While it is not clear how this will affect Hicks' trial and other impending hearings, it is the first time a federal court has intervened in proceedings at Guantánamo Bay. The federal lawsuit on behalf of Hamdan is one of more than 60 similar legal challenges to the commissions.

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