What a to do about David Hicks

Neil James

The subject of David Hicks has reached the stage where the furore over his potential trial by a US military commission is preventing effective discussion on all the other ramifications of his situation. The letters to the editor and opinion columns of our broadsheet newspapers are regularly supplied with fulminating opinions on the various real, purported and misunderstood flaws of the military commission process and the rules of evidence applying. Talkback radio and the 'blogosphere' are even worse. The volume and vituperation is perhaps matched only by the astounding levels of ignorance as to the facts, the probable facts and the international law actually applying.

Dealing a US trial off the cards

So let's get one thing straight at the outset so we can get to the real point concerned – what to do about David Hicks? Whatever the rights and wrongs of the matter, because of the constant delays, bungling and a breathtakingly bad record in explaining their position, the US authorities have effectively forfeited the option of trying Hicks by a military commission and probably even by a standard court martial or civil criminal trial.

So if we can all agree that the US (or anyone else) trying David Hicks for criminal offences or war crimes is probably no longer an option, we can then properly concentrate on what to do next without unnecessary distractions (such as those who insist on discussing the Hicks matter using concepts based only in peacetime, civilian, domestic law).

Extremes and fallacies

The immediate assumption by many is that withdrawal of the trial option means that Hicks could and should be freed forthwith. This belief, an unmistakably mistaken one, has seized popular hold because of the widespread and mainly justified outrage concerning the flaws of his potential trial.

But even allowing for the passion, confusion and widespread ignorance of the facts, David Hicks generates highly polarised views. To some, Hicks is a bigoted, anti-Semitic traitor who trained and fought with terrorist organisations in their continuing war with the international community and he can therefore rot in prison indefinitely. On the opposite extreme are those who simply regard Hicks as a harmless naïf who, at worst, was forced into nominally defending a Taliban tank one autumnal afternoon, and who has been somehow wrongly 'imprisoned without charge' or 'incarcerated' for years as a result.

These are both extreme opinions which disregard legal and moral principle and ignore or downplay important facts. That many appear to hold either opinion does not make them any less extreme or result in their logic being less tenuous. They are also extreme opinions because they risk widespread damage to the universality of international humanitarian law. What makes these extreme opinions doubly dangerous is that many, perhaps most, of those holding them would sincerely baulk at the classification of their position as extreme.

These extremes have other things in common too. One false assumption particularly shared is that David Hicks is simply *imprisoned* – justly if you presume he is a traitor or unjustly if you assume this is merely some form of criminal matter.

Another thing in common is that neither of these extreme positions actually helps David Hicks, especially in getting him released from Guantanamo Bay anytime soon.

What is instead required is an informed and dispassionate analysis of his *actual* legal situation and negotiation of a *practical* solution. The horse must be put before the cart for once. Irrespective of whether Hicks can or should be tried or not by anyone, the simple truth is that his actual detention is a fundamentally separate issue to any potential trial.

But this is also the truth that will set him free.

Why David Hicks is actually detained

David Hicks is detained (not imprisoned) because he was a belligerent for one side in a war and was captured by the other side. He was not arrested by a police force for civil crimes and then imprisoned on some form of remand or by some arbitrary whim. What's more, in international law armed conflict (war) exists as a material fact – thus automatically triggering the limitations and protections of the

Hague and Geneva Conventions respectively – not because some individual or some government (or even some lawyer) declares that the war concerned does or does not exist.

Many Australians are shocked when advised of these facts because they have just assumed David Hicks is some form of alleged criminal prisoner and is being treated without appropriate due process. Some choose to ignore the facts with wishful thinking that they somehow do not apply. Others take the easy way out and opt for irrelevant slogans such as 'try him or free him'. Such simplistic stances are adopted by some because it is just too hard to reason the problem through. Others deliberately misrepresent the situation because the facts are contrary to what they want to believe on ideological grounds. Some even do not really give a hoot about David Hicks. For them he is just another cause to burnish their self-righteousness inner glow or a convenient stick with which to beat an Australian Government they dislike.

But the facts rarely shock those Australians who lived through World War II or the Korean War where many fellow Australians became prisoners-of-war or civilian internees of the enemy for the duration of hostilities. They also do not shock members of the defence force because the facts are so obvious to them they usually cannot understand confusion on the matter among civilians.

Trust the lawyers … to confuse the issue

The uninformed opinions offered by many Australian lawyers have not helped. Nearly all Australian lawyers are understandably so steeped in domestic legal culture, such as the principle of habeas corpus, that they automatically revert to the familiar even when it does not apply. Again, this does not really help David Hicks.

The laws that do apply are that part of international humanitarian law known as the Laws of Armed Conflict (LOAC), primarily based on the Hague and Geneva Conventions. A significant cause of public misunderstanding concerning David Hicks is that there are only about a dozen lawyers in Australia with a good knowledge of LOAC, and how this relates to wider international humanitarian law. Nearly all of them wear a regular or reservist defence force uniform and have therefore been absent from the public debate concerning Hicks. Even when the ADF's Director of Military Prosecutions was recently feted publicly for her criticism of the military commission trial process, few noticed the important point that she had not actually questioned the legality of the separate detention of Hicks as a captured belligerent.

The narrow approach of many Australian lawyers specialising in domestic human rights law has also not helped effective public debate. Most have not been aware of the LOAC actually applying or have mistakenly dismissed it. Others have tried to twist other international law to sideline LOAC somehow. A leading Melbourne QC, for example, recently cited the International Covenant on Civil and Political Rights (ICCPR) as the only relevant law applying to Hicks, whereas the covenant is clearly subordinate to LOAC in international humanitarian law during wars (on the principle that the most specialist law applies). It is particularly irrelevant to Hicks' predicament because, as provided in the ICCPR, due to the exigencies of conflict those parts of the covenant which clash with LOAC can also be suspended by due declaration of a belligerent party – and in the case of David Hicks they were.

