

David Hicks – Military Commissions Act 2006 – Compliance with Common Article 3 of the Geneva Conventions , the *Hamdan* Decision and Australian Law

EXECUTIVE SUMMARY OF OPINION

The Questions for Analysis

1. This opinion answers the following questions:
 - (a) whether the Military Commissions Act of 2006 which passed into law in the United States on 17 October 2006 complies with Common Article 3 of the Geneva Conventions and is consistent with the decision of the Supreme Court of the United States in *Hamdan v Rumsfeld, Secretary of Defense*;
 - (b) whether a trial of David Hicks conducted before a Military Commission established under the Military Commissions Act of 2006 would contravene Australian law; and
 - (c) whether to counsel or urge a trial to take place before such a body with the requisite knowledge and intention would constitute a war crime under sections 11.1, 11.2, 11.4 and 268.76, alternatively section 268.31, of the Australian *Criminal Code*.

Background

2. In the *Hamdan* case, the Supreme Court of the United States found that Hamdan was a Common Article 3 protected person under the Geneva Conventions and was therefore entitled, as a minimum, to the protections provided for, including the right to a fair trial provided by Common Article 3.
3. The Supreme Court also found that, at least in one respect, the Military Commission established by Presidential Order of 13 November 2001 (the “First Military Commission”) failed to satisfy the requirements for a fair trial prescribed by Common Article 3 of the Geneva Conventions, namely that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.
4. The Supreme Court left open other respects in which the First Military Commission failed to comply with the provisions of Common Article 3.
5. The Military Commissions Act of 2006 passed into law in the United States on 17 October 2006. The legislation establishes a replacement military commission. The present proposal, supported by the Australian government, is to charge and try David Hicks before the Replacement Military Commission.

Defects in the Replacement Military Commission

6. The Replacement Military Commission suffers from the same essential defects as the First Military Commission. In particular, its structure and procedures do not comply with Common Article 3 of the Geneva Conventions.
7. First, the Replacement Military Commission contemplated by the Military Commissions Act 2006 will not be a “regularly constituted court” within the meaning of Common Article 3 of the Geneva Conventions:
 - (a) It did not exist at the time of the capture of David Hicks in Afghanistan in November 2001;
 - (b) American citizens and service personnel are expressly excluded from its operation;
 - (c) It has been specifically designed to try a small number of detainees held at Guantanamo Bay; and
 - (d) Its procedures and safeguards fall well short of a regular criminal court or a court-martial.
8. Second, in a number of respects, the Replacement Military Commission will fail to provide the “judicial guarantees which are recognized as indispensable by civilized peoples” as required by Common Article 3 of the Geneva Conventions:
 - (a) The Replacement Military Commission will not be independent and impartial. It would manifestly violate the essential pre-conditions for an independent and impartial tribunal required to satisfy Common Article 3 of the Geneva Conventions. In short, the same official, the US Secretary of Defense, is responsible for the original detention of accused persons, selecting the members of the tribunals that will hear charges against them, prescribing important procedural rules for the running of trials and making the final decision as to an accused person’s guilt or innocence.

The clear lack of independence and impartiality may be illustrated by the following hypothetical: a citizen is charged by the police with an offence of aiding others to attack members of the police force and destroy items of police property. The presiding judge who determines the law at the trial is a policeman. A jury is selected for the trial by the Chief of Police. The jury consists entirely of policemen. The Chief of Police then reviews the decision of the jury before the decision becomes final. How could the citizen be guaranteed a fair trial under

these circumstances? Still less, how could such a system even approach the appearance of a fair trial?

- (b) The Military Commission rules do not exclude evidence obtained by the use of moral or physical coercion exerted on a prisoner (short of torture) in order to induce him to admit himself guilty of the act of which he is accused. Interrogation techniques authorized by the US Secretary of Defense since 2 December 2002 include treatment amounting to the use of physical coercion.
- (c) The rules of the Replacement Military Commission permit the Prosecution to rely upon hearsay evidence, thereby denying to an accused person any adequate opportunity to present his defense by cross examining the authors of the statements presented against him. This is unacceptable, particularly given the very serious penalties which are open in the sentencing process, which in the case of David Hicks, resulting from an agreement between Australia and the United States, carries the potential for a sentence of imprisonment including life imprisonment, and for others charged before a Military Commission, the potential for the death penalty.
- (d) The rules also provide a facility to exclude an accused from parts of the evidence adduced against him. This is remarkable in the light of the specific observations of the Supreme Court in the *Hamdan* case, where the majority of the Court was particularly troubled by this aspect of the First Military Commission process, noting that this procedural defect violated Common Article 3 of the Geneva Conventions.
- (e) After 5 years of imprisonment, much of it in solitary confinement, David Hicks' basic right to an expeditious trial has been cruelly violated. Months of solitary confinement has exposed him to the kind of torment which the rule of law has never tolerated. Detention without trial for a prolonged period such as this clearly contravenes international law.

It is not fairly open to attribute this inordinate delay to Mr Hicks and his lawyers. It was the illegal system of trial created by government of the United States which gave rise to the legitimate and successful court challenge to the First Military Commission. Further, there remains no explanation for the unconscionable 2.5 year delay prior to David Hicks being charged on 10 June 2004.

The reality is that following the *Hamdan* case, the already inordinate delay is likely to be compounded several times over if David Hicks is exposed to a trial before a re-vamped Second Military Commission.

Like its predecessor, the Second Military Commission is a legal experiment which is vulnerable to legal challenge. Indeed, by its very structure and the nature of its trial procedures, such a challenge is invited. If David Hicks or others pursue their legal entitlements through the appeal process in the United States, further delays of some years will be inevitable.

9. Accordingly, the proposal to conduct a trial of David Hicks before the Replacement Military Commission would not be consistent with the decision of the Supreme Court of the United States in *Hamdan*.
10. Further, the Replacement Military Commission will contravene the standards for a fair trial under Australian law provided for in the Australian *Criminal Code*, and counselling or urging a trial to take place before any such Military Commission with the requisite knowledge and intention would constitute a war crime under Division 268 of the *Code*.
