

# **AN ANALYSIS OF THE MANUAL for MILITARY COMMISSIONS**

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The David Hicks case as argued in Australia should only be discussed in the context of due process. Any commentary on the charge or the facts is speculative and uninformed unless the commentator has read the prosecution brief. In order to consider whether Hicks will receive due process as understood in the common law jurisdiction it is necessary to analyze the Manual for Military Commissions. The Manual sets out the rules of evidence and procedure under which Hicks will be tried.

The Manual for Military Commissions in its Executive Summary states that it provides for a full and fair prosecution of alien unlawful enemy combatants, and that it affords all the judicial guarantees which are recognized as indispensable by civilized people.

It should be judged by such standards as should any criminal justice system.

Whilst acknowledging that many of the rules of procedure and evidence in the Manual for the Military Commission are unexceptional and indeed familiar to criminal law practitioners in Australia the Manual for the Military Commission fails its own standards in the following ways:

- its jurisdiction is retrospective and wide ranging;
- an involuntary confession is admissible.
- the hearsay rule is unfair to the Accused and dilutes the common law rules of hearsay;
- important procedural rules are not predicated on principles of fairness;
- any custodial sentence imposed does not take into account time served by the Accused;

## **JURISDICTION**

The jurisdiction of the Military Commission steps outside the normal bounds of procedure. The definition of unlawful enemy combatant is so wide as to include purposeful and material support of hostilities against a

co-belligerent of the US. A political analyst could imaginatively construct any number of scenarios that would fit into such a definition but would be outside “the war against terror”.

Combine this with the Rule 201 timelines and the Military Commission in effect has unlimited and retrospective jurisdiction over any perceived opponent of the United States in foreign policy.

A debate about what is material and purposeful support of hostilities and who is the co-belligerent supporting hostilities against a common enemy is a foreign policy debate. At trial the defence would seek to call experts of such to explain the meanings but always cognizant of the reality of appearing in a military tribunal.

1. An unlawful enemy combatant is defined in Rule 103 (a) (24) RMC as a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents. That status is determined by a Combatant Status Review Tribunal. There is a right of appeal against such determination to a US Court of Appeal for the District of Columbia.
2. A co-belligerent means any State or armed force joining and directly engaged with the US in hostilities or directly supporting hostilities against a common enemy.
3. Rule 201 (b) (1) gives jurisdiction to a military commission to try any offence made punishable by the MCA or the law of war when committed by an unlawful enemy alien combatant before, on, or after September 11, 2001.

## **EVIDENCE**

An involuntary statement excluding one obtained by torture may be admissible. Torture is narrowly defined and conduct outside the definition could cover a wide range of physical and mental actions. It is only when it is ruled admissible that the defence can raise voluntariness.

The tests of admission refer to probative value, reliability and the interests of justice. The oral admission section in effect allows for the spectre of “the police verbal”. Because there is no provision for compulsory recording either by tape or video of a confession an oral

account cannot be checked and reliance is placed on the truthfulness of the interviewing official.

Any statement obtained by coercion in these circumstances does not conform to the stated standards of a fair prosecution and the judicial guarantee that is regarded as indispensable by civilized people. Such a confession would not be admissible in Australia.

The rules for confessions, with regard to the Military Commission are as follows;

### **CONFESSIONS**

1. Rule 304 (a) of the MC Rules of Evidence excludes a statement obtained by use of torture but if obtained by the product of coercion it may be admitted.
2. Torture is defined as an act specifically intended to inflict severe mental pain or suffering upon another within the actor's custody or physical control. Coercion is not defined.
3. Rule 304 (c) as to statements obtained by coercion before December 30, 2005, provides that if admissibility is disputed the military judge may admit such statement if the totality of the circumstances renders the statement reliable and possessing sufficient probative value and the interests of justice would be best served by the admission. As to statements obtained after that date a third finding must be made that is that the interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment.
4. Rule 304 (e) provides that if a statement is admitted into evidence the defence can present relevant evidence re the question of voluntariness and the military judge instructs the members of the commission to give such weight to the statement as it deserves under all the circumstances.
5. Rule 304 (g) provides that an oral confession may be proved by the hearer of the statement even if the hearer reduced it to writing and the writing is not accounted for.