While the Taliban never accepted or applied the ICCPR, and terrorist organisations such as Al Qa'eda obviously do not by definition, it is the sequence of events that is fundamentally important. The Islamist terrorist attacks in New York and Washington DC on 11 September 2001 were followed by a UN Security Council Resolution on 29 September authorising, among other things, the elimination of international terrorist sanctuaries in Taliban-controlled areas of Afghanistan. Coalition air-strikes began on 07 October and some form of international conflict in Afghanistan definitely existed as a material fact from at least that date.

On 13 October 2001 the US Government exercised its right to suspend certain provisions of the ICCPR where they conflicted with, and were over-ridden by, the Laws of Armed Conflict. Whatever his previous affiliations in Afghanistan may or may not have been, David Hicks apparently returned to that country in order to serve with the Taliban or Al Qa'eda

soon after the 11 September attacks. He was captured on 09 December – well after the war started (and the Hague and Geneva Conventions kicked in) – and well after the US legitimately suspended those provisions of the ICCPR which conflicted with LOAC.

Not forgetting the Geneva Conventions

As the US Supreme court emphasised in the June 2006 Hamdan test case (covering a Yemeni member of Al Qa'eda), those held at Guantanamo Bay are legitimately detained as captured belligerents. Indeed it was Common Article 3 of the Geneva Conventions that the court mainly used to strike down the separate criminal trials for some detainees, including David Hicks, by military commissions established by presidential order and not legislation.

Even if every criminal charge against David Hicks was dropped tomorrow he could still be legitimately detained under LOAC until the relevant conflict ends. But, more importantly, he could also be released earlier if appropriate steps are taken under wider international humanitarian law to ensure he could not resume activities as a belligerent.

The truth that will set him free

David Hicks is no different in this regard to all 770 of the captured belligerents ever detained at Guantanamo Bay – with only 10-20 of them (around two per cent) also facing criminal or war crimes charges in front of a military commission. Nearly half of those ever detained, some 375, have already been released over the last five years after examination by competent tribunals constituted under the Geneva Conventions. The nub of the matter in practical terms is to get David Hicks into the latter group not the former.

The Australian government needs to convince the US to drop the intention to also try Hicks as a criminal. Surely this cannot be difficult on practical and moral grounds, particularly given that the duration of his detention thus far has not been that different from the type of prison sentence he might expect if tried and found guilty of many (but not all) of the criminal offences with which he is accused. Australia and the US have also been supportive allies to each other in various wars over the last 90 years. This must surely count for something, even given the professed gravity of the war crimes charges Hicks is facing. Moreover, if trying and punishing him for alleged war crimes is judged as no longer a legal or moral issue, the only remaining issue is the practical one of how to prevent David Hicks from resuming activities as a belligerent in the relevant war – and whether this can be achieved by other than continued detention.

Once the option of trying him for criminal offences or war crimes is off the table, Australia can then mount a practical case to release him on parole from detention as a captured belligerent.

Hicks would need to give undertakings not to resume activities as a belligerent and to abide by this parole until the applicable conflict ended. His lawyers have indicated he is prepared to do this. Wider international humanitarian law means he would also need to renounce any past or current affiliation he might have, or be thought to have, to internationally-proscribed terrorist organisations.

Terrorist organisations are not legitimate international actors that can practically be held responsible for the activities of those fighting on their behalf, and which can be punished for infringements as, for example, Germany and Japan were in World War II. But perhaps the International Committee of the Red Cross would accept responsibility for enforcing Hicks' adherence to parole, as it did for Soviet Prisoners-of-War released by the Mujahideen during the 1979-1989 war in Afghanistan.

While release to detention in a neutral country has been the traditional option it would be much harder to negotiate politically. But Australia is an ally to the US in the same war so he could be easily transferred here.

Transfer to Australia for further detention or paroled release in the community under a control order is therefore a much more achievable solution. As well as being legally and morally consistent with long-established international law, it neatly sidesteps the real and supposed difficulties with trying David Hicks for civil crimes in Australia.

Just as importantly, after five years it offers practical solutions to dilemmas of an international strategic, domestic political and (from Hicks' viewpoint) personal nature, that save face all round. All sides have painted themselves into different corners over David Hicks and face-saving solutions are now much in demand on all sides (including Hicks).

In practical and moral terms, releasing Hicks on parole is surely the easiest resolution to negotiate with the US and the International Committee of the Red Cross as the authorised detaining and protecting powers respectively under the Geneva Conventions. It is also the most humane solution.

Conversely, arguments dwelling on the unfairness of his potential criminal trial, or which incorrectly view his detention as a captured belligerent as merely a form of criminal custody (and mistakenly as a case of habeas corpus), simply postpone practical resolution of his actual legal status under LOAC. Legally incorrect and simplistic calls to 'try him or release him', for example, do not really help David Hicks one iota.

More disturbingly, many ostensibly championing Hicks are merely using him as a proxy issue for moral posturing in wider ideological feuding. ◆

Neil James is the executive director of the Australia Defence Association. During his previous military career he was the original author of the Australian Defence Force's operational manual covering the interrogation and associated detention of prisoners-of-war. A detailed analysis of David Hicks' legal situation is at www.ada.asn.au/LatestComment.htm