

Robert Briggs is a CLA member and a lawyer (US and Australia) who keeps an eye on developments in the US, especially cases brought under the Bush administration and in response to policies to Bush's policies. He has been following the Hicks case closely from the outset. Here's his quick take on the new military commission manual:

US Military Commission manual ignores Supreme Court and redefines war crimes

The new rules for military commissions under the US *Military Commissions Act 2006* (MCA) reject the clear principles set out by the US Supreme Court in 2006 in the *Hamdan* case which found that the previous military commissions were unconstitutional, ie, unlawful.

Unfortunately, it is obvious from the first page of the "Manual for Military Commissions" that the Pentagon is ignoring the Supreme Court order that military commissions must comply with the Constitution and laws of the United States, including the Geneva Conventions (part of US law). In fact, one section of the new manual - self-incrimination - provides in its notes that "alien unlawful enemy combatants" (a category unknown to Geneva) have only a privilege - the one provided in the MCA - against self-incrimination. This implies that the Guantanamo defendants, unlike Americans, have no rights whatever under the US Constitution. That is false.

Nevertheless, the Manual begins by giving lip service to the *Hamdan* decision and Geneva Conventions, when it recites:

"It is intended to ensure that alien unlawful enemy combatants who are suspected of war crimes *and certain other offences* are prosecuted before *regularly constituted courts affording all of the judicial guarantees which are recognized as indispensable by civilized people.*"

This is the language of Common Article Three of the Geneva Conventions. But on their face, these are specially-created courts. Only the existing US courts-martial could have been considered regular courts, but the US was determined to provide "alternative" justice. Non-Americans were not entitled to American justice.

In a further flouting of the *Hamdan* decision, the Manual claims that "Military commissions may try any offence ***under the MCA*** or the law of war". The Pentagon and the Administration have clearly rejected the Supreme Court ruling that offences

tried before military commissions be war crimes. Most of the offences the US calls war crimes aren't in fact war crimes, but by claiming that "other offences" are included, which then are also tried in these courts, the governments hopes to legitimate their status before these so-called "regularly-constituted courts".

The goal seems to be to militarise civilian offences such as aiding terrorism and remove them from the protections of civilian courts. This is worse than flouting the Geneva Conventions: it is to subvert and misuse the Conventions.

Other new provisions which cause concern:

- A determination by kind of "competent tribunal" of the US President or Secretary of Defense is "dispositive" that one is an "enemy combatant" subject to a military commission "without regard to any petitions for review or other appeals". This may refer to appeals to the DC Court of Appeals under the *Detainee Treatment Act 2005*, as well as habeas corpus petitions.
- Detailed defence counsel (eg Major Mori) can be replaced for the "good cause" of "military exigency".
- A court may prevent disclosure of classified evidence **"including the sources, methods or activities by which the United States acquired the evidence"**. This provision invites the government to 'classify' illegal actions it has taken. That could include and no one would ever know if it is kept secret from the defence lawyers as well as the defendant.
- Although, the court can require an unclassified summary of such sources, methods or activities. However, no summary is likely to be offered for mistreatment or unlawful interrogations.
- The defence has to provide the government with a list of witnesses and their statements before trial.
- Depositions can be denied if they might result in the disclosure of "sources, methods or activities", eg, torture.
- Very one-sided witness immunity and plea bargaining provisions are included, preserving the US Government's options at the expense of indemnified witnesses and defendants.
- The "torture" definition requires such intent and pain as to be meaningless and is certainly different from that of the Geneva Convention. The distinction between torture and coercion (if any) is left to the judge.
- What would ordinarily be regarded as torture is treated as mere "coercion" and is admissible in most cases.
- "An oral confession or admission of the accused may be proved by the testimony of anyone who heard it, even if it was reduced to writing and the writing is unaccounted for".
- "The United States has a privilege to refuse to disclose the identity of an informant". In other words, "secret accusers" are permitted, thus denying the defendant the opportunity of properly confronting and cross-examining a witness. This is truly Stalinesque.
- "Hearsay included within hearsay is not excluded...", that is, "evidence" twice removed may be accepted.

And finally, the "war crimes" list includes what the US has in fact decided to use against David Hicks:

- "Providing material support for terrorism" (a hitherto civilian offence).



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