### **HEARSAY**

The hearsay rule in Australian criminal law has been diluted by its admission as relationship evidence and contextual evidence. However the onus is on the party seeking to have the evidence admitted to justify such. The MC hearsay rules are much wider and are justified in the discussion

notes on the basis that many witnesses are likely to be foreign nationals and not amenable to process or otherwise unavailable. Thus if CIA agent X testifies that he heard a non witness foreign national say that the accused told him that he bombed a US military base that would be admissible. The defence could not cross examine the maker of the statement and would be reduced to discrediting agent X under the test of Rule 803 – a very difficult forensic exercise – and carrying the onus in arguing for its exclusion. The test for admission by the prosecution under rules 402 and 403 would be easy to satisfy as it has probative value.

The onus on the Accused to demonstrate unreliability in practical terms means any hearsay evidence including hearsay within hearsay would invariably be admitted. This cannot be described as a fair prosecution. The basis for the exclusion of hearsay evidence is that the original witness can have his evidence tested in court. The party seeking the admission of hearsay should bear the onus of providing cogent reasons for such admission.

The rules for the admission of hearsay evidence are as follows;

1. Rule 803 of the MC Rules of Evidence allows hearsay evidence to be admitted. Under subsection (c) any party opposing the admission must demonstrate by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances.
2. Under Rule 802 hearsay is admissible on the same terms as other evidence. Thus Rules 402 and 403 apply and evidence that has probative value to a reasonable person and is not excluded on the grounds of prejudice, confusion or waste of time will be admitted.
3. Rule 806 allows hearsay included within hearsay.

## **PROCEDURE**

In combination or singly the procedures discussed above infringe the Accused's right to a fair trial. An Accused must be able to test evidence at its source. An Accused must either personally or through his lawyer know the full extent of the evidence against him in order to meet it. A right of appeal should not be limited so as to exclude appealing the factual basis of the conviction.

The rules of procedure, as they apply an Accused's right to a fair trial, are as follows for the Military Commission:

1. Rule 601 RMC provides that the convening authority in determining whether to refer charges against an Accused can make a finding based on hearsay in whole or part. This means that from the start of the process hearsay evidence can have an important role in the decision to refer charges.
2. Classified information is privileged if disclosure would be detrimental to national security: Rule 701 RMC and Rule 505 Rules of Evidence. The effect of these rules could significantly effect the ability of an Accused to understand the case against him:
  - exculpatory evidence can be withheld and provided only in summary or other substitute form;
  - both the Accused and his lawyer can be excluded from the proceedings where the prosecution claims the privilege
  - in addition to classified information, the sources, methods or activities by which the evidence was obtained can be withheld;
3. Rule 1201 RMC provides for a review or appeal process. The initial review body is the Court of Military Commission Review and thereafter to the District of Columbia Appeals Court and then the Supreme Court. To succeed on review an error of law that has prejudiced a substantial trial right of an Accused must be demonstrated. In Australia an error of law can include an unsafe and unsatisfactory verdict thus allowing the Appellant to dispute a jury's verdict on a factual basis. Rule 1201 on its face does not seem to allow any appeal that contests the factual basis of a conviction. It is a limited right of appeal.

## **SENTENCE**

The unfairness of this is so obvious as to not need explanation. Surely a civilized people would regard such a deduction as indispensable. By not allowing for time served to be added to any custodial sentence, the Military Commission has, again, stepped outside the bounds of standard procedure for a fair trial.

Rule 1113 RMC (d) provides that any period of confinement begins to run from the date the sentence is adjudged. This would exclude a deduction for time served awaiting trial; a deduction normal in Australian courts. See s.18 of the Victorian Sentencing Act.

The progress of the Hick's case will be difficult to predict. Challenges to the Manual in the US Supreme Court would seem to be inevitable. Such would be based on the questions of unfairness that I have raised. The delay that has occurred would in Australia form the basis of a compelling case for bail. That is not available to Hicks. The prosecution case should be based on fairness, eye witness accounts and voluntary statements. A conviction obtained under the Manual for Military Commissions will be tainted and unreliable. Such an outcome is not good for the rule of law as we know it and the governments that have the very legitimate concern of combating terrorism.

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