Australian government continues to back discredited US military tribunals

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25 August 2005

The release on July 31 of emails written by two senior US military prosecutors denouncing the Guantánamo Bay military tribunals has intensified the opposition facing the Howard government over its stance on the only remaining Australian detainee, David Hicks.

In messages written in March 2004, the military commission officers declared that the trials were "rigged," with handpicked tribunal members and evidence "lost" to ensure that guilty verdicts were found against the defendants, which they described as "low-level" participants in military operations in Afghanistan.

Captain John Carr, one of the prosecutors, wrote: "An environment of secrecy, deceit and dishonesty exists within our office... I cannot morally, ethically, or professionally continue to be part of this process." Carr and two other military prosecutors quit in protest before the trials began last year. (See "Military commissions' prosecutors charge: trials rigged against Guantánamo detainees".)

Under tribunal rules the guilt or innocence of those on trial is determined on the basis of a two-thirds majority vote by a panel of military officers. There is no civil court appeal and evidence like anonymous hearsay and information extracted under torture is allowed. US President Bush makes the final decision on any sentencing, including the death penalty.

The British and other European governments have publicly criticised these procedures and secured the repatriation of their own citizens from Guantánamo. But the Howard government has slavishly endorsed the trials and the illegal detention of Hicks, a 30-year-old Australian citizen incarcerated for more than three and a half years.

Canberra dismissed the US prosecutors' emails, claiming that the tribunals, which were specifically designed to circumvent US civilian and military law and the Geneva Conventions, would provide a "fair trial" for Hicks.

Prime Minister John Howard, Foreign Minister Alexander Downer and Attorney-General Phillip Ruddock insisted that the emails had already been "investigated" by US authorities and that their claims were the result of "personality clashes" and therefore of little consequence.

The following day, however, Australia's top military lawyer and Queens Counsel, Navy Captain Paul Willee, contradicted the government, declaring that the tribunals were "fundamentally flawed".

"Can [Hicks] get a fair trial? Personally, I'd say absolutely not. It just doesn't lend itself to being open and fair and reasonable in its whole process... It is patently obvious that this is wrong," he said. And even if the allegations in the prosecutors' emails were not true, he added, the very structure of the military trials was faulty.

"The process is very much akin to the process we, Australia, abandoned after World War II because it denied people access to evidence, denied them the ability to cross-examine those who made the statements used against them and generally flies in the face of all of the rules of fairness that we've developed over the last 50 or 60 years," he said.

Asked on ABC television's "7.30 Report" about Willee's remarks, a visibly nervous Foreign Minister Downer refused to comment and alleged that the show's anchor was pursuing a political agenda and "trivialising the American military".

Prime Minister Howard also refused to address Willee's remarks. He claimed that his government had secured changes in the Military Commission procedure 18 months ago and said he "remained satisfied" that the tribunals "would produce a fair outcome".

Speaking on Melbourne radio on August 2, Howard said the prosecutors' emails had already been investigated. When he asked who had conducted the inquiries, he blithely replied: "By the people against whom the

allegations were made."

The emails and Willee's remarks provoked a round of op-ed articles and public statements condemning the military trials as star-chamber hearings.

Former High Court judge Mary Gaudron told ABC radio that Hicks's basic rights had been infringed and that the Australian government should have intervened. "It is just an extraordinary procedure and extraordinary process. One in which rights are put at risk, in which the truth is put at risk," she said.

The *Sydney Morning Herald* published an editorial headlined "Guantánamo: America's shame" on August 2 criticising the government for not defending Hicks's basic rights. The next day a Melbourne *Age* editorial declared that the government had surrendered "the right to a fair trial". It warned that Canberra's attitude to Hicks provided "a disturbing insight into the vulnerability of our own democratic values".

An op-ed comment in the *Sydney Morning Herald* entitled, "No justice as Hicks is thrown to the wolves," declared: "Everyone but the most gormless knows that Hicks won't receive a fair trial... [B]y selling out Hicks to this process and the ultimate dictates of George Bush, Howard and Ruddock have sold us all out." Another columnist in the newspaper lambasted the government for being "shamelessly eager to crawl to the White House and the Pentagon".

The comments reflect a concern in ruling circles that the blatantly unjust treatment of Hicks, along with revelations about the abuse of prisoners in the Guantánamo jail, is helping to fuel growing popular opposition. Broad layers of people are deeply opposed to the illegal US-led occupation of Iraq, as well as the Howard government's slavish support for the Bush administration and its "war on terrorism".

Hicks, who was captured in Afghanistan in December 2001, was charged in 2004 with conspiracy, attempted murder and aiding the enemy. If convicted, he could face life imprisonment. He has pleaded not guilty to all charges.

Howard's claims that he will receive a fair trial and that Canberra has persuaded the Bush administration to reform the military tribunals are absurd. The government has specifically refused to call for Hicks's repatriation as he could not be charged under Australian law.

The only modifications to the tribunals came late last year, following challenges by defence lawyers against particular members of the tribunal panel. These changes, however, have only worsened the position of those on trial. The military panels have been reduced from five to three officers, which means that the two-thirds majority required for a guilty verdict is easier to obtain.

Lex Lasry QC, an official observer to Hicks's initial hearings, noted in his second report to the Law Council of Australia last month that the circumstances facing Hicks were worse than in August 2004.

The report explained that prosecution evidence will probably have been extracted through the physical or psychological torture of detainees. But Hicks's ability to defend himself is limited by the repatriation of those who provided this information, making it virtually impossible to cross-examine them.

Hicks faced a trial, Lasry said, in which prosecution evidence "will not come out of the mouth of the witness of the fact but from someone else who was told about it or from an 'un-cross-examinable' piece of paper".

In the past three years the US military has released over 200 prisoners from Guantánamo Bay. The British and other European governments have secured the release of all their citizens, leaving Australia as the only country in the world to have not demanded repatriation of its citizens from the US military prison.

The Howard government's complicity in this violation of long-established legal rights is mirrored in the series of repressive anti-terror laws introduced in Australia, with Labor Party support. That the US military tribunals are establishing precedents for the further erosion of democratic rights within Australia was made explicit by Attorney-General Ruddock.

In a chilling off-the-cuff remark, Ruddock told the Murdoch-owned *Herald Sun* in Melbourne on August 6, that Australia had used military commissions during World War II and that although "this is not a matter that is particularly germane at the moment... we're not ruling anything in or out".